

PUBLIC COMMENT

for

1993 AMENDMENT CYCLE

UNITED STATES SENTENCING COMMISSION



THE CATHOLIC UNIVERSITY OF AMERICA

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March 8, 1993

The Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20002-8002

RE: Proposed Guideline Amendments
for Public Comment - 1993 Cycle

Dear Chairman Wilkins:

On behalf of the Practitioner's Advisory Group (hereinafter called "PAG"), I am writing to you concerning the upcoming amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comments.

TO AMEND OR NOT TO AMEND THE GUIDELINES

A significant debate has begun both within and outside of the Sentencing Commission concerning the propriety of continuously amending the Guidelines. 28 U.S.C. §991(b)(1)(C) requires that "The Commission develop means of measuring the degree to which the sentencing, penal and corrections practices are effective in meeting the purpose of sentencing ... " 28 U.S.C §994 (o) requires the commission to "periodically review and revise.... the guidelines promulgated pursuant to this section." This same statute requires an annual review of the operation of the Guidelines with suggested changes.

It appears that Congress contemplated continued fine tuning of the guidelines sentencing process with at least an annual review of that process culminating in amendments if appropriate. It appears that Congress did not intend that amendments be required annually but such amendments are clearly permitted.

The arguments put forth in support of the practice of amendments is that at least during the initial period of guidelines application there is a need for adjustments in the process which completely altered how sentencing is accomplished in Federal court. The guidelines

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are still relatively young; indeed, one of the attributes of a guidelines system is the ability to change practices based on experience gained from the application of the guidelines, while at the same time continuing to promote uniformity in sentencing.

Those who have begun to voice concerns about the continuing amendment process have criticized a perceived IRS-type code mentality with constant changes resulting in confusion, misapplication and the reappearance of disparate sentencing practices based upon institutional disparity resulting from continual Commission and congressional action. The critics point out that for sentencing to be an effective crime deterrent punishment must be certain and consistent, and a system which continually changes cannot be either.

The PAG finds merit in both of the above arguments. Continuous substantive changes in guidelines would result in institutional disparity with one's sentence being potentially dependent upon substantive changes taking place in the amendment cycle immediately preceding one's crime. On the other hand Congress clearly intended for the guidelines sentencing process to be dynamic and not stagnant with changes occurring as dictated by experience, especially in the initial application period in response to actual guidelines utilization.

The Commission's five-year practice of restrained change appears to appropriately balance these competing interests. In fact, the PAG has recommended less restraint and more substantive changes during past cycles than we are advocating during this amendment cycle. It would be unfortunate if the argument against any change prevailed in this amendment cycle in that many of the current proposals represent the culmination of area review or working groups final reports which have taken either one year or several cycles to complete. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the Commission is to truly abide by the duties which were entrusted to it by Congress in enabling legislation.

SPECIFIC AMENDMENT PROPOSALS

The PAG has broken down its comments into three areas: (1) Proposed Drug Amendments (numbered paragraph 1); (2) Proposed Tax Amendments (numbered paragraph 2); and (3) other proposed amendments which are covered sequentially (numbered paragraphs 3-22).

COMPREHENSIVE PROPOSAL FOR DRUG OFFENDERS

1. Proposed Amendments 8-12 - Drug Trafficking and Role in the Offense - The PAG prefers the Comprehensive Proposal for Drug Offenders that forms the basis of our Proposed Amendment number 39. Our original proposed amendment number 39 was published as pages 57-63 of the "reader friendly" proposed guideline

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amendments. Attached to this letter is our "new" proposed amendment number 39, which contains changes as a result of further reflection and as a result of a consensus reached at the Practitioners' Advisory Group meeting held on February 22, 1993. The PAG rational for our proposed amendments in the drug area is as follows:

One of the most troublesome aspects of the sentencing guidelines revolves around controlled substances. Judges, defense lawyers, probation officers and even prosecutors have focused criticism on four major areas. First, it is argued that by centering drug sentences on the quantity of controlled substances, other aspects of drug crimes such as violence, organization, profits and obstruction of justice are inappropriately diminished as factors which influence sentencing, especially at the higher ranges where these aggravating characteristics are most likely to occur. Second, critics have argued that the establishment of drug crime mandatory minimum sentences in the Crime Control Acts of 1986 and 1988 inappropriately influenced the sentencing levels set by the Sentencing Commission for all drug crimes, even those not subject to the congressional mandate. Third, it has been argued that the Commission's failure to more fully define the mitigating factors of minor and minimal participants has resulted in a disparate application of this critical aspect of drug sentencing. Finally, there has been vocal protest that the drug guidelines treat less significant participants in concerted drug activity too harshly. Critics argue that usually overkill results when a lower level defendant, because of the application of relevant conduct principles, is credited with most or all of the substances distributed by all the participants in jointly undertaken drug activities.

The PAG believes that many of these criticisms have merit. Because the critical interplay between role in the offense adjustments, specific offense characteristics and drug quantity significantly influences the final sentence in drug crimes, the PAG believes that a comprehensive integrated proposal which addresses all of these critical aspects is the approach most likely to correct what currently is an imperfect system for sentencing drug offenders.

The PAG has closely examined various proposals and has synthesized those changes which would have the most impact on current inequities. The central guiding principles of the changes proposed are the underlying justifications for sentencing codified in 18 U.S.C., §3553(a)(2). Only changes which offer significant increases in deterrence, protection and just punishment should be adopted by the Commission now that the guidelines have in large part been successfully tested in the Courts. The PAG believes that the changes proposed are necessary when considered in light of these guideposts of deterrence, protection and just punishment.

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SPECIFIC OFFENSE CHARACTERISTICS

The increasing possession, display and use of firearms in drug crimes remains a societal problem which demands increased protection. The PAG believes that an incremental rise of 2 and 4 levels for increasingly serious conduct involving firearms can provide increased protection and deterrence which is needed and warranted when firearms are used to facilitate drug offenses. In fact, 15% of all drug offenders sentenced in 1991 in Federal Court possessed firearms. In contrast, only 3% were career offenders. The current two-level increase for possession, or the threat of a 924(c) prosecution for use or carrying, does not adequately address the use of weapons in drug crimes. Our new incremental proposal (a 2 level increase for possession of a dangerous weapon and a 4 level increase for use of a dangerous weapon) forms an important link to the proposal which follows to emphasize aggravating and mitigating factors in drug crime sentencing.

As quantity somewhat decreases in importance in drug crimes, role in offense increases in importance. The PAG does not believe any further distinction should be drawn between organizations which employ more than 5 individuals. It may take only a few pilots to smuggle large amounts of cocaine, while it may take 225 off-loaders to smuggle a large amount of marijuana, so that at the upper levels, numbers of participants become less relevant. The result is that persons who qualify for level 38 quantity, who are organizers, but who fully accept responsibility, would not receive the maximum penalty unless they obstructed justice or otherwise engaged in other aggravating conduct. Again, quantity is adequately considered under the PAG proposal, but leadership and obstruction are also re-established as critically important factors, as they should be, in a system grounded on protection and deterrence.

DRUG TABLE

When the Commission originally structured §2D1.1, the drug quantity tables ended at level 36, but the table was later amended to level 42. The Commission also keyed the offense levels for drug amounts which corresponded to the 10-year (1 kilogram of Heroin, 5 kilograms of Cocaine, 1,000 kilograms of Marijuana, etc.) and 5 year (100 grams of Heroin, 500 grams of Cocaine, 100 kilograms of Marijuana, etc.) mandatory minimums at guideline ranges so that the mandatory minimums were encompassed by the low point in the corresponding range rather than the high point in that range. The result of these two fundamental decisions have made drug quantity the linchpin in federal sentencing for controlled substances violators. The PAG recognizes that mandatory minimums must play a role in designing sentences for all drug defendants and that because mandatory minimums focus on drug quantity, the guidelines must reflect such a focus. The PAG thus rejects proposals which inappropriately diminish these aspects. However, both the selection of a low point keyed to the mandatory minimum and the increase of the tables up to the

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maximum level of 42 have severely overemphasized quantity in achieving the final sentence for the drug offender. The PAG believes that this overemphasis on quantity provides less rather than more protection to citizens of the United States.

The guidelines system is significantly built on the underlying theoretical justification of deterrence. Potential defendants are discouraged from committing crimes, and persons who committed lesser offenses are deterred from aggravating their conduct because increasing penalties are prescribed.

The Commission has identified certain specific aggravating factors which increase a defendant's sentence so as to deter persons from engaging in such acts.

The entire guidelines system presupposes that the more aggravated a crime becomes the higher the sentence should be so that the system is designed to punish in a graduated manner with incremental increases as conduct becomes more serious so that society is protected from the serious offender.

Unfortunately, the current guidelines contain no incentive for persons distributing larger quantities of substances to desist from engaging in aggravating conduct, because at the upper end of the guidelines quantity determines the maximum sentence without regard to aggravating factors. There is no differentiation between the large quantity dealer who uses a firearm (15%), who obstructs justice (5%), who uses special skills (1%), or who realizes substantial gain, from the large scale dealer who does not engage in such conduct. In essence, for the level 42 dealer, the guidelines speak words of encouragement to obstruct justice because the dealer's sentence is only determined by quantity, and if the dealer successfully obstructs justice, the dealer may receive no sentence at all.

The larger scale, non-violent drug dealer who uses no weapon, pays no hush money, bribes no official, and uses no special skill should not receive the same sentence, simply because of quantity, as the dealer who does engage in such aggravating conduct.

By adjusting the guidelines downward so as to further punish those upper end drug defendants who committed egregious acts in furtherance of their drug enterprises, the Commission can reestablish deterrence as an element of sentencing for these offenders without violating the intent of Congress which established mandatory minimums. The PAG proposal would establish level 38 as the upper end for quantity. The proposed departure is eliminated for truly unusually large quantities so as to emphasize aggravating factors which are also expanded under our proposal. The PAG proposal also would key the mandatory minimum to the upper end of the guideline range so that persons below that range would be sufficiently deterred from larger scale distributions and to provide more emphasis on aggravating factors. These proposals preserve quantity as an important factor

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but contain the additional benefits of protecting society by discouraging offenders from aggravating their conduct. Only 3% of all drug offenders are career offenders, yet Congress and the Commission have focused attention on this group. The PAG proposal impacts upon 15% to 20% of offenders while preserving congressional mandates.

Finally, a base offense level cap of level 32 for serious drug offenses and a base offense level cap of 26 for offenses involving all other controlled substances for those defendants who qualify for a mitigating role adjustment, protects against overly harsh sentencing for defendants who are only peripherally involved in the offense.

ROLE IN OFFENSE

Mitigating Role

The PAG believes its proposal to clarify by example those who qualify for mitigating treatment in concerted activity will significantly end disparity in this area.

Deleting the language concerning the lack of knowledge of the scope of the activity, which is contained in the subgroup proposal, was accomplished because such knowledge and lack thereof can play a significant role in the newly redesigned rules of application for relevant conduct and should therefore play no part in determining mitigating role. If the defendant is responsible for all jointly undertaken activities, but played a minor or minimal role, he qualifies for a reduction. If he was only aware of a small part of the offense conduct, but was not a minor participant in the conduct he was aware of, his overall offense level may be diminished but not because of a downward role adjustment.

Also, the PAG sees no reason to treat "mules" any differently than sellers, financiers, or owners and includes transporters so that they are treated in the same manner as these persons.

Because of the increases proposed for firearms possession as specific offense characteristics, the PAG believes a disqualification for firearms possession is no longer appropriate. Using the "Pinkerton" theory to saddle a significantly minimal participant with the principal organizer's weapon is a concept which should be rejected because it blurs the organizational lines between such participants. Minimal offenders who actual possess weapons will receive incremental increases as a deterrent to weapon possession. Persons who induce others to possess or use weapons also are included in this specific offense characteristic.

The PAG believes that the changes proposed enhance the underlying purposes of sentencing, diminish disparate treatment and ameliorate the sentences for minor and

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minimal participants in drug distribution activity while continuing to provide significantly just punishment for these serious federal offenders. The PAG believes that the changes proposed substantially contribute to forming a more perfect guidelines sentencing structure. The PAG believes that if this package of amendments is adopted as a whole, the concerns articulated by the Judicial Advisory Group resulting from a simple reduction in base offense levels are in large part eliminated because of the re-emphasis on aggravating factors created by the balance of the provisions in this package of amendments.

PROPOSALS RELATING TO TAX OFFENSES

This report comments on the proposed amendments to the federal sentencing guidelines affecting prosecutions for tax offenses. The amendments published by the Sentencing Commission for public comment would delete the enhancements for "more than minimal planning" and "sophisticated means" used in connection with fraud-related and tax offenses in Sections 2B, 2F and 2T, and substitute increases in the loss tables, consolidate the guidelines for tax offenses in Section 2T, and create a uniform definition of "tax loss." The proposals published at the request of the Internal Revenue Service would restructure the guidelines applicable to most tax felonies to provide for a fixed base offense level and an incremental enhancement for tax losses. All reference to the tax loss table in §2T4.1 is deleted. The IRS also seeks to modify the Chapter 3 grouping rules to increase offense levels for certain grouped offenses, proposes a new offense guideline for the non-violent aspects the omnibus criminal provision in 26 U.S.C. §7212(a), and puts forth proposed enhancements to the narcotics and money laundering offenses that would apply when there is evidence of unreported income.

