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STATEMENT OF
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U.S. SENTENCING GUIDELINES COMMITTEE
CRIMINAL JUSTICE SECTION

ON BEHALF OF THE
AMERICAN BAR ASSOCIATION

BEFORE THE
U.S. SENTENCING COMMISSION

CONCERNING THE PROPOSED
1992 AMENDMENTS TO THE SENTENCING GUIDELINES

WASHINGTON, D.C.
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Mr. Chairman and members of the Commission:

My name is Steven Salky. I appear today to testify on behalf of the 380,000 members of the American Bar Association in my capacity as Chairperson of the ABA's Committee on the United States Sentencing Guidelines. Our Committee, part of the Section of Criminal Justice, is made up of a cross-section of interested parties, including private defense attorneys, public defenders, Assistant United States Attorneys, attorneys from the Justice Department, academicians, and judges. I am pleased to have this opportunity to convey the ABA's views with respect to the proposed 1992 amendments to the federal sentencing guidelines.

As you know, we have testified before the Commission on numerous occasions concerning the process by which the Commission promulgates guideline amendments. Our position is informed to a significant extent by our Criminal Justice Standards, and in particular the Sentencing Standards (which, by the way, are undergoing revision). The Standards envision a guidelines process much like that contemplated by the Sentencing Reform Act -- whereby an administrative agency with particular expertise in the operation of the criminal justice system, and removed from the political process, can study and refine guidelines that serve the basic purposes of criminal sentencing: deterrence, incapacitation, just punishment, and rehabilitation. Thus, we have praised the Commission when its process has been deliberative and has been based upon a careful assessment of the need for guideline revisions,

including an evaluation of available empirical data. Likewise, we have not hesitated to criticize the Commission when its processes have been characterized by undue haste and the absence of a meaningful analysis of the reasons for amending particular guidelines.

The process by which many of this year's proposed amendments have been developed has much to praise. The Commission decided last year that particular matters deserved careful study and thereafter assigned various working groups to research the operation of the guidelines in these priority areas. We commend the Commission for establishing these working groups to study the acceptance of responsibility guideline, the criminal history guidelines, the drug offense guidelines, and other areas. Regardless of whether or not we agree with the conclusions reached by the working groups, we believe the Commission acts wisely when it amends the guidelines on the basis of staff recommendations, especially where the staff has analyzed the available data to determine the actual problems in guideline application. We very much appreciate having had the opportunity to provide input to several of the working groups and were particularly impressed by the quality of several of these reports.

The value of the working group process for generating amendments can be seen by reviewing The Acceptance of Responsibility Working Group Report. According to its report, the working group analyzed the raw data generated from the

case files submitted to the Commission after each guidelines sentencing and conducted an in-depth analysis of the files containing atypical cases. The working group further analyzed published opinions of the courts, reviewed available literature, and considered the input of defense practitioners, judges, probation officers and others. Only after considering the implications drawn from the raw data and only after considering the manner in which a guideline was used in the plea bargaining and sentencing processes, did the group draft proposed amendments. We believe this type of deliberative study is what Congress had in mind when it created the Commission. Thus, any amendment to Section 3E1.1 can now be based on current practice data and social science research.

To commend the Commission for establishing working groups to study an area before it considers amending guidelines is not to suggest that the Commission should never amend a guideline without a working group report. However, there should be a presumption against any substantive amendment that is not accompanied by some research and analysis that clearly justifies an alteration. We note that several proposed amendments would increase offense levels or provide greater enhancements for certain offenses without any justification and without any reference to any staff report. We suggest shelving any such proposals, regardless of the proponent, until the matter is studied by the Commission.

Before leaving the matter of "process," let me renew the suggestion that one of my predecessors, Sam Buffone, has raised with you in the past: the Commission should promulgate internal regulations to govern the guideline amendment process. The Commission is an expert administrative agency regulating a complex area of our society. Most federal agencies have adopted regulations governing their rulemaking activity. The Sentencing Reform Act envisions the same for this agency. For the Commission not to adopt a set of regulations for its rulemaking function is not only to leave its decisionmaking process open to legal challenge, but to limit its credibility within the criminal justice community.

