

SCCP's fees proposed in this proposed rule change will be implemented by SCCP upon Commission approval of Phlx's proposed rule change to permit primary remote specialists.³

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, SCCP included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. SCCP has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.⁴

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

On August 6, 2002, SCCP amended its fee schedule to: (1) Adopt new fees relating to remote competing specialists on the Phlx and (2) provide that certain existing fees and discounts applicable to Phlx specialists would not apply to remote competing specialists.⁵ Because at that time the Phlx's remote specialist program was to be limited to remote competing (as opposed to primary) specialists, that proposed rule change applied only to Phlx remote competing specialists.⁶

Phlx now proposes to change its rules to expand its remote specialist program to include remote primary specialists in addition to remote competing specialists. The purpose of this SCCP proposed rule change is to apply the same fees, credits and discounts applicable to remote competing specialists to remote primary specialists. Accordingly, the text of SCCP's fee schedule is amended by the deletion of the word "competing" in items 2, 3, 4, and 13 and the first time that the word appears in the final sentence of the schedule. All existing references to "remote specialists" on SCCP's fee schedule will now be construed to

include both remote primary specialists and remote competing specialists.⁷

SCCP believes that the proposed rule change is consistent with Section 17A(b)(3)(D) of the Act⁸ because it provides for the equitable allocation of reasonable dues, fees, and other charges among its participants, in that the fees apply equally to all SCCP participants with remote specialist operations or which clear for remote specialists.

B. Self-Regulatory Organization's Statement on Burden on Competition

SCCP does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act⁹ and Rule 19b-4(f)(2)¹⁰ thereunder because it establishes or changes a due, fee, or other charge. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549-0069. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-SCCP-2003-06. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments

should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the rule filing that are filed with the Commission, and all written communications relating to the rule filing between the Commission and any person, other than those that may be withheld from the public in accordance with provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in Washington, DC. Copies of such filing will also be available for inspection and copying at SCCP's principal office and on SCCP's Web site at http://www.phlx.com/exchange/memos/SCCP/sccp_rules/010604.pdf. All submissions should refer to File No. SR-SCCP-2003-06 and should be submitted by February 4, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.¹¹

J. Lynn Taylor,

Assistant Secretary.

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UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, and section 4(b) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act of 2003"), Public Law 108-187, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also provides multiple issues for comment, some of which are contained within proposed amendments.

The specific proposed amendments and issues for comment in this notice

include remote primary specialists (File No. SR-Phlx-2003-78).

³ Securities Exchange Act Release No. 48515 (Sept. 22, 2003), 68 FR 56031 (Sept. 29, 2003) [File No. SR-Phlx-2003-10].

⁴ The Commission has modified the text of the summaries prepared by NSCC.

⁵ Securities Exchange Act Release No. 46513 (Sept. 18, 2002), 67 FR 60276 (Sept. 25, 2002) [File No. SR-SCCP-2002-03].

⁶ Phlx Rule 461, PACE Remote Specialist, and Securities Exchange Act Release No. 45184 (Dec. 21, 2001), 67 FR 622 (Jan. 4, 2002) (approving SR-Phlx-2001-98).

⁷ This filing also makes a technical correction by changing the footnote number from "1" to "2" in the caption to Item 4 of the fee schedule.

⁸ 15 U.S.C. 78q-1(b)(3)(D).

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁰ 17 CFR 240.19b-4(f)(2).

¹¹ 17 CFR 200.30-3(a)(12).

are as follows: (1) Proposed amendment to §§ 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport) pertaining to certain immigration offense conduct, and related issues for comment; (2) proposed amendment to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) that modifies the proposed amendment pertaining to controlled substance analogues published in the **Federal Register** on December 30, 2003 (see 68 FR 75339), by including a rule for calculating the base offense level in cases in which a controlled substance is not referenced in § 2D1.1; and (3) an issue for comment regarding the implementation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act of 2003"), Public Law 108-187.

DATES: (1) Proposed Amendments and Issues for Comment.—Written public comment regarding the proposed amendment on controlled substance analogues should be received by the Commission not later than March 1, 2004. Written public comment regarding (A) the proposed amendment on immigration offenses, and related issues for comment; and (B) the issues for comment regarding the implementation of the CAN-SPAM Act of 2003, should be received by the Commission not later than March 15, 2004.