SUMMARY

The PAG opposes the Commission's proposal to delete the enhancements for "more than minimal planning" and "sophisticated means" used to calculate the sentencing range for fraud-related and tax offenses and use an increase in the loss tables as a surrogate. The PAG favors the proposal to consolidate the tax guidelines and to simplify the definition of "tax loss" by using a uniform standard that allows the actual loss of revenue to the government to rebut an artificial construction of a defendant's tax liability. The PAG opposes new commentary in Section 2T that would cumulate the tax loss on individual and corporate returns involved in a single course of conduct on the grounds it constitutes invidious double counting.

The PAG takes no position on the IRS proposals that generally increase the sanctions for tax crimes and increase the offense levels determined when two or more counts are grouped. The PAG prefers the tax loss definition suggested in the amendments for public comment over the IRS formulation which relies more heavily on

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artificial constructs of a defendant's tax liability than on the actual tax loss suffered by the government. The PAG expresses no opinion on the IRS' proposed guideline for violations of 26 U.S.C. §7212(a). Finally, the PAG opposes the IRS proposal to add an enhancement to the narcotics and money laundering guidelines for unrelated and uncharged tax offenses.

Proposed Amendment number 5 - Fraud, Theft, Tax -

1. Summary of Guideline

The guidelines for larceny, fraud-related offenses, and tax crimes include an enhancement when the defendant's conduct involves more planning or sophistication in committing the offense than would otherwise be typical or required to support a conviction. In the larceny and fraud-related guidelines the enhancement applies to "more than minimal planning."¹ In the tax context, the enhancement applies when a defendant uses "sophisticated means" to prevent the offense from being detected.

The General Application Principles in Chapter One instruct that the "more than minimal planning" enhancement for larceny and fraud offenses is appropriate in three situations: (1) where the offense involves "more planning than is typical for commission of the offense in a simple form," (2) where "significant affirmative steps were taken to conceal the offense," and (3) "in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." U.S.S.G. §1B1.1, comment. n.1(f). See also United States v. Rust, 976 F.2d 55 (1st Cir. 1992).

In the guidelines for tax offenses, the enhancement is to be used "if sophisticated means were used to impede discovery of the nature or extent of the offense." See, e.g., U.S.S.G. §2T1.1(b)(2). Like the enhancement for "more than minimal planning" the standard is subjective and only generally defined. See United States v. Brinson, No. 90 CR 273-1, 1991 WL 235925 at *4 (N.D. Ill. Oct. 30, 1991) ("whether 'sophisticated means' were employed (§2T1.1(b)(2))" requires a subjective determination similar to that in §2F1.1(b)(2) (citation omitted)). It "includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case." U.S.S.G. §2T1.1, comment. (n.6). By way of illustration, the guidelines suggest that the enhancement is applicable "where the defendant used offshore bank accounts, or transactions through corporate shells." Id.

¹Under the fraud and deceit guideline the enhancement is worded in the disjunctive and applies either to "more than minimal planning" or "a scheme to defraud more than one victim." U.S.S.G. §2F1.1(b)(2).

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Amendment No. 5 would delete entirely the specific offense characteristic for "more than minimal planning" employed in the guidelines for larceny, fraud and insider trading² and the correlative specific offense characteristic for "sophisticated means" employed in the guidelines for tax offenses.³ As a surrogate, changes would be made to the applicable loss tables resulting in a two level increase over the November 1, 1992, guidelines for loss amounts greater than \$40,000. Additionally, this amendment would modify the loss tables in Sections 2B, 2F and 2T to use a more constant rate of increase in the loss increments and to increase the offense levels for cases that involve exceptionally high losses. The proposed changes to the loss tables are set forth below:

Larceny, §2B1.1(b)(1)

<u>Increase in Level</u>	<u>Loss (Current)</u>	<u>Loss (Proposed)</u>
No increase	\$100 or less	\$600 or less
Add 1	More than \$100	More than \$600
Add 2	More than \$1,000	More than \$1,000
Add 3	More than \$2,000	More than \$1,700
Add 4	More than \$5,000	More than \$3,000
Add 5	More than \$10,000	More than \$5,000
Add 6	More than \$20,000	More than \$8,000
Add 7	More than \$40,000	More than \$13,500
Add 8	More than \$70,000	More than \$23,500
Add 9	More than \$120,000	More than \$40,000
Add 10	More than \$200,000	More than \$70,000
Add 11	More than \$350,000	More than \$120,000
Add 12	More than \$500,000	More than \$200,000
Add 13	More than \$800,000	More than \$325,000
Add 14	More than \$1,500,000	More than \$550,000
Add 15	More than \$2,500,000	More than \$950,000
Add 16	More than \$5,000,000	More than \$1,500,000
Add 17	More than \$10,000,000	More than \$2,500,000
Add 18	More than \$20,000,000	More than \$4,500,000
Add 19	More than \$40,000,000	More than \$8,000,000

² See U.S.S.G. §§ 2B1.1, 2B1.2, 2B1.3, 2B4.1, 2B5.1, 2B6.1, 2F1.1, and 2F1.2.

³See U.S.S.G. §§ 2T1.1(b)(2), 2T1.2(b)(2), 2T1.3(b)(2); 2T1.3(b)(2), 2T1.4(b)(2), and 2T1.3(b)(1).

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Add 20	More than \$80,000,000	More than \$13,500,000
Add 21		More than \$23,500,000
Add 22		More than \$40,000,000
Add 23		More than \$70,000,000
Add 24		More than \$120,000,000

Fraud and Deceit, §2F1.1(b)(1)

Increase in Level	Loss (Current)	Loss (Proposed)
No increase	\$2,000 or less	\$1,700 or less
Add 1	More than \$2,000	More than \$1,700
Add 2	More than \$5,000	More than \$3,000
Add 3	More than \$10,000	More than \$5,000
Add 4	More than \$20,000	More than \$8,000
Add 5	More than \$40,000	More than \$13,500
Add 6	More than \$70,000	More than \$23,500
Add 7	More than \$120,000	More than \$40,000
Add 8	More than \$200,000	More than \$70,000
Add 9	More than \$350,000	More than \$120,000
Add 10	More than \$500,000	More than \$200,000
Add 11	More than \$800,000	More than \$325,000
Add 12	More than \$1,500,000	More than \$550,000
Add 13	More than \$2,500,000	More than \$950,000
Add 14	More than \$5,000,000	More than \$1,500,000
Add 15	More than \$10,000,000	More than \$2,500,000
Add 16	More than \$20,000,000	More than \$4,500,000
Add 17	More than \$40,000,000	More than \$8,000,000
Add 18	More than \$80,000,000	More than \$13,500,000
Add 19		More than \$23,500,000
Add 20		More than \$40,000,000
Add 21		More than \$70,000,000
Add 22		More than \$120,000,000

Tax Table, §2T4.1

Offense Level	Tax Loss (Current)	Tax Loss (Proposed)
6	\$2,000 or less	\$1,700 or less
7	More than \$2,000	More than \$1,700
8	More than \$5,000	More than \$3,000
9	More than \$10,000	More than \$5,000
10	More than \$20,000	More than \$8,000
11	More than \$40,000	More than \$13,500
12	More than \$70,000	More than \$23,500
13	More than \$120,000	More than \$40,000
14	More than \$200,000	More than \$70,000
15	More than \$350,000	More than \$120,000
16	More than \$500,000	More than \$200,000
17	More than \$800,000	More than \$325,000
18	More than \$1,500,000	More than \$550,000
19	More than \$2,500,000	More than \$950,000
20	More than \$5,000,000	More than \$1,500,000
21	More than \$10,000,000	More than \$2,500,000
22	More than \$20,000,000	More than \$4,500,000
23	More than \$40,000,000	More than \$8,000,000
24	More than \$80,000,000	More than \$13,500,000
25		More than \$23,500,000
26		More than \$40,000,000
27		More than \$70,000,000
28		More than \$120,000,000

We oppose the portion of this proposed amendment that would delete the enhancement for "more than minimal planning" and "sophisticated means" and substitute a two level increase in the loss tables. This proposal is philosophically, practically, and legally flawed. Deleting the enhancement is inconsistent with the underpinnings of the guidelines because it removes a valid sentencing variable from consideration and increases the opportunities for sentencing disparity. Moreover, phasing out the planning and sophistication enhancements undercuts the effort to increase offense levels where extremely high losses are involved. As a practical matter, the amendment erroneously presumes that a measure of the quantitative monetary loss suffered by the victim or society is a rational surrogate for the qualitative acts of the defendant when he commits the offense. In the context of the case law, the proposed amendment appears to

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eliminate a double counting problem that to date has gone unrecognized in the published opinions. The problem that appears in the application of this enhancement is its overuse where there are "repeated acts" otherwise already taken into consideration by the loss tables, and the tendency to confuse the number of acts with thorough planning.

The proposed amendment is philosophically inconsistent with the Sentencing Commission's goals of increasing deterrence, reducing sentencing disparity, and distinguishing between offenses committed on the spur of the moment and those that require forethought and preparation. See, e.g., U.S.S.G. §1B1.1, comment. (n.1(f)). If there is validity to the proposition that "[t]he extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm," the enhancement for more than minimal planning and sophistication should be retained so that the courts have an articulated basis in the guidelines for distinguishing such offenses at sentencing. See U.S.S.G. §2F1.1, comment. (backg'd.) (emphasis added). The current guidelines contain a framework that the courts can use to assess the defendant's conduct. When a defendant's criminal activity involves only minimal planning, no enhancement is called for under the guidelines. When a defendant's preparations for carrying out the offense are "more than" minimal or the defendant utilizes sophisticated means to avoid detection, the guidelines provide for a two level increase in the offense level. Finally, when a defendant takes "extraordinary" measures to conceive, execute and conceal the offense of conviction and the relevant conduct, an upward departure is warranted. Eliminating the sentencing variable for planning and sophistication risks losing sight of the goal of deterring sophisticated criminals by punishing them more severely than those who commit the typical offense and offers a greater opportunity for sentencing disparity. See U.S.S.G. §2T1.1, comment. (backg'd.); United States v. Werlinger, 894 F.2d 1015, 1018 (8th Cir. 1990) ("a major purpose of providing individualized, conduct-related adjustments is to ensure different sentences for criminal conduct of different severity.... [D]ouble counting is inconsistent with this goal").

Monetary loss is not a rational surrogate for forethought, planning and sophistication. There is no rational basis for assuming that it necessarily takes more planning to steal \$10 by false pretenses than it takes to steal \$10,000. See United States v. Meek, 972 F.2d 1346 (9th Cir. 1992), pet. for cert. filed, _____ U.S.L.W. _____ (U.S. Nov. 16, 1992) (text in Westlaw). Similarly, when a defendant submits a false travel voucher to the state for reimbursement, there is no qualitative difference between a \$1,700 alteration and a \$17,000 alteration. See United States v. Rust, 976 F.2d 55, 56 (1st Cir. 1992). Yet, under the proposed amendment, there would be no enhancement for the former and a four level increase for the latter. There can be large loss cases where no planning, no repetitive acts, and no significant acts to conceal the conduct were involved. Cf. U.S.S.G. §2F1.1, comment. (n.10) ("[i]n a few instances the loss determined

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[from the loss table] may overstate the seriousness of the offense"). By like token, a well-planned and concealed fraud may produce little or no monetary loss.

Reviewing the proposed amendment in light of the published case law suggests that this proposal seeks to eradicate a non-existent double counting problem. The guidelines acknowledge that certain offenses, even in their "simple form," require more than minimal planning. For example, where the offense "substantially jeopardize[s] the safety and soundness of a financial institution," courts are instructed there shall be a rebuttable presumption that the offense involved "more than minimal planning." U.S.S.G. §2F1.1, comment. (n.18) (emphasis added). In the tax guidelines, the commentary observes that "tax evasion always involves some planning." U.S.S.G. 2T1.1, comment. (backg'd.). See United States v. Beauchamp, ____ F.2d ____, 1993 WL 30804 at *4 (1st Cir. Feb. 16, 1993) ("[c]rimes of fraud and deceit by their very nature may, and often do, compel, quite predictably, later efforts at a cover-up"); United States v. Lennick, 917 F.2d 974, 979 (7th Cir. 1990) (applying enhancement "to factual scenarios involving clear examples of ... complex criminal activity"); United States v. Fox, 889 F.2d 357, 361 (1st Cir. 1989); ("[we] cannot conceive of how obtaining even one fraudulent loan would not require more than minimal planning"); United States v. Kaufman, 800 F. Supp. 648, 655 (N.D. Ind. 1922) (refusing to find that a scheme involving a second set of corporate books to facilitate tax evasion "was more complex or demonstrated greater intricacy ... than a routine tax evasion case"). Cf. United States v. Sanchez, 914 F.2d 206, 207 (10th Cir. 1990) (upholding enhancement because the offense involved "several calculated falsehoods"). Compare United States v. Maciaga, 965 F.2d at 408 ("a simple step to hide [the] crime ... does not amount to 'more than minimal planning'").