The Commission's process for amending guidelines has shown progress as regards the public comment period. In 1990, we expressed our dismay at the very short comment period. This year, the Commission published its proposed amendments in early January, thus allowing interested parties such as the ABA approximately 45 days before the public hearing and 60 days before the end of the comment period in which to review and develop comments on the significance and desirability of the proposals. We continue to recommend that the Commission allow at least 90 days between publication and the end of the comment period. While the ABA had access to working group reports and monitored the development of certain amendments, not all interested parties had this luxury. In light of the importance of many of the proposed amendments, a 90 day

comment period will help involve others in the amendment process and further develop institutional credibility for the Commission.

Our praise for the process of guideline amendments should not overshadow our continued criticism of the fact that the amendments, either individually or as a package, do not include any assessment of prison impact. The Sentencing Reform Act explicitly requires the Commission to continually assess the impact of the Guidelines on the existing capacity of penal, correctional, and other facilities and services. The Sentencing Reform Act further requires that any guideline be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons. The projections in your 1991 Annual Report and the projections in your recently released Report on the Operation of the Guidelines System and Short Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining indicate significant increases in the use of incarcerative sentences and in the average length of prison sentences well into the future. The Commission, however, continues to ignore its responsibility to evaluate the potential impact of any amendment on prison populations. We cannot comprehend why the Commission continues to ignore its statutory duties in light of the crisis in prison overcrowding. In our view, every working group report ought to contain a prison impact analysis. While the effect on the

rate of imprisonment may not be a basis to accept or reject a proposed amendment, it cannot continue to be ignored.

Lest my remarks be viewed as simply those of another disgruntled defense attorney, let me quote to you the words of Andrew L. Sonner, the Chairperson of the ABA Section of Criminal Justice, whose Report to the Members was published in the Winter, 1992, edition of the magazine Criminal Justice. Mr. Sonner, the highly respected States Attorney for Montgomery County, Maryland, commented on the remarks of experienced state and local prosecutors who have called for the development of new approaches to dealing with guilty criminals other than imprisonment. He said,

"[T]here is a great deal of evidence to support their position. The costs of construction and maintenance of new jails drains precious resources from vital social programs that many believe prevent more crime than punishment does. . . . Most experts argue that there is no perceptible correlation between getting tough by imposing long sentences and reduced crime rates."

The ABA believes these comments apply equally to the federal system and point to the absurdity of regulating sentencing practices without any consideration of the effect on rates and length of imprisonment.

We are also concerned about the proposed amendments as a whole for another reason. While there are clearly areas within the guidelines for improvement, we are concerned that the Commission not over-amend the guidelines. One of the conclusions of the Report on Disparity referred to earlier is

that most private defense attorneys do not have an adequate understanding of the guidelines. One of the reasons is clearly the fact that each year the practitioner is faced not only with mastering the original set of guidelines, but with mastering an ever greater number of amendments. This does not mean the Commission should not react to real problems in guideline application. When I turn to our comments on specific proposals, you will note that we endorse many of the proposed clarifications and changes. The point we want to make, however, is that the Commission should avoid the tendency inherent in any highly regulated scheme (such as the Sentencing Guidelines) constantly to revise, simply for the sake of amending.

I have appended to this testimony our specific comments on the proposed amendments. While I will limit my remarks to just a few proposals, let me be up front about several concerns which inform those comments:

o First, several of the proposed amendments will increase the use of and length of incarceration. While this may or may not be warranted in a particular case, many proposed amendments contain no justification for this result and, indeed, appear to be based on the normative view of the proponent that more incarceration is always good. For instance, proposed amendment 6 would increase by four levels any offense graded under 2F1.1 that "affected a financial institution." While the purpose may be to punish officers convicted

of savings and loan fraud, the amendment would increase sentences for a much broader range of conduct, for which there does not appear any justification. If the argument is that fraud offense levels -- which were amended in 1989 -- are too low in the case of a significant class of offenders, the proponent has not put forth any evidence to support this claim. Consistent with the ABA Standards, we believe a heavy burden rests on the proponent of any amendment that seeks to further increase offense levels. Thus, we generally oppose any amendment that will increase punishment, but does not articulate some evidence, empirical or otherwise, to establish that the increase will enhance deterrence or the other purposes of sentencing.