(2) Public Hearing.—The Commission has scheduled a public hearing on its proposed amendments for March 17, 2004, at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE., Washington, DC 20002-8002. A person who desires to testify at the public hearing should notify Michael Courlander, Public Affairs Officer, at (202) 502-4590, not later than March 1, 2004. Written testimony for the public hearing must be received by the Commission not later than March 1, 2004. Timely submission of written testimony is a requirement for testifying at the public hearing. The Commission requests that, to the extent practicable, commentators submit an electronic version of the comment and of the testimony for the public hearing. The Commission also reserves the right to select persons to testify at any of the hearings and to structure the hearings as

the Commission considers appropriate and the schedule permits. Further information regarding the public hearing, including the time of the hearing, will be provided by the Commission on its Web site at <http://www.usc.gov>.

ADDRESS: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2-500, Washington, DC 20002-8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May of each year pursuant to 28 U.S.C. 994(p).

The Commission seeks comment on the proposed amendments, issues for comment, and any other aspect of the sentencing guidelines, policy statements, and commentary.

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part on comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The Commission also requests public comment regarding whether the Commission should specify for retroactive application to previously sentenced defendants any of the proposed amendments published in this notice. The Commission requests comment regarding which, if any, of the proposed amendments that may result

in a lower guideline range should be made retroactive to previously sentenced defendants pursuant to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's Web site at <http://www.usc.gov>.

Authority: 28 U.S.C. 994(a), (o), (p), (x); section 4(b) of the CAN-SPAM Act of 2003, Pub. L. 108-187; USSC Rules of Practice and Procedure, Rule 4.4.

Diana E. Murphy,
Chair.

1. Proposed Amendment: Immigration Offenses

Synopsis of Proposed Amendment: This proposed amendment addresses issues involving immigration offenses. Specifically, the proposed amendment makes changes to §§ 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). Two issues for comment also are contained in this proposed amendment.

(1) § 2L1.1 (*Smuggling, Transporting, or Harboring an Unlawful Alien*)

(A) Entering the United States To Engage in Subversive Activity

The proposed amendment provides alternative enhancements at § 2L1.2(b)(4)(A) and (B) if the defendant smuggled, harbored or transported an alien knowing that the alien intended to enter the United States to engage in (1) a crime of violence or a controlled substance offense [; or (2) terrorist activity]. The proposal provides a [2-] [4-][6-] level enhancement if the alien intended to commit a crime of violence or a controlled substance offense[, and a [12-] level enhancement, and a minimum offense level of [32], if the alien intended to engage in "terrorist activity" as defined in 8 U.S.C. 1182]. An increase equivalent to the terrorism adjustment at § 3A1.4 (Terrorism) was chosen to reflect the seriousness of aiding the importation of terrorists. An issue for comment follows regarding the appropriate interaction between the proposed terrorism enhancement and the terrorism adjustment at § 3A1.4.

(B) Offenses Involving Death

The amendment proposes three significant changes to the guideline in cases in which death occurred. First, the proposed amendment removes the increase of eight levels “if death resulted” from the current specific offense characteristic in § 2L1.1(b)(6) addressing bodily injury and places this increase in a stand alone specific offense characteristic in § 2L1.1(b)(8). This new specific offense characteristic provides an increase of [8], [10], or [12] levels and a minimum offense level of level [25–30].

Second, the cross reference at § 2L1.1(c) is expanded to cover deaths other than murder, if the resulting offense level is greater than the offense level determined under § 2L1.1. Third, the proposed amendment provides a new special instruction at § 2L1.1(d) to address cases involving multiple deaths. If applicable, the guideline will be applied as if the case involved a separate count of conviction for each death.

(C) Number of Illegal Aliens

The proposed amendment provides additional offense level increases to the table in § 2L1.1(b)(2) relating to the number of aliens involved in the offense. An increase of [11][12] levels would be applicable under the proposal if the offense involved 200 to 299 aliens, and an increase of [13–18] levels would be applicable if the offense involved 300 or more aliens. The current upward departure provision in Application Note 4 has been modified to reflect this proposed change.