Accordingly, the base offense level for larceny, fraud-related and tax offenses already incorporates the "simple form" planning in the conception, execution or concealment phases. The enhancement is appropriate only when this basic degree of planning has been exceeded. See United States v. Georgiadis, 933 F.2d 1219, 1226 (3d Cir. 1991) ("§2B1.1(b)(1) calibrates punishment to the magnitude of victim injury and criminal gains ... 'more than minimal planning' considers the deliberative aspects of a defendant's conduct and criminal scheme"). Since the base offense level contemplates the ordinary planning necessary to commit the offense, and the enhancement applies only to incremental additional planning, there is no double counting. See United States v. Wilson, 955 F.2d 547, 550 (8th Cir. 1992); Cf. United States v. Curtis, 934 F.2d 553, 556 (4th Cir. 1991). Finally, this proposal is unnecessary. Prison sentences for those whose crimes result in greater losses can effectively be lengthened by adopting that portion of the amendment that modifies the loss tables and leaving the "more than minimal planning" and "sophisticated means" enhancements in place to be independently evaluated.

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Rather than eliminating the enhancement, the PAG suggests that it be clarified so that it focuses on the kinds of planning and sophistication that cannot be quantitatively measured. The "repeated acts" prong can be deleted without disturbing the purpose of the enhancement because where there are repeated acts of fraud by definition there will be increases in the losses and concomitant increases in the offense level.

Proposed Amendment number 21 - Tax -

Summary of Guidelines

In the sentencing guidelines as amended on November 1, 1992, there are 12 tax guidelines in Section 2T. Nine relate to income tax offenses, including tax evasion, tax perjury, willful failure to file or supply information, aiding and assisting in the preparation of a false return, and conspiracy to defraud the United States.⁴ U.S.S.G. §§2T1.1- 2T1.9. Two deal with non-payment of taxes and regulatory offenses in connection with alcohol and tobacco tax offenses. U.S.S.G. §§2T2.1 - 2T2.2. One relates to evading import duties, smuggling and receiving or trafficking in smuggled property. U.S.S.G. §2T3.1.

There is substantial overlap in the five guidelines related to tax evasion, willful failure to file, tax perjury, aiding and abetting tax fraud, and filing false returns (U.S.S.G. §2T1.1 - 2T1.5). All but the guideline for filing a false return use the tax loss table in §2T4.1 to determine the base offense level and enhance the level if the offense involves more than \$10,000 of income from criminal activities or "sophisticated means" were used to impede discovery of the nature or extent of the offense.⁵ However, each guideline utilizes a different definition of "tax loss," which is the key determinant of the sentence.

This amendment would consolidate the guidelines for tax evasion, willful failure to file, tax perjury, and false tax returns into one guideline. The base offense level would be the greater of the level taken from the tax table in §2T4.1, or six, in instances where

⁴Although the conspiracy statute does not appear in the Internal Revenue Code, tax-related indictments often include a charge of defrauding the United States by impeding or obstructing the lawful governmental functions of the IRS in ascertaining and collecting taxes in violation of 18 U.S.C. §371. See United States v. Klein, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).

⁵The PAG's comments on the proposed amendments affecting the specific offense characteristic related to "sophisticated means" appear in the discussion of Amendment No. 5, supra.

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there is no tax loss. There would be two specific offense characteristics each calling for a two level enhancement. One would apply "if the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity" (the same as in the current guidelines). A second would apply "if sophisticated means were used to impede discovery of the existence or extent of the offense."

This proposal would adopt a uniform definition of "tax loss" based on a series of rebuttable presumptions tailored to the nature of the offense or the actual amount that was the object of the evasion, or that the taxpayer owed and did not pay. The amendment also contains two new Application Notes related to the "tax loss" definition. As proposed, the commentary would provide that "the rebuttable presumption is to be used unless the government or defense provides sufficient information for a more accurate assessment of the actual tax loss." The proposed commentary would also provide that "if the offense involves both individual and corporate tax returns, the tax loss is the cumulative tax loss from the offenses taken together."

Finally, this Amendment contains minor clarifications of the specific offense characteristics related to professional return preparers convicted of aiding and abetting tax fraud in §2T1.4, and conduct to encourage others to commit tax crimes or participate in Klein conspiracies encompassed in §2T1.9. The amendment also contains proposals to conform the grouping guidelines in §3D1.2(d) to the proposed consolidation in Section 2T.

The PAG favors simplifying the guidelines for tax offenses. The proposed consolidation does not alter the structure of the tax guidelines or their substantive operation. The only change that would result would be a one level increase in the base offense level applicable to convictions for willful failure to file a return currently set at one level less than the amount derived from the tax table or five where there is no tax loss.

The PAG also favors adoption of a more workable definition of the "tax loss" to be used in calculating the base offense level. The current framework -- with four different definitions and numerous variables -- has led to inconsistent interpretations. Some courts look to the actual tax loss; some use other formulations. Compare United States v. Schmidt, 935 F.2d 1440 (4th Cir. 1991) with United States v. Brimberry, 961 F.2d 1286 (7th Cir. 1992).

The PAG favors the adoption of a uniform definition of "tax loss." A single tax loss definition that utilizes presumptions rebuttable by evidence of the actual tax loss to the government would eliminate the confusion and allow sentences to be determined based on the actual tax loss as computed in accordance with the Internal Revenue Code.

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The only aspect of this amendment that the PAG opposes is the new Application Note that provides "if the offense involves both individual and corporate tax returns, the tax loss is the cumulative tax loss from the offenses taken together." This provision constitutes blatant double counting when applied to a single course of criminal conduct and flies in the face of the changes to the "tax loss" definition in which the actual loss of revenue to the government is preferred over an artificial construction of the loss based on rebuttable presumptions.

Assume the following factual scenario: The defendant skims money from his employer and alters the corporate books and records to conceal the amount diverted. He fails to report the diverted income on his individual income tax return and causes the corporation to file a false return that understates its corporate revenue. He pleads guilty to one count of income tax violation in connection with his individual tax return. There is only one source of income, i.e., the \$1 paid to the corporation is the same \$1 diverted by the defendant.

The proposed application note presumes that each \$1 diverted by the defendant constitutes \$2 taxable income: \$1 of income on which the corporation is liable for taxes and \$1 of taxable income to the defendant. A "tax loss" based on this formulation double counts one course of conduct to arrive at an artificial "tax loss" incurred by the government.

The Supreme Court requires a clear expression of legislative intent before sentence enhancement provisions can be applied cumulatively. See Basic v. United States, 446 U.S. 398, 403-404 (1980); Simpson v. United States, 435 U.S. 6, 12-13 (1978). Coupled with the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," Id. at 14 (citation omitted), in the context of determining a sentencing factor cumulative punishment for the same conduct would be impermissible absent specific recognition and authority from the Commission and the Congress. The rule, to date, has been that one course of conduct should not be cumulatively punished under the guidelines. See United States v. Lamere, 980 F.2d 506, 517 (8th Cir. 1992); (an enhancement based on "conduct that [is] coterminous with the conduct for which [the defendant is] convicted" constitutes impermissible double counting); United States v. Romano, 970 F.2d 164, 167 (6th Cir. 1992) ("the Commission did not intend for the same conduct to be punished cumulatively"); United States v. Werlinger, 894 F.2d 1015, 1018 (8th Cir. 1990) ("the Sentencing Commission did not intend for multiple Guidelines sections to be construed so as to impose cumulative punishment for the same conduct"). There is no basis for departing from this rule to calculate a tax loss especially where the result would overstate the actual loss of revenue to the government.

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PROPOSED TAX AMENDMENTS PUBLISHED AT THE REQUEST OF THE IRS

Proposed Amendment number 41 - Tax - (I.R.S. Proposal)

Summary of Guideline

The IRS proposes to rewrite §2T1 in its entirety. The guidelines in Sections 2T1.1 through 2T1.9 would be replaced in toto. The commentary would also be revised. The IRS would increase base offense levels, adopt a uniform definition of "tax loss," and create a new offense guideline for certain non-violent violations of 26 U.S.C. §7212(a). The IRS would abandon the current structure of the tax guidelines which uses tax losses and the tax table in §2T4.1 to determine a base offense level where there is a tax loss, and a fixed level where there is no loss. In its place, the IRS proposes to fix the base offense level for felonies at nine for failure to file and ten for tax evasion, tax perjury and Klein conspiracies. A new specific offense characteristic would enhance the base offense level where the "tax loss" from the defendant's conduct exceeded \$10,000. Using the same incremental increases employed in the November 1, 1992, tax table (not the increments appearing in proposed Amendment No. 5), the enhancement ranges from a low of one additional level for a tax loss of more than \$10,000 but less than \$20,001 to a high of 10 additional levels when the tax loss exceeds \$800,000. The IRS would define "tax loss" for the purposes of this guideline as "the amount of loss that was the object of the evasion or fraud." A simple set of facts will illustrate the differences between the IRS proposal and the combined impact of proposed Amendments No. 5 and 21. Assume that a defendant is convicted of one count of tax evasion. Although the indictment alleges that the defendant attempted to evade \$1.0 million of tax, at the sentencing hearing, the defendant establishes that the actual tax loss to the government was only \$600,000. All of the income at issue is from legal sources. The defendant did not use sophisticated means to impede discovery of his offense, and no other guideline adjustments are applicable. Under the IRS proposal, the tax loss would be the entire \$1 million, and the base offense level would be 20 (10 for tax evasion plus an enhancement of 10 for a tax loss greater than \$800,000). Under proposed Amendment No. 21, the tax loss would be \$600,000. Using the tax loss table appearing in proposed Amendment No. 5, a tax loss of \$600,000 would yield a base offense level of 18.

The commentary proposed by the IRS provides for a rebuttable presumption that the tax loss would be determined by applying the defendant's applicable tax rate to the total amount that the defendant attempted to evade, the amount of omitted income, the improper deduction or tax credit, and so forth. Furthermore, while these calculations could be overcome by "credible evidence" produced by the defendant that the tax loss "was different," the defendant would be prohibited from showing "that the actual tax loss was less than the amount calculated ... by asserting that the intended loss was less than

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that which would have resulted had the scheme succeeded." The IRS also proposes a new offense guideline to be used for violations of 26 U.S.C. §7212(a), pertaining to "corrupt endeavors to obstruct or impede the due administration of the internal revenue laws" excluding those involving forcible threats or interference which would continue to be addressed by the assault guidelines in §2A2.2 and §2A2.3, as suggested in the Commission's statutory appendix.

While the PAG expresses no opinion on whether there should be an increase in the base offense levels for tax crimes, it prefers the "tax loss" formulation appearing in proposed Amendment No. 21 over the IRS proposal. The IRS proposal ignores the actual impact of the defendant's conduct and would put artificial constraints on a defendant's ability to rebut tax loss calculations made by the government. The PAG expresses no opinion on whether it is necessary or desirable to adopt a new offense guideline for violations of 26 U.S.C. §7212(a).

Proposed Amendment number 42 - Grouping Rules - (I.R.S. Proposal)

Summary of Guideline

Guideline §3D1.2 sets forth the criteria for grouping multiple counts involving "substantially the same harm". The specific section addressed by proposed Amendment No. 42 provides that two (or more) counts shall be grouped when one embodies conduct that is treated as a specific offense characteristic in (or other adjustment to) the guideline applicable to another count. U.S.S.G. §3D1.2(c). The rules for determining the offense level applicable to counts grouped in accordance with §3D1.2(c) appear in §3D1.3(a). When counts are grouped pursuant to §3D1.2(c), the offense level applicable to the group is the offense level for the most serious single count within the group. Guideline §2D1.1 applies to certain narcotics crimes and violation of the continuing criminal enterprise ("CCE") statutes. Guideline §2S1.1 applies to certain money laundering activities.

This Amendment has two options. In Option One, the IRS proposes an amendment to §3D1.3 to address the situation where the count that gives rise to a grouping requirement pursuant to §3D1.2(c) has a lower base offense level than the other count(s) with which it is grouped. In this circumstance, the IRS proposes that two levels be added to the applicable base offense level determined in accordance with §3D1.3(a). Option Two proposes the addition of a special offense characteristic to the narcotics and CCE guideline in §2D1.1(b) and the §2S1.1(b) money laundering guidelines to be employed "if the defendant failed to report income exceeding \$10,000 in any year." The proposed amendment to the narcotics and CCE guideline specifically refers to unreported income from the "unlawful manufacturing, importing, exporting,

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trafficking, or possession of drugs." The proposed amendment to the money laundering guideline has no such limitation.

The PAG believes that both Options One and Two are superfluous. Under §3D1.3(a), the ultimate offense level applicable to counts grouped pursuant to §3D1.2(c) will be that offense level which is the highest for any single count within the group. Any specific offense characteristic that constitutes a criminal activity will be considered as relevant conduct pursuant to §1B1.3(a). Similarly, the proposed enhancement for the tax offenses specified in Option Two will either be addressed as relevant conduct, or in the sentence calculations for unrelated charged offenses. Unrelated, uncharged conduct is not and should not be a basis for sentence enhancements.

Proposed Amendment number 43 - Grouping Rules (I.R.S. Proposal)

Summary of Guideline

Section 3D1.4 provides the framework for determining the offense level when there is more than one group of counts. The bench mark is the group with the highest offense level. Each additional group is assigned a unit value (that corresponds to an enhancement) depending on its seriousness (measured by its calculated offense level) relative to the bench mark. Under §3D1.4(b) any group that is five to eight levels less serious than the bench mark is assigned one-half Unit. Groups that are nine or more levels less serious than the bench mark are disregarded. U.S.S.G. §3D1.4(c).