o Second, several amendments appear to move specific guidelines away from "modified real offense" to "pure real offense" sentencing. Amendment no. 4, part A, Amendment no. 9, Amendment 20, Option 1 and 3, Amendment 36, Part (G) and (P) all appear to eliminate any reference for purposes of sentencing to the charge of conviction. When the initial guidelines were promulgated, the Commission acknowledged the tension between real offense and charge offense sentencing and explained that it had resolved that tension by constructing a carefully balanced compromise between the two systems. In brief, those convicted of offenses involving more "fungible" items like money and drugs would be subject to real offense sentencing to minimize the dangers of prosecutorial manipula-

tion of sentencing. On the other hand, offenders convicted of offenses involving very discrete acts, like robbery and burglary, would be subject to charge offense sentencing. This balance between real offense and charge offense sentencing constitutes one of the bedrock policy choices of the initial guidelines. Several of our comments reflect our concern that on an ad hoc basis, the Commission is moving from its carefully considered "line" between real offense and charge offense sentencing without detailed public explanation based on available data.

Let me turn to our comments on proposed amendments. They are listed below in the order in which they appear in the Federal Register, but I will limit my remarks today to those proposals that we strongly endorse (numbers 1(A) and 1(B); 23; 29; and 34).

1A and 1B. These amendments represent valuable clarifications of the critically important relevant conduct standard. In our judgment, the amendment makes it clear that the relevant conduct is not meant to be limitless - instead, courts must carefully evaluate the extent to which each defendant should be held accountable for the acts and omissions of others. This amendment helps clarify that defendants in all types of offenses are to be punished only for criminal acts and harms which were "in furtherance" of jointly undertaken activity and which were "reasonably foreseeable". Likewise, the terms "common scheme or plan" and "same course of conduct" are not without limits. The amendment gives judges some flexibility to tailor the offense level to the total amount of drugs or money for which each defendant should be held culpable, instead of sentencing all co-defendants to the same period. While some members of the ABA may have some minor language suggestions, the amendment is an admirable attempt to guide the courts in their interpretation of these terms. An important aspect of this is be that the Commission should indicate that the purpose of the amendment to be

clarification of the guideline and commentary. This should avoid judicial rulings that this is a substantive change that does not apply before the effective date.

2B. This is a useful amendment for several reasons. First, it will allow a defendant to clear his/her conscience, something the criminal justice system should encourage. Second, it will allow the government to solve many additional cases, as it will encourage defendants to admit to all their prior criminal conduct. For example, assume that a defendant has committed four bank robberies, but only one is known to the government. This amendment will encourage the defendant to report his involvement in the other three, allowing the government to close these cases. Because the guideline requires the government to agree that the self-incriminating information will not be used, it is difficult to perceive how this guideline amendment could be abused by defendants.

3. The ABA standards envision an entirely different model of sentencing juveniles from that used for adults. Indeed, the system is recognized as being so different that there are 24 corporate volumes of juvenile justice standards. The ABA believes that juveniles have very different needs than adults and that they should be treated differently. The emphasis should be, in large part, on treatment and rehabilitation -- issues that are not recognized in the guidelines. Further, the juvenile justice system must take into account a wide variety of individual characteristics. Again, this is contrary to the guidelines system. We oppose any introduction of sentencing guidelines into that system, especially without an extensive study of the effects this would have on the system.

4(A). This amendment moves the guideline in sexual abuse cases to a pure real offense guideline and is objectionable for the reasons we have already explained in our general testimony. Moreover, by this amendment, consent -- a classic issue for the jury in a criminal case -- is now left for adjudication at sentencing. This merely lowers the standards of proof and represents a dangerous precedent.

5. We agree that the "more than minimal planning" enhancement has not been applied consistently. We note that if the Commission promulgates this amendment, it may want to eliminate "more than minimal planning" from the other guidelines that are often cross-referenced. In addition, the elimination of "more than minimal planning" from these guidelines would avoid double-counting.