(2) Immigration Documentation Fraud

The proposed amendment makes several changes to § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). First, the proposed amendment increases the base offense level in § 2L2.2(a) from level 8 to level [8–12]. Second, the proposed amendment increases by two levels the current enhancements in §§ 2L2.2(b)(1) (regarding unlawful aliens who have been deported on one or more occasions) and 2L2.2(b)(2) (regarding defendants who commit the instant offense after sustaining a felony conviction for an immigration and naturalization offense). Third, the proposed amendment provides an [4–10]-level enhancement in § 2L2.2(b)(3) if the defendant was a fugitive wanted for

a felony offense in the United States [or any other country]. An issue for comment follows the proposed amendment regarding whether that enhancement should include fugitive status from a country other than the United States. [Finally, the proposed amendment provides an [2–8]-level enhancement at § 2L2.2(b)(4) if the defendant fraudulently obtained or used a United States passport.]

Proposed Amendment

Section 2L1.1(b)(2) is amended by striking the following:

“(C) 100 or more and 9.”,

and inserting the following:

“(C) 100–199 add 9

[(D) 200–299 add [11][12]

(E) 300 or more add [13][15][18].]”.

Section 2L1.1(b) is amended by redesignating subdivisions (4), (5) and (6) as subdivisions (5), (6), and (7), respectively; and by inserting after subdivision (3) the following:

“(4) If the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States—

(A) to engage in a crime of violence or controlled substance offense, increase by [2–6] levels; or

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

Section 2L1.1(b)(7), as redesignated by this amendment, is amended by striking “died or”; by striking “Death or”; by redesignating subdivisions (1), (2), and (3) as subdivisions (A), (B) and (C), respectively; by inserting a period after “add 6 levels”; and by striking subdivision (4).

Section 2L1.1(b) is amended by adding at the end the following:

“(8) If the offense resulted in the death of any person, increase by [8–12] levels, but if the resulting offense level is less than level [25–30], increase to level [25–30].

Section 2L1.1(c) is amended by striking “If any person” and all that follows through “Subpart 1.” and inserting the following:

“(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined above.”.

Section 2L1.1 is amended by adding at the end the following:

“(d) Special Instruction

(1) If the offense involved the death of more than one alien, Chapter Three, Part D (Multiple Counts) shall be applied as if the death of each alien had been contained in a separate count of conviction.”.

The Commentary to § 2L1.1 captioned “Application Notes” is amended in Note 1 by striking “For purposes of this guideline—” and inserting “Definitions.—For purposes of this guideline:”; and by striking “Number of unlawful aliens” and all that follows through “include the defendant.”.

The Commentary to § 2L1.1 captioned “Application Notes” is amended in Note 2 by inserting “Application of Aggravating Role Adjustment.—” before “For purposes of”; and by striking Note 3 and inserting the following:

“3. Application of Subsection (b)(2).—For purposes of subsection (b)(2), the number of unlawful aliens smuggled, transported, or harbored does not include the defendant.”.

The Commentary to § 2L1.1 captioned “Application Notes” is amended in Note 4 by inserting “Upward Departure Provision.—” before “If”; and by striking “100” and inserting “300”.

The Commentary to § 2L1.1 captioned “Application Notes” is amended in Note 5 by inserting “Prior Convictions Under Subsection (b)(3).—” before “Prior”.

The Commentary to § 2L1.1 captioned “Application Notes” is amended by redesignating Note 6 as Note 7; and by inserting after Note 5 the following:

“[6. Application of Subsection (b)(4).—

(A) Definitions of Terms Used in Subdivision (b)(4)(A).—For purposes of subdivision (b)(4)(A):

‘Controlled substance offense’ has the meaning given that term in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

‘Crime of violence’ has the meaning given that term in § 4B1.2.

(B) Definitions of Terms Used in Subdivision (b)(4)(B).—For purposes of subdivision (b)(4)(B):

‘Engage in terrorist activity’ has the meaning given that term in 8 U.S.C. § 1182(a)(3)(B)(iv).

‘Terrorist activity’ has the meaning given that term in 8 U.S.C. § 1182(a)(3)(B)(iii).

(C) Inapplicability of Chapter Three Adjustment.—If subdivision (b)(4)(B) applies, do not apply the adjustment from § 3A1.4 (Terrorism).]”.

The Commentary to § 2L1.1 captioned “Application Notes” is amended in Note 7, as redesignated by this amendment, by inserting “Application of Subsection (b)(6).—before “Reckless”; by striking “(b)(5)” each place it appears, and inserting “(b)(6)”; and by striking “(b)(4)” and inserting “(b)(5)”.