The IRS proposal would delete §§3D1.4(b) and 3D1.4(c), and assign one-half Unit value to any group where the offense level is five or more units less serious than the bench mark. The PAG expresses no opinion on this proposed amendment.

3. **Proposed Amendment number 1 - Relevant Conduct** - The PAG favors Proposed Amendment numbered 1 (PAG #35) which would amend Section, 1B1.3 by adding a new subsection (c) which would prohibit a sentencing court from including in the offense level alleged conduct of which the defendant has been acquitted after either a court trial or a jury trial. This amendment makes good sense. Although caselaw indicates that double jeopardy provisions do not prohibit a sentencing court from considering conduct of which the defendant has been acquitted, no defendant should be forced to run the gauntlet twice. The present sentencing mechanism allows the government to include counts in an indictment on which the evidence is marginal or weak, take the case to trial on all counts, lose some of the counts at trial because of insufficiency of the evidence on a "beyond a reasonable doubt" standard and then relitigate the matter at sentencing

(where hearsay evidence is allowed) and prevail on a preponderance of the evidence standard.

The government should be content with one bite at the apple. With the relaxed rules of evidence that apply at a sentencing hearing, the defendant should only be held accountable for those counts to which he has either pled guilty or been convicted of in a contested trial.

4. Proposed Amendment number 3 - Juvenile Delinquency Act - The PAG is in support of a new policy statement which would address the applicability of the guidelines to juveniles. We believe this policy statement is necessary in light of the recent Supreme Court decision in United States vs. R. L. C., 112 S. Ct. 1329 (1992).
5. Proposed Amendment number 6 - Fraud - This proposed amendment would add language to § 2F1.1, Application Note 10(a), authorizing upward departure where a fraud "caused substantial non-monetary harm." At present, Application Note 10(a) authorizes upward departure only where "the primary objective of the fraud was non-monetary", but fails explicitly to cover those situations where fraudulent activity results in unintended by nonetheless substantial non-monetary harm.

a. Mens Rea

Upward departure may be appropriate in those rare instances where monetary loss is an inadequate measure of the seriousness of an offense. Certainly, there such offenses including, for example, schemes "to deprive another of the intangible right of honest services" (18 U.S.C. §§ 1341 and 1346). However, *unintended* harm is an inappropriate measure of culpability. At a minimum, consideration should be limited to *reasonably foreseeable* harm.⁹ The Commission's legitimate concern might be addressed by an application note which recognizes that reasonable foreseeability is a factor to be taken into account in determining whether the defendant intended a particular result.¹⁰

⁹ This sort of limitation obviously has occurred to the Commission in other contexts, as shown by the language of the existing guideline provisions discussed *infra*, and by one of the questions posed with respect to Amendment #65, also discussed *infra*.

¹⁰ Perhaps it would be appropriate for the Commission to establish a single standard of culpability for all of the offense characteristics and adjustments based on the harm caused by the offense. It doesn't make much sense for a defendant to be held responsible under

b. Cumulativeness

This proposed amendment, if adopted, should note the existence of specific offense characteristics, adjustments and commentary which already take non-monetary harm into account, and therefore would make departure inappropriate in many cases of non-monetary harm. For example:

§ 2F1.1(b)(4) provides for an increase of two levels, to a minimum of level 13, for offenses which involve the conscious or reckless risk of serious bodily injury;¹¹

§ 3A1.1 provides for a 2 level upward adjustment where the defendant knew or should have known that a victim was unusually vulnerable.

In addition, the commentary to this proposed amendment clearly is cumulative of existing provisions. The single example given in the proposed amendment is that departure:

might be warranted in the case of a fraudulent blood bank operation that failed to preserve the donors' blood. Such an offense might cause substantial harm to numerous victims that is not adequately taken into account by the total monetary loss, which might be comparatively small.

Contrary to the language of the proposed amendment, departure would be inappropriate in that case because the harm caused by this sort of offense was adequately taken into account in the formulation of specific offense characteristics. The sentencing court likely would impose a 2 level increase because the offense involved more than one victim (§2F1.1(b)(2)(B)).¹² In addition, the court would impose an additional 2 level increase, to a minimum of 13, based on the obvious risk of serious bodily injury (§ 2F1.1(b)(4)).

§ 3A1.1 when he "knew or should have known" that a victim was particularly vulnerable, while being held responsible under § 2F1.1 only for the "conscious or reckless" risk of serious bodily harm.

¹¹ Although §2F1.1(b)(4) is phrased in terms of "risk", such risk is inherent in every case where harm actually occurs. In any event, language relating to actual harm could easily be incorporated into particular provisions, where necessary.

¹² Although Application Note 3 is phrased in terms of "obtain[ing] something of value from more than one person", the offense characteristic probably would apply equally in cases of non-monetary fraud.

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The court would also have available a 2 level upward adjustment because the offense described in the amendment commentary would involve obviously vulnerable victims (§ 3A1.1).

6. Proposed Amendment number 7 - Fraud & Theft - The Commission invites comment on whether certain guidelines (§§ 2B1.1, 2B1.2 and 2F1.1) should be amended to identify circumstances where upward departure may be appropriate to take into account circumstances where loss does not fully capture the seriousness of the offense. Proposed Amendment number 7 is related to number 6 and suffers from similar defects.

- a. Cumulativeness

Most of the examples given in this proposed amendment often are covered by existing provisions. For example:

A fraud offense which "caused particularly significant emotional trauma to ...one or more victims" will, at least in some cases, be covered by the vulnerable victim adjustment (§3A1.1), which specifically refers to "mental condition", and victims who were "particularly susceptible to the criminal conduct".

An offense in which the defendant "consciously or recklessly endangered the solvency of...one or more victims" most often will be covered by § 2F1.1(b)(6) where the victim is a financial institution.

A fraud offense in which the defendant risked the health, bodily safety or life of one or more victims is covered by § 2F1.1(b)(2)(B) (2 level increase where more than 1 victim involved) and § 2F1.1(b)(4)(2 level increase, to a minimum of 13, if the offense involved conscious or reckless risk of serious bodily injury).

- b. Mens Rea

As discussed above in connection with Proposed Amendment number 6, the examples given would authorize the court inappropriately to depart upward based on wholly unintended, and possibly unforeseeable, consequences.

c. Preference for Authorizing Departures

This proposed amendment poses the question whether the Commission should continue to add specific offense characteristics with 1 or 2 level increases, or simply authorize upward departure when unexpected situations arise. The latter approach is preferable. The government often advocates application of specific offense characteristics whenever there is any supporting evidence, however slight. The courts have developed an unsettling tendency of accepting the government's arguments uncritically. On the other hand, the courts seem more reluctant to depart without ample supporting evidence. Thus, by authorizing departure in unexpected situations, the courts would be given needed flexibility without inviting unwarranted increases in offense levels.

7. Request for Comment number 13 - Calculation of weight under negotiation in reverse sting cases - Should there be an amendment addressed to the offense level determination in such cases? Yes. Why? Because government agents should not be able to control, and increase, a defendant's potential punishment based on the agents' ability to set artificial market conditions. A defendant should not be punished for what he or she would like to be able to do, but rather on the basis of what he or she can do.

To determine an appropriate amendment to address the issue raised by the Commission, it is necessary to realize that the problem is actually broader than stated by the Commission. The problem exists not only where government agents set a below-market price, but whenever agents, in a reverse sting operation, create artificial market conditions that increase a defendant's purchasing power.

Two recent cases of which the PAG is aware help illustrate the scope of the problem. In one case, undercover government agents offered to sell the defendant 300 kilograms of cocaine. The defendant agreed to do so. The only problem was that he had no money (none). The agents, however, suggested that the defendant issue a quit claim deed to his house to the agents to serve as collateral for the cocaine purchase, which the defendant then did. (As a result, the house has been forfeited.) It turns out that the mortgage on the house exceeded the current appraised market value of the property--i.e., the house had negative equity. The government's position is that the defendant should be punished for a 300 kilogram offense.

In the second case, the defendant wanted to purchase 5 kilograms of cocaine and had the money to do so. The undercover FBI agents said they did not deal in such small quantities and that they would only sell the defendant 55

kilograms. Since the defendant did not have money for 55 kilograms, the agents told him the payment and delivery of the five kilograms would be the first installment on a 55 kilogram deal. If government agents were not the supposed sellers, there either would have been no deal (if the sellers were insistent upon only selling in quantities greater than 50 kilograms) or there would have been an agreed upon sale of 5 kilograms. Nevertheless, under the conditions set by the agents, the overall 55 kilogram deal proceeded and the defendant was arrested when he showed up with money for five kilograms. At sentencing, the government argued that the offense level should be based on 55 kilograms, because the defendant had agreed to purchase that amount. The district judge saw this as a transparent attempt by the agents to manipulate the guidelines and refused to sentence on the 55 kilogram amount. The judge ruled that the defendant had the ability to purchase five kilograms and that the offense level should be based on that amount.

It seems to the PAG that the judge in the second case adopted a reasonable method for resolving the artificial market problem. (While the judge's ruling in the second case might be seen as suggesting that an amendment is not necessary at all, we doubt that all or even most judges would feel free to adopt such an approach without an amendment providing authority to do so.) The guidelines should provide that in a reverse sting case, where the government sets or agrees to artificial market conditions which have the effect of increasing the defendant's purchasing power, the court shall determine the defendant's offense level on the basis of the amount of drugs that he or she could have purchased based on the agreement.

The amendment should provide that this method is mandatory (i.e., "shall determine") whenever artificial market conditions have been set or agreed upon for several reasons. First, no defendant should be sentenced on the basis of artificial market conditions. Second, if the amendment is not mandatory, disparity will result among similarly situated offenders. Third, the passage of such an amendment will probably reduce the frequency of such cases but it is less likely to have such a salutary effect unless it is mandatory (i.e., if agents know that it is still possible to increase a defendant's punishment by artificial market conditions).

There still remains the question of what constitutes artificial market conditions. That is not as difficult as it might seem. The DEA keeps statistics on the "going price" for different controlled substances according to geographic area and time period. The question of what constitutes artificial market terms for a sale could be established by expert testimony or common established practices familiar to the court or the parties. Perhaps the defendant should have the initial

burden of making a prima facie showing (by proffer or otherwise) that the price and/or terms were artificial and the government would have an opportunity to rebut the showing by a preponderance of the evidence standard. Alternatively, the defendant could have the burden of establishing, by a preponderance of the evidence standard, that there were artificial market conditions set or agreed to by the government agents which increased his or her purchasing ability.

One final note. The request for comment number 13 does not completely address the problem of "sentencing entrapment." There are cases where defendants are encouraged to purchase, or sell amounts that they had not intended to, but agreed to buy or sell at the encouragement of government agents. Even where the defendant has the ability to purchase or sell the increased quantity (which means they would be unaffected by the proposed amendment), it seems to me that a convincing case can be made for not sentencing the defendant on the amount which is the product of government inducement.

8. Proposed Amendment number 20 - Money Laundering - The PAG strongly supports the proposed amendments to §§ 2S1.1 through 1.4, pertaining to money laundering offenses and reporting violations. As noted by the Money laundering Working Group, the money laundering statute, 18 U.S.C. § 1956, has been used by prosecutors to "up the ante" in selected cases despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. Money Laundering Working Group, "Explanation of Draft Amendments to §§ 2S1.1 through 1.4" at 1 (November 10, 1992) (footnote omitted). Also, as the Money Laundering Group recognizes, the existing guideline's high base offense level assumed that large scale, sophisticated money laundering would be the norm. The experience of the PAG is that money laundering counts are often added to other cases to increase prosecutorial leverage and obtain harsher sentences. Accordingly, from the perspective of the PAG, the most important aspect of the proposed amendments is that they remove the potential for actual or threatened sentence manipulation through charging practices. We agree with the Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense." Id.

Although we largely support the proposed amendment, we are concerned about two issues. First, the amendment would eliminate reliance on the table found in § 2S1.1(b)(2) and substitute reliance on the fraud table found in § 2F1.1, despite the substantial difference between loss in a fraud case and the value of

funds involved in a money laundering transaction. Second, the pervasive use of government stings in money laundering cases, in which the government largely controls the value of funds involved in the offense, provides continued opportunities for sentence manipulation and exacerbates the problem of using the elevated offense levels which would be dictated by the fraud table. Accordingly, the PAG recommends that the amendment be adopted with certain revisions: 1) that the incorporation of the fraud table be deleted with the existing money laundering table remaining in its place; and 2) that a lower base offense level be employed for violations of 18 U.S.C. § 1956(a)(3).

While we understand the Working Group's desire to use the fraud table in order to promote uniformity and consistency in economic crime cases, the attempt to equate the value of funds in a money laundering transaction and the loss involved from fraud is without any basis in logic. Fraud offenses almost invariably involve loss to a victim; and it is this loss which is the driving force behind the table. See § 2F1.1(b). Money laundering offenses involve financial transactions which do not involve loss to a discrete victim; and, at least under the current Guidelines, it is the value of the funds involved in the transaction which is the driving force behind the table. See § 2S1.1(b)(2).¹³

In addition to the difference in the "victim," the two offenses are completely different in terms of the amount of funds generally involved. While money laundering typically involves relatively large sums of money, fraud comes in all shapes and sizes: using a counterfeit telephone credit card to make long distance telephone calls or a scheme to fraudulently collect on a five million dollar insurance policy.