Additional Issues For Comment. All distinctions in offense levels based on the amount of loss are arbitrary at best. Given the arbitrariness of the distinctions in dollar

loss, we favor placing less emphasis on "loss" as a sentencing factor. Thus, Table 3 is the best of the proposed alternatives in our view.

6. We can find no justification for this amendment. What empirical basis is there for increasing the offense levels for these offenses? If the intent is to punish more severely the officers and/or directors of savings and loans who have been proven to have looted their institutions, the language is much too broad. Many offenses not committed by the "S and L bandits" can be said to "affect a financial institution." This is an example of a proposed amendment that appears to be motivated simply by the normative views of its proponent that the punishment is too lenient; there has not been any attempt made to demonstrate that the existing guidelines are ineffectual in accomplishing the purposes of sentencing in these cases.

7. Given the extent to which drug quantities are subject to inflation simply by virtue of statements made by the undercover agent, it is dangerous to simply increase the offense levels by the amount of drugs involved. There must be a better way to characterize those persons who have a significant role in larger drug operations and, at the same time, avoid casting a net that increases offense levels for persons who play a peripheral role in the drug operation. Again, this proposal increases sentences without any apparent reliance on the Commission's own study of the operation of the drug offense guidelines.

9. Option 1 moves this guideline to real offense sentencing without any explanation or support. While the current guideline contains a limited cross-reference, the amendment results in a complete elimination of the need for this guideline in the first instance. While there may be a sound rationale, there is no explanation for this and promulgating this amendment would be inappropriate.

11. Why is the Commission eliminating "more than minimal planning" in the fraud and larceny guideline because it has proven difficult to apply consistently and adding "more than minimal planning" here?

12. The ABA believes that this amendment needs to be reconsidered in its entirety. The proposed amendment will create further inconsistencies in sentencings for currency transaction reporting violations (31 U.S.C. § 5313, § 5322), importing and exporting of monetary instrument violations (31 U.S.C. § 5316, § 5322), and violations of the IRS cash reporting rules (26 U.S.C. § 6050I; 26 U.S.C. § 7203, § 7206(I)). As currently drafted, the failure to file a Form 8300, or the filing of a false Form 8300 will be treated as part of §

2S1.4, with a base offense level of 9. A failure to file a currency transaction report would have been a base level of 5 under § 2S1.3, and the filing of a fraudulent currency transaction report would have been a base level of 13 pursuant to § 2S1.3. Structuring transactions for purposes of avoiding the IRS cash reporting rules or the currency transaction reporting rule would be treated as a level 13 pursuant to § 2S1.3, but the structuring of an importing and exporting currency transaction would have been a base level 9 pursuant to § 2S1.3. The ABA can discern no rational difference for the differing treatments by and among these statutory provisions.

13. As initially proposed in 1987, the tax guidelines substantially increased the prison time for offenders convicted of criminal tax offenses. These guidelines were amended in 1989 and increased in prison terms again. Due to the delay in prosecuting tax crimes, offenses for the 1987 and 1988 years involving the first set of guidelines are just now emerging from investigation, while the second set of guidelines will not be construed or analyzed for at least another one to two years (when offenses relating to the 1989 year are first brought). Until the Commission has time to analyze empirical data resulting from the initial sets of tax guidelines, the ABA recommends that no new and drastic amendments to the tax guidelines occur. In particular, these guidelines raise issues of proportionality by treating misdemeanor and felony offenses on identical levels. They also create "rebuttable presumptions" which subject the guidelines to constitutional attack or otherwise may be ill-advised. We recommend that a working group be established to coordinate amendments to the tax and the money laundering guidelines during the next guideline cycle.

14. This is an amendment which again illustrates our concern that the Commission is moving in an ad hoc manner toward pure real offense sentencing. If this amendment is promulgated by the Commission, the government could charge and convict a defendant of tax evasion and, by simply introducing evidence at sentencing concerning drug involvement, set the minimum guideline sentence at level 17 -- a much higher level than might apply to the offense of conviction. The Commission has gone on record, based upon a convincing report, as being opposed to mandatory minimum sentences promulgated by Congress. To establish a mandatory minimum guideline sentence seems equally ill-advised, especially where the mandatory minimum guideline is based on conduct proven by a mere preponderance of evidence instead of beyond a reasonable doubt.

