

Mass Transportation Vehicle or Ferry) rather than, or in addition to, § 2A6.1 (Threatening or Harassing Communications).

Similarly, the Commission requests comment regarding whether any or all of the substantive criminal provisions of 18 U.S.C. 32 should be referenced only to § 2A5.2.

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

4. The Commission seeks comment regarding whether the “destructive device” definition at Application Note 4 of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) should be amended. Practitioners have commented that it is unclear whether certain types of firearms qualify as “destructive devices”. Should the Commission clarify the definition of “destructive device”? If so, what issues should be addressed?

Issue for Comment 10: Aberrant Behavior

Issue for Comment: The Commission requests comment regarding whether the departure provision in § 5K2.20 (Aberrant Behavior) should be eliminated (and departures based on characteristics described in § 5K2.20 should be prohibited) and whether those characteristics instead should be incorporated into the computation of criminal history points under § 4A1.1 (Criminal History Category). Specifically, are there circumstances or characteristics, currently forming the basis for a departure under § 5K2.20, that should be treated within § 4A1.1 instead, particularly for first offenders?

Issues for Comment 11: Hazardous Materials

Issue for Comment: In its annual submission to the Commission dated August 1, 2003, the Department of Justice urged the Commission to consider revising the guideline treatment for the illegal transportation of hazardous materials. According to the Department, the 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 such offenses because (1) such offenses are different from more typical pollution offenses covered by that guideline and have characteristics that are not addressed by that guideline; and (2) the specific offense characteristics in that guideline are not characteristic of such offenses. As a consequence, the offense levels applicable to hazardous materials offenses often are inadequate given the severity of the offense.

Specifically, the Department stated that § 2Q1.2 originally was intended to cover the release of toxic substances and pesticides in the context of ongoing, continuous, or repetitive releases into the environment and the failure to obtain government permits to handle certain materials. Offenses involving hazardous materials, on the other hand, often involve a one-time, catastrophic occurrence that provide a “target-rich” environment for terrorists and that, because of the movement of these materials in commerce, could affect a large population or occur in a setting such as aboard an aircraft where corrective or preventive action is unlikely. Further aggravating the risks inherent in the transportation of hazardous materials is that, unlike other toxins, government permitting is not required.

In light of the Department of Justice’s concerns, the Commission requests comment regarding whether existing guidelines should be revised, or whether a new guideline should be created, to address more adequately offenses involving hazardous materials. Specifically:

(1) How should the Commission define key terms regarding offenses involving the transportation of hazardous materials? For example, for purposes of enhanced penalties governing hazardous materials (as opposed to other toxic materials and pesticides) what hazardous materials, and/or what statutory provisions, should be covered? What activities constitute a “release” in the context of transportation of hazardous materials?

What is the appropriate definition of “environment” in the context of transportation of hazardous materials?

(2) What is an appropriate base offense level for offenses involving the transportation of hazardous materials?

(3) What aggravating and/or mitigating factors particular to such offenses should be incorporated into the guidelines as specific offense

characteristics? For example, should the guidelines provide enhancements if the offense involved any of the following:

(A) The transportation of a hazardous material on a passenger-carrying or other aircraft.

(B) The transportation of a hazardous material on any passenger-carrying mode of mass transportation.

(C) The concealment of the hazardous material during its transportation, such as by misrepresentation, deception, or physical concealment.

(D) The release of a hazardous material.

(E) Disruption of, or damage to, critical infrastructure.

(F) The release of a hazardous material resulting in damage to the environment, or to public or private property.

(G) An emergency response and/or the evacuation of a community or part thereof.

(H) Repetition of the offense.

(I) The substantial likelihood of death or serious injury.

(J) Actual serious bodily injury or death.

(K) A substantial expenditure for remediation.

(L) The failure to provide, submit, file, or retain required information about a hazardous material, including the failure to notify for certain hazardous material incidents under 49 CFR 171.1.

(M) Financial gain to the defendant or the financial loss to others, excluding government costs of cleanup.

(N) The transportation of radioactive or explosive material.

(O) A terrorist motive.

(P) A controlled substance manufacturing or trafficking offense.

(Q) The failure to properly train transporters of hazardous materials (see, e.g., 49 U.S.C. 5107).

(R) The procurement of a license through fraudulent means.

What should be the extent of any specific characteristic added to the guidelines for these enhancements, including gradation for seriousness of the specific offense characteristic involved?

(4) If a new guideline were to be promulgated covering only offenses involving the transportation of hazardous materials:

(A) What interaction should the new guideline covering hazardous materials transportation offenses have with the guidelines in Chapter Eight (Sentencing of Organizations)? For example, should a separate compliance program be established for persons involved in the transportation of hazardous materials, or should additional factors be added to the compliance requirements in Chapter Eight?