This difference in the amount of funds involved in each crime and in the nature of the "victim" of each crime makes any reliance on the fraud table ill-advised, and the PAG recommends that the Commission not eliminate the table currently found in § 2S1.1(b)(2), but rather use this table rather than the fraud table as the basis for the adjustments called for in the amendment, §§ 2S1.1(a)(2-3), 2S1.2(1)(1-2). This table should be used in connection with the amendments

¹³Indeed, although fraud is far closer in nature to theft than to money laundering in that both involve a discrete victim who has lost something of economic value, the Third Circuit recently held that for sentencing purposes the differences between the nature of a theft and the nature of a fraud rendered the equation of these two crimes "flawed." United States v. Kopp, 951 F.2d 521, 535 (3d Cir. 1991).

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proposed lower base offense level in light of the Money Laundering Working Group's recognition that low dollar amount, unsophisticated cases are prosecuted under this statute. In the event that the Commission believes that the existing table is inadequate a revised, money laundering specific table should be employed.

The proposed guideline amendments fail to recognize the unique nature of the money laundering sting provisions of 18 U.S.C. § 1956(a)(3). Under that section the crime is completed if a defendant with the intent (1) to promote specified unlawful activity; (2) to conceal or disguise property believed to be the proceeds of specified unlawful activity; or (3) to avoid a CTR requirement, engages in a financial transaction with property represented by a law enforcement official to be the proceeds of specified unlawful activity. This section has been used in an ever increasing number of undercover sting operations in which federal agents attempt to engage in money laundering activities and represent that their money comes from unlawful sources. As in drug sting operations the agents control the amount of money laundered. Accordingly, there is increased risk of prosecutorial manipulation of the guidelines by government agents increasing the amounts of tendered funds to increase the guideline range.

In such cases there will never be commission of the underlying offense by the defendant, since it is the government agents who are representing that they, or their confederates, committed that offense. Accordingly, while a defendant who commits an underlying offense and launders the funds will be sentenced under the guideline for the underlying offense, under proposed § 2S1.1(a)(1) in a sting operation the defendant will receive a potentially higher sentence for only engaging in the laundering offense.

For example, if a defendant engages in mail fraud with a loss of \$1,600 then launders the proceeds, his offense level would be 6 under the proposed amendments to §§ 2F1.1 and 2S1.1. If agents merely represented that the funds were derived from mail fraud and the defendant believed them and engaged in a financial transaction designed to avoid a CTR requirement, his offense level would be 10 (assuming a (b)(1)(A) enhancement, 8 if no enhancement). It makes little sense to punish a defendant more severely for engaging in a sting than for actually committing of the underlying offense.

9. Proposed Amendment number 23 - Abuse of Position of Trust - This proposed Commission amendment would significantly narrow the existing 2 level "abuse of position of trust" adjustment, so that it applies only to abuse of "special trust." "Special trust" would be defined as referring to "a position of trust characterized

by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference)."

The PAG favors adoption of this amendment, because the current "abuse of position of trust" guideline is extremely broad and susceptible of varying and unfair interpretations, particularly in fraud and embezzlement cases where some form of breach of trust almost always exists. The fraud guidelines themselves already contain a number of add-on provisions, such as the 2 level increase for "more than minimal planning" or a scheme to defraud more than one victim, and the 2 level increase for misrepresentation that the defendant was acting on behalf of charitable, educational, religious or political organizations. § § 2F1.1(2), 2F1.1(3)(A). The embezzlement guidelines likewise contain a 2 level increase for more than minimal planning. § § 2B1.2. The proposed amendment makes it far more likely that the 2 level enhancement for abuse of trust appropriately would be limited to professionals, high ranking managers and others in a special position of trust, and would not be added to the typical fraud or embezzlement defendant's sentence.

The Commission has also invited comment on whether, as an alternative to modifying § 3B1.3, the Commission should amend § 2B1.1 and § 2B1.2 to add a specific offense characteristic relating to enhancement for abuse of trust in embezzlement cases and provide that the enhancement in § 3B1.3 would not apply if the proposed specific offense characteristic was applied. The PAG recommends against such an amendment, as that would not cure the overbreadth problem inherent in the current language of § 3B1.3, and would compound the problem by adding a vague offense characteristic to the guidelines.

10. Proposed Amendment number 24 - Substantial Assistance - Call for Comment- The PAG is in favor of amending section 5K 1.1 by providing that a sentencing court can, sua sponte, depart downward from the guidelines in those cases involving first offenders where no violence was associated with the criminal offense. This would apply in those cases where the government does not present a section 5K1.1 Motion For Substantial Assistance but where the court nonetheless finds from the evidence that such a motion would have been appropriate had it been filed by the government.
11. Proposed Amendments number 25 and 36 - Standards for Acceptance of Plea Agreements - The PAG strongly urges the commission to adopt its proposed amendment number 25 (PAG #36) by adding commentary which would recommend that the government disclose to the defendant information relevant to the application of the sentencing guidelines prior to entry of a guilty plea. This

commentary would create no new right for a defendant, but would add to "truth in sentencing" and improve the practice of federal criminal law around the country under the Sentencing Guidelines.

12. Proposed Amendment number 27 - Guideline Consolidation - The PAG favors this amendment as it would simplify the Guidelines by deleting 27 Chapter Two guidelines through consolidation with other guidelines that cover similar offense conduct.
13. Proposed Amendment number 28 - Miscellaneous Substantive, Clarifying, and Conforming Amendments Affecting White Collar Offenses - The PAG makes the following recommendations on some of the miscellaneous amendments proposed by the Commission:

§ 2B1.1 Larceny, Embezzlement, and Other Forms of Theft

The PAG recommends adoption of these changes, which conform the embezzlement Commentary on loss computation with the Commentary for fraud and deceit at § 2F1.1.

§ 2F1.1 Fraud and Deceit

The PAG agrees that the specific offense characteristic for violation of an order should apply only when not otherwise addressed in the guidelines. The PAG agrees that the Commentary for fraudulent loan applications and contract procurement cases should be changed to make clear that where the loss significantly overstates or understates the seriousness of the conduct, an upward or downward departure may be warranted. Similarly, we agree that the Commentary on loss determination should be amended to make clear that when loss overstates the seriousness of the offense, a downward departure may be warranted.

§ 2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

§ 2C1.6 Loan or Gratuity to Bank Examiner for Adjustment of Farm Indebtedness, or Procuring Bank Loan or Discount of Commercial Paper

§ 2C1.7 Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

§ 2E5.1 Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan

§ 2E5.6 Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives or Labor Organizations

The PAG recommends adoption of the proposed amendments for determining the fines for organizations. These amendments would provide that consequential damages could be used in lieu of pecuniary loss only when "reasonably foreseeable." Without such a limitation, consequential damages are likely to distort the appropriate fine level by taking into account a myriad of unforeseen circumstances.

14. Proposed Amendment number 37 - Theft and Fraud - Although styled as an issue for comment, the PAG supports an amendment to the commentary about loss in the theft guideline which would conform the commentary in the theft guideline with the commentary on loss in the fraud guideline.
15. Proposed Amendment number 38 - Theft - Although listed as an issue for comment, the PAG would support an Amendment under section 2B .1 which would provide that the sentencing court has the discretion to make a downward adjustment in those cases where defendants do not personally profit from the offense.
16. Proposed Amendment number 40 - Cocaine and Cocaine Base - The PAG strongly supports this issue for comment which would provide that the Commission would ask Congress to modify or eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100 to 1. At a minimum, we would urge the Commission to do a study on this whole area as to whether or not the ratio of 100 to 1 accurately reflects current scientific research and whether, in fact, the ratio should be reduced.
17. Proposed Amendment number 44 - Theft - This amendment increases the offense level for theft of mail by 2 levels in addition to the monetary value of the property stolen, and provides a minimum offense level of 14 if the offense involved an "organized scheme" to steal mail. Without knowing the Postal Service's experience with theft of mail, it is difficult to comment on the advisability of increasing the offense level. Further, we recognize that the Postal Service's minimal level 14 approach has already been adopted by the Commission for "an organized scheme to steal vehicles or vehicle parts," because it often is difficult to fix a loss figure on stolen vehicles and parts. § 2B1.1(b)(6); comment. (backg'd.). However, the PAG recommends that the Commission not adopt at this time any additional guideline that utilizes the "organized scheme" language, as that term is vague and seems duplicative of the specific offense characteristic for "more than

minimal planning." Virtually any scheme involving more than one person is an "organized scheme," and the Commission should study whether that term can be modified to more precisely cover the activity which concerns the Postal Service.

18. Proposed Amendment number 45 - Multiple Victims - This broad proposal by the Postal Service would create a new victim-related adjustment of 2 levels if more than one victim is affected, and if the offense affected 100 victims or more, the offense level would be increased by 2 levels for every 250 victims, up to a total of 8 levels. The PAG recommends against this proposal, as the 2 level increase would apply in a large number of typical fraud and theft cases, where dollar value already acts as a proxy for impact on multiple victims. Also, the proposed step increase for every 250 victims is arbitrary, and there does not appear to be a need for such an adjustment, especially given the loss tables, and the likelihood that the 2 level increase for "more than minimal planning" would apply to any scheme involving a large number of victims.
19. Proposed Amendment number 46 - Abuse of Position of Trust - The Postal Service proposes to add to the Commentary for 3B1.1 an application note that would specify that the enhancement for abuse of a position of trust applies to all postal employees for theft or obstruction of the mails, embezzlement of Postal Service funds, and theft of Postal Service property. As noted above, the PAG supports the Commission proposal to amend § 3B1.3 so that it applies to abuse of position of special trust. The PAG agrees that Postal Service employees to hold such a position of special trust with regard to theft or obstruction of the mails, because they have special access to the mails and the public depends so heavily on their honesty. Therefore, the Commentary to the proposed Commission amendment could include a reference to such Postal Service employees. However, with regard to embezzlement of Postal Service funds and theft of Postal Service property, the employees do not enjoy a special position of trust, and should not be subject to an enhancement for such offenses.
20. Proposed Amendment number 59 - This proposed amendment would create a new guideline, § 2F1.2, applicable to violations of the Computer Fraud and Abuse Act of 1988 (18 U.S.C. § 1030). As stated in the "Synopsis of Amendment", and as is apparent throughout the commentary, its emphasis is on dealing with non-monetary harm. This proposed guideline is overbroad and cumulative of existing provisions.

a. Overbreadth

The proposed guideline is drafted so that the base offense is largely meaningless in that one or more specific offense characteristics will apply to virtually every covered offense. Offense level increases are provided for virtually all computer crimes including, for example, the mere examination of business information "not meant for public distribution" (see proposed § 2F1.2(b)(2) and Application Notes 4 and 7).

Furthermore, inclusion of "consequential losses from trafficking in passwords" in the calculation of economic loss invites a host of problems. 18 U.S.C. § 1030(a)(6) makes it a separate crime to traffick in passwords only where there is also intent to defraud. There is, however, no such limitation in proposed § 2F1.2(b)(4)(B). "Trafficking" is defined broadly to include the mere "transfer" of a password (see 18 U.S.C. § 1030(a)(6) and 1029(e)(5)). Thus, less pernicious forms of trafficking in passwords may be included as relevant conduct under Guideline § 1B1.3(a)(2). This could include, for example, one "hacker" merely revealing a password to another without hope or expectation of economic gain. Inclusion of such consequential losses creates a real possibility that defendants will inappropriately be punished for acts by others that were not intended or reasonably foreseeable.

b. Cumulativeness

Violations of 18 U.S.C. § 1030 are presently subject to the fraud guideline, § 2F1.1, for which Application Note 10 authorizes upward departure where the primary objective of the fraud was non-monetary. In addition, Proposed Amendment number 6 would authorize upward departure where "the fraud caused substantial non-monetary harm", and Proposed Amendment number 7 addresses a similar issue. Thus, there is no need for a specific computer fraud guideline to deal with the sort of non-monetary injury discussed in connection with this proposed amendment.

In addition, particular parts of this proposed amendment are cumulative of existing provisions. For example:

Proposed § 2F1.2(b) deals with offenses where the defendant obtained and/or altered protected information, which includes (under Application Notes 4 and 6) information "relat[ing] to military operations or readiness, foreign relations or intelligence, or law enforcement investigations or operations." This sort of harm is adequately covered by §2F1.1,

Application Note 10(d), which authorizes upward departure where "the offense endangered national security or military readiness."

Proposed § 2F1.2(b)(3)(A) deals with offenses which caused or were likely to cause "interference with the administration of justice." Such offenses often will constitute obstruction of justice, and be separately prosecutable, and punishable, under Title 18, Chapter 73 ("Obstruction of Justice"). In some circumstances (such as where a defendant enters false information in a law enforcement or court database), this sort of harm might also be covered by §2F1.1, Application Note 10(b), which authorizes upward departure where "false statements were made for the purpose of facilitating some other crime."

Proposed §2F1.2(b)(3)(A) also deals with offenses which caused or were likely to cause "harm to any person's health or safety." This sort of harm is adequately covered by § 2F1.1, Application Note 10(c), which authorizes upward departure where "the offense caused physical or psychological harm."

21. Proposed Amendment number 62 - Bank Fraud - Here, the Commission solicits comment on whether the guidelines principally applicable to bank fraud (§§ 2B1.1, 2B4.1 and 2F1.1) should be amended to provide a 4 level enhancement in the base offense level for all offenses which affect a financial institution. This proposal invites problems of both overbreadth and redundancy.