The Commentary to § 2L1.1 captioned “Application Notes” is amended by adding at the end the following:

“8. Special Instruction at Subsection (d)(1).—Subsection (d)(1) directs that if

the relevant conduct of an offense of conviction includes the death of more than one alien, whether specifically cited in the count of conviction or not, each such death shall be treated as if contained in a separate count of conviction. For the purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving the death of more than one alien are not to be grouped together under § 3D1.2 (Groups of Closely Related Counts)."

Section 2L2.2(a) is amended by striking "8" and inserting "[8–12]".

Section 2L2.2(b) is amended in subdivision (1) by striking "2 levels" and inserting "[4 levels]"; and in subdivision (2) by striking "offense, increase by 2 levels" and inserting "offense, increase by [4 levels]", and by striking "prosecution, increase by 4 levels" and inserting "prosecution, increase by [6 levels]".

Section 2L2.2(b) is amended by adding at the end the following:

"(3) If the defendant was a fugitive wanted for a felony offense in the United States, [or any other country,] increase by [4–10] levels.

"(4) If the defendant fraudulently obtained or used a United States passport, increase by [2–8] levels."

Issues for Comment

(1) The Commission requests comment on the proposed enhancement in § 2L1.1(b)(4)(B), which provides a significant increase and minimum offense level if the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in terrorist activity. Specifically, how should this enhancement interact with the terrorism adjustment at § 3A1.4 (Terrorism), as promulgated in response to section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104–132, and amended in response to the PATRIOT Act, Public Law 107–56? Should the proposed enhancement instead more closely track the provisions of 8 U.S.C. 1327, which prohibit, among other things, the smuggling, transporting, or harboring of an alien who is inadmissible under 8 U.S.C. 1182(a)(3)(B) (because that alien has engaged in terrorist activity, as defined in such provision)? Alternatively, should commentary be added inviting use of the upward departure provision in Application Note 4 of § 3A1.4 if the defendant smuggled, transported, or harbored an alien knowing the alien intended or was likely to engage in terrorist activity?

(2) The Commission specifically requests comment regarding whether the proposed enhancement in

subsection § 2L2.2(b)(3) should include fugitive status in a country other than the United States. Are there application problems that may arise as a result of such inclusion?

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

Synopsis of Proposed Amendment: This proposed amendment revises a proposed amendment published in the **Federal Register** on December 30, 2003 (see 68 F.R. 75339), pertaining to controlled substance analogues. In addition to the proposed rule regarding analogues, the proposed amendment provides an application note regarding controlled substances not currently referenced in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The note directs the court to use the marijuana equivalency of the closest analogue of the controlled substance in order to determine the base offense level.

Proposed Amendment

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 5 by inserting "Analogues and Controlled Substances Not Referenced in this Guideline.—" before "Any reference"; by striking "and" after "includes all salts, isomers,;" by inserting "and, except as otherwise provided, any analogue of that controlled substance" after "all salts of isomers"; and by adding at the end the following:

"In the case of a controlled substance that is not referenced in either the Drug Quantity Table or the Drug Equivalency Tables of Application Note 10, determine the base offense level using the marijuana equivalency of the closest analogue of that controlled substance.

For purposes of this guideline "analogue" has the meaning given "controlled substance analogue" in 21 U.S.C. 802(32)."

3. Issues for Comment: Implementation of the CAN–SPAM Act of 2003

Section 4(b)(1) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN–SPAM Act of 2003"), Public Law 108–187, directs the Commission to review and as appropriate amend the sentencing guidelines and policy statements to establish appropriate penalties for violations of 18 U.S.C. 1037 and other offenses that may be facilitated by the sending of a large volume of unsolicited e-mail.

Section 4(b)(2) of the CAN–SPAM Act of 2003 further directs the Commission to consider providing sentencing enhancements for—

(A) Defendants convicted under 18 U.S.C. 1037 who—

(i) Obtained e-mail addresses through improper means, including the harvesting of e-mail addresses from the users of a Web site, 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; and

(B) Defendants convicted of other offenses, including fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children, if such offenses involved the sending of large quantities of e-mail.