15. Given the presumably small number of cases to which this adjustment will apply, is this proposed amendment not better left to the court's authority to depart? Chapter Five already contains a suggestion for an upward departure for

terrorism. Furthermore, this amendment is inconsistent with the general intent of Chapter 3 adjustments, which are meant to apply across all offenses. This proposal is the type of over-amending that we commented upon earlier.

18(A). We do not understand the justification for eliminating the three-level adjustments. As for the amendments to the Commentary, this is one of the few amendments for which the format obscures the proposal. However, to the extent we understand what is being proposed, we are concerned that the amendment tries to specify every circumstance possible for mitigating role and limits the application in non-drug cases to too many factors. We resist the idea that to qualify for a minimal role adjustment, a defendant must prove all five factors listed in Note 3. We would prefer leaving the courts some discretion in the area of applying Chapter 3 role adjustments. (We note that these amendments are for the most part directed to drug cases. Might not it be better to propose these amendments to Section 2B1.1?)

Issues for comment:

(1) The assessment of mitigating role should be in the context of the typical defendant. A mandate of the Sentencing Reform Act was to eliminate unwarranted disparity in all federal courts, not simply disparity between co-defendants.

(2) As for function-based role adjustments, we have long favored substantial adjustments based upon a defendant's role. We do not believe, however, that function labels should be determinative. Rather than always applying a reduction or always denying a reduction on the basis of a defendant's function, we favor specifying factors that a court should consider when determining whether to give a defendant a mitigating role adjustment.

(3) We agree with the concept, but not the example. Why is someone who merely transports (a welfare mother who gets paid \$200 for delivering a suitcase) not entitled to a minimal role adjustment?

18(B). The court always had the power to depart on this basis. However, this language is helpful insofar as it makes clear that where the amount of money or drugs involved bears little relation to the defendant's role, a departure is warranted. We would suggest the Commission substitute "is" for "may be."

19. The ABA has previously endorsed the concept of capping the offense levels for minor and minimal participants in quantity based guidelines such as 2D1.1. As before, we

again decline to comment on the issue of the appropriate offense level cap.

Issues for comment:

1(a). The same offense level caps should not apply to minimal and minor role offenders. Rather, the caps should be lower for minimal role, in accordance with the present definitions.

1(b). The Congress has already made distinctions between illegal substances for purposes of sentencing by adopting schedules for all illegal substances. Why not determine offense level caps by schedule?

2. The cap should limit the offense level, not the sentence, consistent with the operation of the guidelines generally. Were it otherwise, how would a court apply other adjustments such as "acceptance?" Moreover, if stated in months, the same sentence cap would apply regardless of criminal history. This produces an unwise result.

3. The "cap" concept counters the impact of quantity. The role adjustments generally are not tied to quantity. For both reasons, the cap should not be tied to quantity.

4. Mandatory minimums sentencing statutes "trump" the guidelines in any event. The caps should be set without reference to mandatories. The caps should, however, not apply if 2D1.1 (a)(1) or (a)(2) apply.

20. Option 2 is the option most likely to result in treating similarly situated offenders similarly. It recognizes that violations of the statute can involve different amounts of different substances and that the role of the defendant may be very different.

21. Issue for Comment. We have no basis to know whether or not Section 3C1.2 adequately accounts for the full range of behavior to which it is applicable. For this very reason, how can anyone endorse the options presented? Indeed, as we have noted earlier, we suggest that the Commission review the data and review determine how courts have applied the guideline before it engages in amending it.

22. Again, is there evidence that the guideline is creating anomalous results? In the absence of such evidence, there is grave danger in amending this guideline. In the first place, it is already complex and beyond the understanding of many practitioners. Second, by each amendment, the Commission creates an issue regarding the application of ex

post facto principles to the application of the amended guideline. Absent sufficient evidence, the Commission should not over-amend.