First, if the word "affects" is defined broadly, virtually all offenses involving financial institutions would be deemed to affect such institutions. Such a result cannot be justified by the potential consequence to the victim. There is no reason to believe that a garden variety bank fraud will cause greater damage than a comparable fraud on another kind of business. Furthermore, there is no philosophical reason why the former should be punished more harshly than the latter.

If, on the other hand, "affects" is limited to those frauds which have an impact on solvency, then the proposed amendments would be largely cumulative of existing offense characteristics. Sections 2B1.1, 2B1.4 and 2F1.1 already include as specific offense characteristics that the offense "substantially jeopardized the safety and soundness of a financial institution" (§§ 2B1.1(b)(7)(A), 2B4.1(b)(2)(A) and 2F1.1(b)(6)(A)); and that the offense "affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense" (§§ 2 B1.1(b)(7)(B), 2B4.1(b)(2)(B) and

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2F1.1(b)(6)(B)). In either of those events, the offense level is increased by 4, to a minimum of 24. Thus, the Guidelines already make ample provision for those frauds which significantly affect financial institutions.

22. Proposed Amendment number 65 - The Commission requests comment on whether §2F1.1 should be amended to include "risk of loss" in determining the applicable guideline range for fraud when the amount at risk is greater than the actual or intended loss. As with Proposed Amendment number 6, *unintended* harm is an inappropriate measure of culpability. At a minimum, consideration should be limited to *reasonably foreseeable* harm. Also as with Proposed Amendment number 6, this sort of provision might be incorporated into an application note which recognizes that reasonable foreseeability is a factor to be taken into account in determining whether the defendant intended a particular result.

The PAG also supports amendments numbered 29 and 30 proposed by the Criminal Law Committee of the Judicial Conference of the United States. We especially support proposed amendment number 29 which would add a paragraph to permit a downward departure when offender characteristics are present to an unusual degree and combined in ways important to the purposes of sentencing.

The PAG also supports, in substance, Amendments numbered 31-34 which are being proposed by the American Bar Association Sentencing Guidelines Committee.

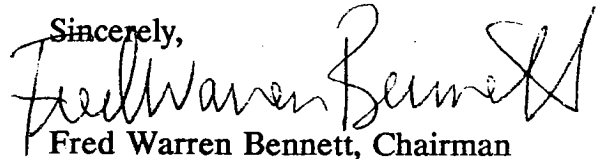
Finally, the PAG supports Amendments numbered 47 and 52-56 of the proposals submitted by the Legislative Subcommittee of the Federal Defenders. As to proposed Amendments numbered 48-51 proposed by the Legislative Subcommittee of the Federal Defenders we prefer our amendment #39 in the Drug trafficking area, but we do support proposed amendment number 50 which would separate the weight of the carrier from the actual weight of LSD to determine the offense level in LSD cases. In the same regard, we also support the concept proposed in amendment number 49 sponsored by the Legislative Subcommittee of the Federal Defenders which would clarify that the weight used to determine the offense level should not include the weight of substances involved in the manufacturing process or substances to which the drug is bonded.

I have confirmed with your Staff Director, Ms. Phyllis J. Newton, that the Sentencing Commission will allow representatives of the PAG to address the Commissioners at your Tuesday, March 23, 1993 meeting at 10:00 A.M. As in the past, the PAG will not be presenting oral comments at the March 22, 1993, public hearing being held at the Ceremonial Courtroom of the United States District Court of the District of Columbia.

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I look forward to working with you during this amendment cycle.

Sincerely,

A handwritten signature in cursive script, appearing to read "Fred Warren Bennett", followed by a large, stylized "H" or "B" mark.

Fred Warren Bennett, Chairman
Practitioner's Advisory Group

cc: Commissioners Nagel, Gelacak,
Carnes and Mazzone

REVISED PROPOSED AMENDMENT #39

Submitted by

PRACTITIONERS' ADVISORY GROUP

PRACTITIONERS ADVISORY GROUP - MODIFIED AMENDMENT #39

(Changes noted are relative to the CURRENT GUIDELINES)

39. **Synopsis of Proposed Amendment:** *This amendment reduces the maximum offense level for drug quantity from 42 to 38 (36 was the maximum offense level in the original sentencing guidelines); provides an additional enhancement for weapon usage; places a cap on the offense level for defendants with mitigating roles; reduces the offense levels associated with higher drug quantities; and provides additional guidance for the determination of mitigating role. (Related amendment proposals: 8, 9, 48, and 60).*

Proposed Amendment: Section 2D1.1(a)(3) is amended by inserting the following at the end:

"Provided, that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role) and —

- (i) the offense involves any of the controlled substances listed below, the base offense level shall not be greater than 32:**
 - (a) Heroin (or the equivalent amount of other Schedule I or II Opiates);**
 - (b) Cocaine (or the equivalent amount of other Schedule I or II Stimulants);**
 - (c) Cocaine Base;**
 - (d) PCP;**
 - (e) LSD (or the equivalent amount of other Schedule I or II Hallucinogens);**
 - (f) Fentanyl; or**
 - (g) Fentanyl Analogue;**
 - (h) Methamphetamine or "Ice".**
- (ii) the offense involves only controlled substances other than those listed in subdivision (i) above, the base offense level shall not be greater than level 24."**

Section 2D1.1(b) is amended as follows (redline indicates additions, strikeout indicates deletions):

"(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.
- (2) ~~If a dangerous weapon (including a firearm) was actually used by the defendant, or the defendant induced or directed another participant to use a dangerous weapon, increase by 4 levels.~~
- (3) If the defendant is convicted of violating 21 U.S.C. § 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26."

Section 2D1.1(c) is amended by deleting subdivisions 1-11; by renumbering subdivisions 12-19 as 9-16; and by inserting subdivisions 1-10:

"(c) DRUG QUANTITY TABLE

<u>Controlled Substances and Quantity*</u>	<u>Base Offense Level</u>
(1) 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 15 KG or more of Cocaine Base; 300 KG or more of PCP, or 30 KG or more of PCP (actual); 300 KG or more of Methamphetamine, or 30 KG or more of Methamphetamine (actual), or 30 KG or more of "Ice"; 3 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 120 KG or more of Fentanyl; 30 KG or more of a Fentanyl Analogue; 300,000 KG or more of Marihuana; 60,000 KG or more of Hashish; 6,000 KG or more of Hashish Oil.	Level 42
(2) At least 100 KG but less than 300 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 500 KG but less than 1500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 5 KG but less than 15 KG of Cocaine Base; At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of PCP (actual); At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Methamphetamine	Level 40

~~(actual), or at least 10 KG but less than 30 KG of "Ice";
 At least 1 KG but less than 3 KG of LSD-
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 40 KG but less than 120 KG of Fentanyl;
 At least 10 KG but less than 30 KG of a Fentanyl Analogue;
 At least 100,000 KG but less than 300,000 KG of Marihuana;
 At least 20,000 KG but less than 60,000 KG of Hashish;
 At least 2,000 KG but less than 6,000 KG of Hashish Oil.~~

(1)

At least 30 KG but less than 100 KG or more
 of Heroin (or the equivalent amount of other
 Schedule I or II Opiates);
 At least 150 KG but less than 500 KG or more of Cocaine
 (or the equivalent amount of other Schedule I
 or II Stimulants);
 At least 1.5 KG but less than 5 KG or more of Cocaine Base;
 At least 30 KG but less than 100 KG or more of PCP, or at least
 3 KG but less than 10 KG or more of PCP (actual);
 At least 30 KG but less than 100 KG or more of Methamphetamine,
 or at least 3 KG but less than 10 KG or more of Methamphetamine
 (actual), or at least 3 KG but less than 10 KG or more of "Ice";
 At least 300 G but less than 1 KG or more of LSD (or the
 equivalent amount of other Schedule I or II Hallucinogens);
 At least 12 KG but less than 40 KG or more of Fentanyl;
 At least 3 KG but less than 10 KG or more of a Fentanyl Analogue;
 At least 30,000 KG but less than 100,000 KG or more of Marihuana;
 At least 6,000 KG but less than 20,000 KG or more of Hashish;
 At least 600 KG but less than 2,000 KG or more of Hashish Oil.

Level 38

(2)

At least 40 30 KG but less than 30 100 KG of
 Heroin (or the equivalent amount of other
 Schedule I or II Opiates);
 At least 50 150 KG but less than 150 500 KG of Cocaine (or the
 equivalent amount of other Schedule I or II Stimulants);
 At least 500 G 1.5 KG but less than 1.5 5 KG of Cocaine Base;
 At least 40 30 KG but less than 30 100 KG of PCP, or at least
 1 3 KG but less than 3 10 KG of PCP (actual);
 At least 40 30 KG but less than 30 100 KG of Methamphetamine,
 or at least 1 3 KG but less than 3 10 KG of Methamphetamine
 (actual), or at least 1 3 KG but less than 3 10 KG of "Ice";
 At least 100 300 G but less than 300 G 1 KG of LSD
 (or the equivalent amount of other Schedule I or II
 Hallucinogens);
 At least 4 12 KG but less than 12 40 KG of Fentanyl;
 At least 1 3 KG but less than 3 10 KG of a Fentanyl Analogue;
 At least 10,000 30,000 KG but less than 30,000 100,000 KG
 of Marihuana;
 At least 2,000 6,000 KG but less than 6,000 20,000 KG of
 Hashish;
 At least 200 600 KG but less than 600 2,000 KG of
 Hashish Oil.

Level 36

- Level 34
- (3) At least ~~3~~ ~~10~~ KG but less than ~~40~~ ~~30~~ KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates);
 At least ~~15~~ ~~50~~ KG but less than ~~50~~ ~~150~~ KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 At least ~~150~~ ~~300~~ G but less than ~~500~~ ~~G~~ ~~1.5~~ KG of Cocaine Base;
 At least ~~3~~ ~~10~~ KG but less than ~~40~~ ~~30~~ KG of PCP, or at least ~~300~~ ~~G~~ ~~1~~ KG but less than ~~4~~ ~~3~~ KG of PCP (actual);
 At least ~~3~~ ~~10~~ KG but less than ~~40~~ ~~30~~ KG of Methamphetamine, or at least ~~300~~ ~~G~~ ~~1~~ KG but less than ~~4~~ ~~3~~ KG or more of Methamphetamine (actual), or at least ~~300~~ ~~G~~ ~~1~~ KG but less than ~~4~~ ~~3~~ KG or more of "Ice";
 At least ~~30~~ ~~100~~ G but less than ~~400~~ ~~300~~ G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least ~~1.2~~ ~~4~~ KG but less than ~~4~~ ~~12~~ KG or more of Fentanyl;
 At least ~~300~~ ~~G~~ ~~1~~ KG but less than ~~4~~ ~~3~~ KG or more of a Fentanyl Analogue;
 At least ~~3,000~~ ~~10,000~~ KG but less than ~~40,000~~ ~~30,000~~ KG or more of Marihuana;
 At least ~~600~~ ~~2,000~~ KG but less than ~~2,000~~ ~~6,000~~ KG or more of Hashish;
 At least ~~60~~ ~~200~~ KG but less than ~~200~~ ~~600~~ KG or more of Hashish Oil.
- Level 32
- (4) At least ~~4~~ ~~3~~ KG but less than ~~3~~ ~~10~~ KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
 At least ~~5~~ ~~15~~ KG but less than ~~45~~ ~~50~~ KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 At least ~~50~~ ~~150~~ G but less than ~~150~~ ~~500~~ G of Cocaine Base;
 At least ~~4~~ ~~3~~ KG but less than ~~3~~ ~~10~~ KG of PCP, or at least ~~100~~ ~~300~~ G but less than ~~300~~ ~~G~~ ~~1~~ KG of PCP (actual);
 At least ~~4~~ ~~3~~ KG but less than ~~3~~ ~~10~~ KG of Methamphetamine, or at least ~~100~~ ~~300~~ G but less than ~~300~~ ~~G~~ ~~1~~ KG of Methamphetamine (actual), or at least ~~100~~ ~~300~~ G but less than ~~300~~ ~~G~~ ~~1~~ KG of "Ice";
 At least ~~40~~ ~~30~~ G but less than ~~30~~ ~~100~~ G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least ~~400~~ ~~G~~ ~~1.2~~ KG but less than ~~4.2~~ ~~4~~ KG of Fentanyl;
 At least ~~100~~ ~~300~~ G but less than ~~300~~ ~~G~~ ~~1~~ KG of Fentanyl Analogue;
 At least ~~1,000~~ ~~3,000~~ KG but less than ~~3,000~~ ~~10,000~~ KG of Marihuana;
 At least ~~200~~ ~~600~~ KG but less than ~~600~~ ~~2,000~~ KG of Hashish;
 At least ~~20~~ ~~60~~ KG but less than ~~60~~ ~~200~~ KG of Hashish Oil.
- Level 30
- (5) At least ~~700~~ ~~G~~ ~~1~~ KG but less than ~~4~~ ~~3~~ KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
 At least ~~3.5~~ ~~5~~ KG but less than ~~5~~ ~~15~~ KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 At least ~~35~~ ~~50~~ G but less than ~~50~~ ~~150~~ G of Cocaine Base;
 At least ~~700~~ ~~G~~ ~~1~~ KG but less than ~~4~~ ~~3~~ KG of PCP, or at least ~~70~~ ~~100~~ G but less than ~~400~~ ~~300~~ G of PCP (actual);
 At least ~~700~~ ~~G~~ ~~1~~ KG but less than ~~4~~ ~~3~~ KG of Methamphetamine, or