The Commission requests comment regarding the most appropriate amendments that might be made to the guidelines to implement the directives in section 4(b) of the CAN–SPAM Act of 2003. Specifically, the Commission requests comment on the following:

(1) What are the appropriate guideline penalties for a defendant convicted under 18 U.S.C. 1037? Section 4(a) of the CAN–SPAM Act of 2003 created the new offense at 18 U.S.C. 1037, which makes it unlawful for any person, in or affecting interstate or foreign commerce, to knowingly:

(a)(1) access a protected computer without authorization, and intentionally initiate the transmission of multiple commercial electronic mail messages from or through such computer;

(a)(2) Use a protected computer to relay or retransmit multiple commercial electronic mail messages, with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of such messages;

(a)(3) materially falsify header information in multiple commercial electronic messages and intentionally initiate the transmission of such messages;

(a)(4) register, using information that materially falsifies the identity of the actual registrant, for five or more electronic mail accounts or online user accounts or two or more domain names, and intentionally initiate the transmission of multiple commercial electronic mail messages from any combination of such accounts or domain names; or

(a)(5) falsely represent oneself to be the registrant or the legitimate successor

in interest to the registrant of five or more Internet Protocol addresses, and intentionally initiate the transmission of multiple commercial electronic mail messages from such addresses.

The criminal penalties for a violation of 18 U.S.C. 1037 are as follows:

(b)(1) Imprisonment up to five years and/or a fine if—

(A) the offense is committed in furtherance of any other federal or State felony; or

(B) the defendant has previously been convicted under this section [18 U.S.C. 1037], under 18 U.S.C. 1030, or under any State law for sending multiple commercial e-mail messages or unauthorized access to a computer system.

(b)(2) Imprisonment up to three years and/or a fine if—

(A) the offense is under subsection (a)(1) (*i.e.*, using without authorization a protected computer to send multiple commercial e-mail messages);

(B) the offense is under subsection (a)(4) (*i.e.*, registering by false identification to e-mail accounts, online user accounts, or domain names) if the offense involved 20 or more falsified e-mail or online user account registrations or 10 or more falsified domain name registrations;

(C) the volume of e-mail messages transmitted in furtherance of the offense exceeded 2,500 during any 24-hour period, 25,000 during any 30-day period, or 250,000 during any 1-year period;

(D) the offense caused a loss to one or more persons of \$5,000 or more during any one-year period;

(E) the defendant obtained as a result of the offense conduct anything of value of \$5,000 or more during any one-year period; or

(F) the defendant acted in concert with three or more other persons and was an organizer or leader with respect to the others.

(b)(3) Imprisonment up to one year and/or a fine for any other violation of the statute.

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

If 18 U.S.C. 1037 is referenced to § 2B1.1, should commentary 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?

Are there circumstances under which an offense under 18 U.S.C. 1037 could be considered to involve sophisticated means, and if so, would it be appropriate to add commentary to § 2B1.1 to invite application of the enhancement for sophisticated means at § 2B1.1(b)(8) under such circumstances? Alternatively, would it be appropriate to add commentary discouraging application of the enhancement for sophisticated means in certain circumstances and, if so, what would those circumstances be?

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 Web site, 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?

(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?

What constitutes a “large volume of unsolicited email”?

(3) Section 5(d)(1) of the CAN-SPAM Act of 2003 makes it unlawful for a person to initiate in or affect interstate commerce by transmitting, to a protected computer, any commercial electronic email message that includes sexually oriented material and—

(A) fail to include in the subject heading for the electronic mail message the marks or notices prescribed by the [Federal Trade Commission] under this subsection; or

(B) fail to provide that the matter in the message that is initially viewable to the recipient, when the message is opened by any recipient and absent any further actions by the recipient, includes only—

(i) to the extent required or authorized pursuant to paragraph (2) [*i.e.*, the recipient has given prior affirmative assent to receipt of the message], any such marks or notices;

(ii) the information required to be included in the message pursuant to section 5(a) of the CAN-SPAM Act of 2003; and

(iii) instructions on how to access, or a mechanism to access, the sexually oriented material.

The criminal penalty for a violation of section 5(d)(1) of the CAN-SPAM Act of 2003 is a fine or imprisonment for not more than five years, or both.

The Commission requests comment on how it should incorporate this new offense into the guidelines. Should the Commission reference this offense in Appendix A to § 2G2.2, the guideline covering the transmission of child pornography, and/or § 2G3.1, the guideline covering the transmission of obscene matter? Are there enhancements that should be added to either of these guidelines to cover such conduct adequately?

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SMALL BUSINESS ADMINISTRATION

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