23. Accepting responsibility for the offense of conviction ought to be worth two levels and there is much in the working group report that supports the need for a "bright line" rule. However, we endorse the concept incorporated into several proposed options that the acceptance reduction not be limited to two levels. The amount of further reduction should not depend on only one factor, such as the severity of offense level. Rather, we can envision a guideline that would allow courts to grant an additional level (or levels) reduction depending on multiple factors, which may include the offense level involved, the acceptance of responsibility for all relevant conduct, other demonstrations of acceptance. In other words, the acceptance of responsibility guideline should "guarantee" every defendant who pleads guilty before trial a two level reduction, but authorize larger deductions where the court is satisfied that other signs of genuine remorse was present. Our approach represents a combination of Options 3 and 4 of the proposed options.

26A. Structured departures for criminal history scores greater than Category VI are appropriate. Commission guidance is useful because the disparity created by departures at this level can be significant. Option 2 appears to be appropriate.

26B. The clarification appears to be appropriate for the reasons stated in the 1990 Recommendations of the Judicial Conference of the United States.

26C. A departure by definition is based upon a finding by the court that the guidelines are inapplicable. While downward departures may be rare in those cases in which the Career Offender or Armed Career Criminal guidelines apply, we do not think it is wise for the Commission to rewrite the Sentencing Reform Act on the court's departure authority.

28A. A zero category would have the tendency to favor white-collar offenders. Similarly, there is potential for abuse in such a category: is a prior arrest of a peaceful demonstrator a basis to deny zero category treatment? Instead of a zero category, should not the Commission simply expand the categories of offenders for whom alternatives to incarceration are available?

28B. We are in favor of structured departures, instead of a new category VII. However, this proposal is not supported by the data collected by the working group and should be shelved for that reason alone.

29. Making sentencing options available to a greater number of defendants is the single most important issue before the Commission. There is currently very little flexibility in the sentencing options available at the lower end of the guidelines table. The table presumes the imposition of a sentence of imprisonment for almost all but the most minor offenders. The current table is clearly sending many more first offenders to prison than was the case prior to the adoption of the guidelines.

Importantly, the initial guidelines table failed to follow the clear statutory directive of the Sentencing Reform Act. That Act, specifically 24 U.S.C. § 994(j), provided that the guidelines should reflect the general appropriateness of imposing a sentence other than imprisonment in cases where the defendant is a first offender who has not been convicted of a crime of violence or otherwise serious offense. Far from compromising the structure of the guidelines, adopting the amendment options proposed will do much to bring the guideline back into sync with this Congressional directive.

In particular, we urge the adoption of Option 2, Option 3, and Option 5. These options should be adopted without limitation as to their application by offense. While white collar offenders may benefit more than blue collar offenders by these amendments, most offenders will still serve some limited period of imprisonment even under these amendments.

The Report on Alternatives to Incarceration provides compelling evidence that the guidelines have resulted in the overuse of imprisonment.

As for the additional issues for comment:

31. We have previously criticized the Commission's promulgation of the "cost of imprisonment" fine and urge its elimination.

33A. We endorse this proposal for the reasons stated in the 1990 recommendations of the Judicial Conference of the United States. The Senate Report to the Sentencing Reform Act contains substantial justification for this amendment.

33B. We endorse this proposal for the reasons stated in the 1990 recommendations of the Judicial Conference of the United States. The Senate Report to the Sentencing Reform Act contains substantial justification for this amendment.

33C. The Commission should worry less about providing guidance for departures and more about eliminating barriers to departures it has erected.

33D. For the reasons that amendment 33(B) is appropriate, this amendment is inappropriate.

34. We have long endorsed this amendment.

35A. This amendment is helpful, as far as it goes. The Commission should go further by either requiring the government to disclose this information prior to execution of the plea agreement or press for an amendment to Fed. R. Crim. P. 16 to accomplish this.

35B and C. It is appropriate that conduct dismissed as part of a plea agreement may nevertheless be considered at sentencing. This is consistent with the modified real offense system originally developed by the Commission. However, acquitted conduct should be disregarded for all purposes as a matter of fairness or the appearance of fairness.