- at least ~~70~~ ~~100~~ G but less than ~~100~~ ~~300~~ G of Methamphetamine (actual), or at least ~~70~~ ~~100~~ G but less than ~~100~~ ~~300~~ G of "Ice";
 At least ~~7~~ ~~10~~ G but less than ~~10~~ ~~30~~ G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least ~~280~~ ~~400~~ G but less than ~~400~~ ~~1.2~~ KG of Fentanyl;
 At least ~~70~~ ~~100~~ G but less than ~~100~~ ~~300~~ G of a Fentanyl Analogue;
 At least ~~700~~ ~~1,000~~ KG but less than ~~1,000~~ ~~3,000~~ KG of Marihuana;
 At least ~~140~~ ~~200~~ KG but less than ~~200~~ ~~600~~ KG of Hashish;
 At least ~~14~~ ~~20~~ KG but less than ~~20~~ ~~60~~ KG of Hashish Oil.
- (6) At least ~~400~~ ~~700~~ G but less than ~~700~~ ~~1~~ KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 28
 At least ~~2~~ ~~3.5~~ KG but less than ~~3.5~~ ~~5~~ KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 At least ~~20~~ ~~35~~ G but less than ~~35~~ ~~50~~ G of Cocaine Base;
 At least ~~400~~ ~~700~~ G but less than ~~700~~ ~~1~~ KG of PCP, or at least ~~40~~ ~~70~~ G but less than ~~70~~ ~~100~~ G of PCP (actual);
 At least ~~400~~ ~~700~~ G but less than ~~700~~ ~~1~~ KG of Methamphetamine, or at least ~~40~~ ~~70~~ G but less than ~~70~~ ~~100~~ G of Methamphetamine (actual), or at least ~~40~~ ~~70~~ G but less than ~~70~~ ~~100~~ G of "Ice";
 At least ~~4~~ ~~7~~ G but less than ~~7~~ ~~10~~ G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least ~~160~~ ~~280~~ G but less than ~~280~~ ~~400~~ G of Fentanyl;
 At least ~~40~~ ~~70~~ G but less than ~~70~~ ~~100~~ G of Fentanyl Analogue;
 At least ~~400~~ ~~700~~ KG but less than ~~700~~ ~~1,000~~ KG of Marihuana;
 At least ~~80~~ ~~140~~ KG but less than ~~140~~ ~~200~~ KG of Hashish;
 At least ~~8~~ ~~14~~ KG but less than ~~14~~ ~~20~~ KG of Hashish Oil.
- (7) At least ~~100~~ ~~400~~ G but less than ~~400~~ ~~700~~ G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 26
 At least ~~500~~ ~~2~~ KG but less than ~~2~~ ~~3.5~~ KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 At least ~~5~~ ~~20~~ G but less than ~~20~~ ~~35~~ G of Cocaine Base;
 At least ~~100~~ ~~400~~ G but less than ~~400~~ ~~700~~ G of PCP, or at least ~~40~~ ~~70~~ G but less than ~~40~~ ~~70~~ G of PCP (actual);
 At least ~~100~~ ~~400~~ G but less than ~~400~~ ~~700~~ G of Methamphetamine, or at least ~~40~~ ~~70~~ G but less than ~~40~~ ~~70~~ G of Methamphetamine (actual), or at least ~~40~~ ~~70~~ G but less than ~~40~~ ~~70~~ G of "Ice";
 At least ~~4~~ ~~7~~ G but less than ~~4~~ ~~7~~ G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least ~~40~~ ~~160~~ G but less than ~~160~~ ~~280~~ G of Fentanyl;
 At least ~~40~~ ~~70~~ G but less than ~~40~~ ~~70~~ G of a Fentanyl Analogue;
 At least ~~100~~ ~~400~~ KG but less than ~~400~~ ~~700~~ KG of Marihuana;
 At least ~~20~~ ~~80~~ KG but less than ~~80~~ ~~140~~ KG of Hashish;
 At least ~~2~~ ~~8~~ KG but less than ~~8~~ ~~14~~ KG of Hashish Oil.
- (8) At least ~~80~~ ~~100~~ G but less than ~~100~~ ~~400~~ G of Level 24

Heroin (or the equivalent amount of other Schedule I or II Opiates);

At least ~~400~~ ~~500~~ G but less than ~~500~~ ~~G~~ ~~2~~ ~~KG~~ of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

At least ~~4~~ ~~5~~ G but less than ~~5~~ ~~20~~ G of Cocaine Base;

At least ~~80~~ ~~100~~ G but less than ~~400~~ ~~400~~ G of PCP, or at least ~~8~~ ~~10~~ G but less than ~~40~~ ~~40~~ G of PCP (actual);

At least ~~80~~ ~~100~~ G but less than ~~400~~ ~~400~~ G of Methamphetamine, or at least ~~8~~ ~~10~~ G but less than ~~40~~ ~~40~~ G of Methamphetamine (actual), or at least ~~8~~ ~~10~~ G but less than ~~40~~ ~~40~~ G of "Ice";

At least ~~800~~ ~~MG~~ ~~1~~ ~~G~~ but less than ~~1~~ ~~4~~ G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

At least ~~32~~ ~~40~~ G but less than ~~40~~ ~~160~~ G of Fentanyl;

At least ~~8~~ ~~10~~ G but less than ~~40~~ ~~40~~ G of a Fentanyl Analogue;

At least ~~80~~ ~~100~~ KG but less than ~~400~~ ~~400~~ KG of Marihuana;

At least ~~46~~ ~~20~~ KG but less than ~~20~~ ~~80~~ KG of Hashish;

At least ~~4-6~~ ~~2~~ KG but less than ~~2~~ ~~8~~ KG of Hashish Oil.

- (9) At least ~~60~~ ~~70~~ G but less than ~~80~~ ~~100~~ G of Heroin (or the equivalent amount of other Schedule I or II Opiates);

Level 22

At least ~~300~~ ~~350~~ but less than ~~400~~ ~~500~~ G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

At least ~~3~~ ~~3.5~~ G but less than ~~4~~ ~~5~~ G of Cocaine Base;

At least ~~60~~ ~~70~~ G but less than ~~80~~ ~~100~~ G of PCP, or at least ~~6~~ ~~7~~ G but less than ~~8~~ ~~10~~ G of PCP (actual);

At least ~~60~~ ~~70~~ G but less than ~~80~~ ~~100~~ G of Methamphetamine, or at least ~~6~~ ~~7~~ G but less than ~~8~~ ~~10~~ G of Methamphetamine (actual), or at least ~~6~~ ~~7~~ G but less than ~~8~~ ~~10~~ G of "Ice";

At least ~~600~~ ~~700~~ MG but less than ~~800~~ ~~1,000~~ MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

At least ~~24~~ ~~28~~ G but less than ~~32~~ ~~40~~ G of Fentanyl;

At least ~~6~~ ~~7~~ G but less than ~~8~~ ~~10~~ G of a Fentanyl Analogue;

At least ~~60~~ ~~70~~ KG but less than ~~80~~ ~~100~~ KG of Marihuana;

At least ~~42~~ ~~14~~ KG but less than ~~46~~ ~~20~~ KG of Hashish;

At least ~~1-2~~ ~~1.4~~ KG but less than ~~1-6~~ ~~2~~ KG of Hashish Oil.

- (10) At least 40 G but less than ~~60~~ ~~70~~ G of Heroin (or the equivalent amount of other Schedule I or II Opiates);

Level 20

At least 200 but less than ~~300~~ ~~350~~ G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

At least 2 G but less than ~~3~~ ~~3.5~~ G of Cocaine Base;

At least 40 G but less than ~~60~~ ~~70~~ G of PCP, or at least 4 G but less than ~~6~~ ~~7~~ G of PCP (actual);

At least 40 G but less than ~~60~~ ~~70~~ G of Methamphetamine, or at least 4 G but less than ~~6~~ ~~7~~ G of Methamphetamine (actual), or at least 4 G but less than ~~6~~ ~~7~~ G of "Ice";

At least 400 MG but less than ~~600~~ ~~700~~ MG of LSD

(or the equivalent amount of other Schedule I or II Hallucinogens);

At least 16 G but less than ~~24~~ 28 G of Fentanyl;

At least 4 G but less than ~~6~~ 7 G of a Fentanyl Analogue;

At least 40 KG but less than ~~60~~ 70 KG of Marihuana;

At least 8 KG but less than ~~12~~ 14 KG of Hashish;

At least 800 G but less than ~~1.2~~ 1.4 KG of Hashish Oil."

Section 3B1.2 is amended by deleting the Commentary and inserting new Commentary as detailed below:

***§3B1.2. Mitigating Role**

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. This section provides a downward adjustment in offense level for a defendant who has a minimal role (4-level reduction) or a minor role (2-level reduction) in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). In cases falling between (a) and (b), a 3-level reduction is provided.
2. One factor that determines whether a defendant warrants a mitigating role is the defendant's role and relative culpability in comparison with the other participants in the criminal activity for which the defendant is accountable pursuant to §1B1.3 (Relevant Conduct). The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating (minimal, or minor) role. See the definition of "participant" in Note 1 of §3B1.1.
3. Subsection (b) (4-level reduction) applies to a defendant who plays a minimal role in concerted activity. To qualify for a minimal role adjustment under subsection (b), the defendant must be one of the least culpable, but not the least culpable, of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating (minimal, or minor) role listed in Note 6.
4. To qualify for a minor role adjustment under subsection (c) (2-level reduction), the defendant plainly must be one of the less culpable participants in the criminal activity, but have a role that cannot be described as minimal.
5. The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating (minimal, or minor) role:
 - (a) the defendant performed only unskilled and unsophisticated tasks;
 - (b) the defendant had no decision-making authority or responsibility;
 - (c) total compensation to the defendant was small in amount, generally in the form of a flat fee; and
 - (d) the defendant did not exercise any supervision over other participant(s).

6. With regard to offenses involving contraband (including controlled substances), a defendant who

- (a) sold, or negotiated the terms of the sale of, the contraband;
- (b) had an ownership interest in any portion of the contraband;
- (c) financed any aspect of the criminal activity; or
- (d) transported contraband as a courier

shall not receive a mitigating (minimal, or minor) role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, owned, or transported, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a minimal, nor a minor participant. For example, a street dealer who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating (minimal, or minor) role adjustment. In contrast, a street dealer who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating (minimal, or minor) role adjustment, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

7. Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating (minimal, or minor) role adjustment. In determining whether a mitigating (minimal or minor) role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court may consider a defendant's assertion of facts that supports a mitigating role adjustment. However, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a), subsection (b) or subsection (c), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case."

PRACTITIONERS ADVISORY GROUP - MODIFIED AMENDMENT #39

(Changes noted are relative to the version of amendment #39 published in the Federal Register at the request of the Practitioners Advisory Group)

39. **Synopsis of Proposed Amendment:** This amendment reduces the maximum offense level for drug quantity from 42 to 36 (36 was the maximum offense level in the original sentencing guidelines); provides ~~an~~ additional enhancements for weapon usage, ~~principal organizers of large scale organizations, and obtaining substantial resources from engaging in the criminal activity by a defendant with an aggravating role;~~ places a cap on the offense level for defendants with mitigating roles; reduces the offense levels associated with higher drug quantities by 2 levels; ~~provides a greater reduction for a significantly minimal participant;~~ and provides additional guidance for the determination of mitigating role. (Related amendment proposals: 8, 9, 48, and 60).

Proposed Amendment: Section 2D1.1(a)(3) is amended by inserting the following at the end:

"Provided, that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role) and -- ~~the offense involves any of the controlled substances listed below, the base offense level shall not exceed level 32:~~

- (i) ~~the offense involves any of the controlled substances listed below, the base offense level shall not be greater than 32:~~
 - (a) Heroin (or the equivalent amount of other Schedule I or II Opiates);
 - (b) Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 - (c) Cocaine Base;
 - (d) Phencyclidine (PCP);
 - (e) ~~Lysergic Acid Diethylamide (LSD)~~ (or the equivalent amount of other Schedule I or II Hallucinogens);
 - ~~(f) N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]propanamide;~~
 - ~~(f) Marijuana, Pentanyl; or~~
 - ~~(g) Pentanyl Analogue.~~
 - (h) Methamphetamine or "Ice".

(ii) the offense involves only controlled substances other than those listed in subdivision (i) above, the base offense level shall not be greater than level 24."

~~Provided, that if the offense involves any controlled substance other than those listed in subparagraphs (a) through~~

~~(g) above, and the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role), the base offense level shall not be greater than level 24. If an offense involves both the above listed controlled substances and other controlled substances, apply the offense level specified in the Drug Quantity Table set forth in subsection (c) below, but the base offense level shall not exceed 32 if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role)."~~

Section 2D1.1(b) is deleted and the following inserted in lieu thereof:

"(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was actually possessed by the defendant, or the defendant induced or directed another participant to actually possess a dangerous weapon, increase by 2 levels.
- (2) If a dangerous weapon (including a firearm) was actually brandished or displayed or fired ~~used~~ by the defendant, or the defendant induced or directed another participant to brandish, display, or fire ~~use~~ a dangerous weapon, increase by 4 levels.
- ~~(3) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received serious bodily injury, or if the defendant induced or directed another participant to use a dangerous weapon and someone other than that participant received serious bodily injury, or if the defendant created a substantial risk of death or serious bodily injury, or induced or directed another participant to participate in activity that created a substantial risk of death or serious bodily injury, increase by 6 levels.~~
- ~~(4)~~ If the defendant is convicted of violating 21 U.S.C. § 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

- ~~(5) If the defendant was the principal organizer or leader of criminal activity that involved 15 or more participants, increase by 2 levels.~~
- ~~(6) If the defendant engaged in criminal activity from which he obtained substantial income or resources, and the defendant qualifies for an aggravating role adjustment pursuant to §3B1.1 (Aggravating Role), increase by 2 levels."~~

Section 2D1.1(c) is amended by deleting subdivisions 1-11; by renumbering subdivisions 12-19 as 9-16; and by inserting the following as subdivisions 1-8:

- (1) 100 KG or more of Heroin Level 38
(or the equivalent amount of other Schedule I or II Opiates);
500 KG or more of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
5 KG or more of Cocaine Base;
100 KG or more of PCP, or 10 KG or more of PCP (actual);
100 KG or more of Methamphetamine, or 10 KG or more of Methamphetamine (actual), or 10 KG or more of "Ice";
1 KG or more of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
40 KG or more of Fentanyl;
10 KG or more of a Fentanyl Analogue;
100,000 KG or more of Marihuana;
20,000 KG or more of Hashish;
2,000 KG or more of Hashish Oil.
- "(2) At least 30 KG but less than 100KG of Heroin Level 36
(or the equivalent amount of other Schedule I or II Opiates);
At least 150 KG but less than 500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 1.5 KG but less than 5 KG of Cocaine Base;
At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of PCP (actual);
At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Methamphetamine (actual), or at least 3 KG but less than 10 KG of "Ice";
At least 300 G but less than 1 KG of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 12 KG but less than 40 KG of Fentanyl;

At least 3 KG but less than 10 KG of a Fentanyl Analogue;
At least 30,000 KG but less than 100,000 KG of Marihuana;
At least 6,000 KG but less than 20,000 KG of Hashish
At least 600 KG but less than 2,000 KG of Hashish Oil.

- (3) At least 10 KG but less than 30 KG or more of Level 34
Heroin (or the equivalent amount of other
Schedule I or II Opiates);
At least 50 KG but less than 150 KG of Cocaine
(or the equivalent amount of other Schedule
I or II Stimulants);
At least 500 G but less than 1.5 KG of
Cocaine Base;
At least 10 KG but less than 30 KG of PCP,
or at least 1 KG but less than 3 KG of PCP (actual);
At least 10 KG but less than 30 KG of
Methamphetamine, or at least 1 KG but less than
3 KG or more of Methamphetamine (actual), or at
least 1 KG but less than 3 KG or more of "Ice";
At least 100 G but less than 300 G or more of LSD
(or the equivalent amount of other Schedule I or II
Hallucinogens);
At least 4 KG but less than 12 KG or more
of Fentanyl;
At least 1 KG but less than 3 KG or more of
a Fentanyl Analogue;
At least 10,000 KG but less than 30,000 KG or
more of Marihuana;
At least 2,000 KG but less than 6,000 KG or
more of Hashish;
At least 200 KG but less than 600 KG or more
of Hashish Oil.

- (3) At least 3 KG but less than 10 KG of Heroin Level 32
(or the equivalent amount of other Schedule I
or II Opiates);
At least 15 KG but less than 50 KG of Cocaine
(or the equivalent amount of other Schedule I
or II Stimulants);
At least 150 G but less than 500 G of Cocaine Base;
At least 3 KG but less than 10 KG of PCP, or at
least 300 G but less than 1 KG of PCP (actual);
At least 3 KG but less than 10 KG of Methamphetamine,
or at least 300 G but less than 1 KG of Methamphetamine
(actual), or at least
300 G but less than 1 KG of "Ice";
At least 30 G but less than 100 G of LSD
(or the equivalent amount of other Schedule I or II
Hallucinogens);
At least 1.2 KG but less than 4 KG of Fentanyl;
At least 300 G but less than 1 KG of Fentanyl Analogue;
At least 3,000 KG but less than 10,000 KG of Marihuana;

At least 600 KG but less than 2,000 KG of Hashish;
At least 60 KG but less than 200 KG of Hashish Oil.

- (4) At least 1 KG but less than 3 KG of Heroin Level 30
(or the equivalent amount of other Schedule I or II Opiates);
At least 5 KG but less than 15 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 50 G but less than 150 G of Cocaine Base;
At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 G of Methamphetamine (actual), or at least 100 G but less than 300 G of "Ice";
At least 10 G but less than 30 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 400 G but less than 1.2 KG of Fentanyl;
At least 100 G but less than 300 G of a Fentanyl Analogue;
At least 1,000 KG but less than 3,000 KG of Marihuana;
At least 200 KG but less than 600 KG of Hashish;
At least 20 KG but less than 60 KG of Hashish Oil.
- (5) At least 700 G but less than 1 KG of Heroin Level 28
(or the equivalent amount of other Schedule I or II Opiates);
At least 3.5 KG but less than 5 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 35 G but less than 50 G of Cocaine Base;
At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Methamphetamine (actual), or at least 70 G but less than 100 G of "Ice";
At least 7 G but less than 10 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 280 G but less than 400 G of Fentanyl;
At least 70 G but less than 100 G of Fentanyl Analogue;
At least 700 KG but less than 1,000 KG of Marihuana;
At least 140 KG but less than 200 KG of Hashish;
At least 14 KG but less than 20 KG of Hashish Oil.
- (6) At least 400 G but less than 700 G of Heroin Level 26
(or the equivalent amount of other Schedule I or II Opiates);
At least 2 KG but less than 3.5 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);

At least 20 G but less than 35 G of Cocaine Base;
 At least 400 G but less than 700 G of PCP, or at
 least 40 G but less than 70 G of PCP (actual);
 At least 400 G but less than 700 G of Methamphetamine,
 or at least 40 G but less than 70 G of Methamphetamine
 (actual), or at least 40 G but less than 70 G of "Ice";
 At least 4 G but less than 7 G of LSD
 (or the equivalent amount of other Schedule I or II
 Hallucinogens);
 At least 160 G but less than 280 G of Fentanyl;
 At least 40 G but less than 70 G of a Fentanyl Analogue;
 At least 400 KG but less than 700 KG of Marihuana;
 At least 80 KG but less than 140 KG of Hashish;
 At least 8 KG but less than 14 KG of Hashish Oil.

- (7) At least 100 G but less than 400 G of Heroin Level 24
 (or the equivalent amount of other Schedule
 I or II Opiates);
 At least 500 G but less than 2 KG of Cocaine
 (or the equivalent amount of other Schedule
 I or II Stimulants);
 At least 5 G but less than 20 G of Cocaine Base;
 At least 100 G but less than 400 G of PCP, or at
 least 10 G but less than 40 G of PCP (actual);
 At least 100 G but less than 400 G of Methamphetamine,
 or at least 10 G but less than 40 G of Methamphetamine
 (actual), or at least 10 G but less than 40 G of "Ice";
 At least 1 G but less than 4 G of LSD
 (or the equivalent amount of other Schedule I or II
 Hallucinogens);
 At least 40 G but less than 160 G of Fentanyl;
 At least 10 G but less than 40 G of a Fentanyl Analogue;
 At least 100 KG but less than 400 KG of Marihuana;
 At least 20 KG but less than 80 KG of Hashish;
 At least 2 KG but less than 8 KG of Hashish Oil.
- (8) At least 70 G but less than 100 G of Heroin Level 22
 (or the equivalent amount of other Schedule
 I or II Opiates);
 At least 350 but less than 500 G of Cocaine
 (or the equivalent amount of other Schedule
 I or II Stimulants);
 At least 3.5 G but less than 5 G of Cocaine Base;
 At least 70 G but less than 100 G of PCP, or at
 least 7 G but less than 10 G of PCP (actual);
 At least 70 G but less than 100 G of Methamphetamine,
 or at least 7 G but less than 10 G of Methamphetamine
 (actual), or at least 7 G but less than 10 G of "Ice";
 At least 700 MG but less than 1,000 MG of LSD
 (or the equivalent amount of other Schedule I or II
 Hallucinogens);
 At least 28 G but less than 40 G of Fentanyl;

At least 7 G but less than 10 G of a Fentanyl Analogue;
At least 70 KG but less than 100 KG of Marihuana;
At least 14 KG but less than 20 KG of Hashish;
At least 1.4 KG but less than 2 KG of Hashish Oil."

- (9) At least 40 G but less than 70 G of Heroin Level 20
(or the equivalent amount of other Schedule
I or II Opiates);
At least 200 but less than 350 G of Cocaine
(or the equivalent amount of other Schedule
I or II Stimulants);
At least 2 G but less than 3.5 G of Cocaine Base;
At least 40 G but less than 70 G of PCP, or at
least 4 G but less than 7 G of PCP (actual);
At least 40 G but less than 70 G of Methamphetamine,
or at least 4 G but less than 7 G of Methamphetamine
(actual), or at least 4 G but less than 7 G of "Ice";
At least 400 MG but less than 700 MG of LSD
(or the equivalent amount of other Schedule I or II
Hallucinogens);
At least 16 G but less than 28 G of Fentanyl;
At least 4 G but less than 7 G of a Fentanyl Analogue;
At least 40 KG but less than 60 KG of Marihuana;
At least 8 KG but less than 14 KG of Hashish;
At least 800 G but less than 1.4 KG of Hashish Oil."

~~The Commentary to §2D1.1 captioned "Application Notes" is amended by inserting the following additional note:~~

~~"16. In defining substantial income or resources the Court should refer to the body of definitional law that has developed in interpreting Title 21 U.S.C. § 848(e)(2)(B)."~~

Section 3B1.2 is deleted in its entirety and the following inserted in lieu thereof:

"§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

- ~~(a) If the defendant was a significantly minimal participant in any criminal activity, decrease by 6 levels.~~
- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in

any criminal activity, decrease by 2 levels.

~~In cases falling between (a) and (b), decrease by 5 levels.~~

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. This section provides a downward adjustment in offense level for a defendant who has a ~~significantly minimal role (6 level reduction)~~, a minimal role (4-level reduction) or a minor role (2-level reduction) in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). In cases falling between (a) and (b), ~~a 5-level reduction is provided, and in cases falling between (b) and (c), a 3-level reduction is provided.~~
2. ~~To determine whether a defendant warrants a mitigating (significantly minimal, minimal, or minor) role adjustment requires an assessment of One factor that determines whether a defendant warrants a mitigating role is the defendant's role and relative culpability in comparison with the other participants in the criminal activity for which the defendant is accountable pursuant to §1B1.3 (Relevant Conduct). The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating (significantly minimal, minimal, or minor) role. See the definition of "participant" in Note 1 of §3B1.1.~~
3. ~~Subsection (a) (6 level reduction) applies to a defendant who plays a significantly minimal role in concerted activity. To qualify for significantly minimal role under subsection (a), the defendant must be the least culpable of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating role listed in Note 6 and must be the least culpable. If more than one defendant equally qualifies as the least culpable, both defendants qualify for this reduction.~~
34. Subsection (b) (4-level reduction) applies to a defendant who plays a minimal role in concerted activity. To qualify for a minimal role adjustment under subsection (b), the defendant ~~plainly~~ must be one of the least

- culpable, but not the least culpable, of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating (~~significantly minimal~~, minimal, or minor) role listed in Note 6.
45. To qualify for a minor role adjustment under subsection (c) (2-level reduction), the defendant plainly must be one of the less culpable participants in the criminal activity, but have a role that cannot be described as minimal.
56. The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating (~~significantly minimal~~, minimal, or minor) role:
- (a) the defendant performed only unskilled and unsophisticated tasks;
 - (b) the defendant had no decision-making authority or responsibility;
 - (c) ~~total compensation to the defendant was small in amount, generally in the form of a flat fee must be small in relation to the compensation or gain realized by those persons who do not have a mitigating role in the offense and should ordinarily not exceed \$5,000 and generally should be paid as a flat fee; and~~
 - (d) the defendant did not exercise any supervision over other participant(s).
67. With regard to offenses involving contraband (including controlled substances, a defendant who
- (a) sold, or negotiated the terms of the sale of, the contraband;
 - (b) had an ownership interest in any portion of the contraband;
 - (c) financed any aspect of the criminal activity; or
 - (d) transported contraband ~~as a courier~~
- shall not receive a mitigating (~~significantly minimal~~, minimal, or minor) role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, owned, or transported, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a ~~significantly minimal~~, minimal, or minor participant. For example, a street dealer who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating (~~significantly~~

~~minimal~~, minimal, or minor) role adjustment. In contrast, a street dealer who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating (~~significantly minimal~~, minimal, or minor) role adjustment, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

78. Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating (~~significantly minimal~~, minimal, or minor) role adjustment. In determining whether a mitigating (~~significantly minimal~~, minimal or minor) role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court may consider a defendant's assertion of facts that supports a mitigating role adjustment. However, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a), subsection (b) or subsection (c), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case."