

**COMMENTS OF THE NEW YORK COUNCIL OF
DEFENSE LAWYERS REGARDING PROPOSED
1993 AMENDMENTS TO THE SENTENCING GUIDELINES**

Respectfully submitted,

**NEW YORK COUNCIL
OF DEFENSE LAWYERS
530 Fifth Avenue
New York, NY
(212) 221-1414**

**Robert G. Morvillo, President
Paul Bergman and Marjorie J. Pearce
Co-Chair, Sentencing Guidelines Committee**

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COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED 1993 AMENDMENTS TO THE SENTENCING GUIDELINES

We would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than one hundred attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including ten previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense attorneys. In the pages that follow, we address a number of proposed amendments of interest to our organization. With respect to those proposed amendments and issues for comment, we have organized our submission essentially in numerical sequence. However, with respect to those matters which deal in the white collar business crime area and the narcotics area, we have departed from the sequential presentation in order to present those areas together.

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PROPOSED AMENDMENT 1

Relevant Conduct (§1B1.3) -- prohibits
use of acquitted conduct in determining
guideline offense level; possible basis
for departure in exceptional cases

We support this proposed amendment, which provides that conduct of which the defendant has been acquitted after trial shall not be considered in determining the defendant's offense level under the relevant conduct section. We oppose the proposed amended commentary insofar as it states that in an exceptional case acquitted conduct may provide a basis for an upward departure.

We believe this proposed amendment comports with the philosophical underpinnings of the Guidelines, as well as fundamental notions of due process. There is an inherent imbalance in including, for the purpose of adding up the relevant conduct of a defendant applicable to Guidelines calculations, conduct for which a defendant has been found not guilty. It is also unfair. For these reasons, we support the proposed amendment as reasonable.

The proposed amendment is also necessary. Practice under the Guidelines thus far indicates that most courts which have confronted the issue have held that an acquittal does not bar a sentencing court from considering the acquitted conduct in imposing sentence. E.g., United States v. Averi, 922 F.2d 765 (11th Cir. 1991); United States v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir. 1990); United States v. Mocchiola, 891 F.2d 13 (1st Cir. 1989);

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United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989) (per curiam); United States v. Ryan, 866 F.2d 604 (3d Cir. 1989). One court has held that a trial court may consider a prior acquittal as long as that acquittal is not relied upon to enhance the sentence, United States v. Perez, 858 F.2d 1272, 1277 (7th Cir. 1988).

We believe the proposed amendment reflects a far better approach.

NYCDL opposes acquitted conduct providing the basis for an upward departure in any case. The Guidelines reflect a balance that in many ways limits the avenues by which defendants can seek downward departures; we cannot see why the prosecution should be able to seek an upward departure as a result of conduct for which the defendant has been found not guilty.

PROPOSED AMENDMENT 2

Use of Guidelines Manual in Effect on Date
of Sentencing (§1B1.11) -- application of
amended guidelines to multiple count cases

We oppose this amendment, which extends the Commission's "one book" rule to multiple count cases on the basis of judicial convenience, while ignoring the basic principles of the ex post facto clause of the United States Constitution. The proposed amendment provides that in cases where a defendant is convicted of two offenses which "straddle" an amendment to the Guidelines, the

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latest revised edition of the Guidelines is to be applied "even if" the revised edition of the Guidelines results in an increased penalty for the first offense. This position is in direct conflict with the "Background" to this Guidelines section which specifically states that courts have consistently held that the ex post facto clause does, in fact, apply to sentencing Guideline amendments that subject the defendant to increased punishment.

The general rule of § 1B1.11 is to apply the sentencing Guideline in effect on the date that the defendant is sentenced. Subsection (b) provides an exception to this general rule where the court decides that to apply the Guidelines in effect on the date of sentencing would violate the ex post facto clause. The Guidelines, therefore, permit the courts to apply the Guidelines in effect on the date of the offense of conviction. By enacting such a provision, the Commission codified the rationale displayed throughout the federal courts, which recognizes that to sentence a defendant based on legislation not in effect at the time of the offense raises serious constitutional problems. We believe that proposed amendment 2, which provides that "straddled" offenses be sentenced uniformly based on the most recent amendments, contradicts the policy and the rationale epitomized in enacting § 1B1.11(b) in the first place. This amendment enables a court to sentence a defendant based on legislation not in effect at the time of the offense and therefore violates the ex post facto clause.

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It is the position of the NYCDL that the proposed amendment be revised to say one of two things. Primarily, we would endorse a version of the amendment which replaced the words "even if" with "unless," thereby allowing use of the most recent amendment for sentencing on multiple counts in cases where such "grouping" would not result in a harsher sentence for the defendant based on legislation not in effect at the time he committed his crime. This proposal balances institutional interests in judicial convenience and efficiency with the well-established constitutional concerns of Article I, section 9.

Our second recommendation concerning this amendment calls for reworking the section to read that "the revised edition of the Guidelines shall be applied to both offenses, when the court, in its discretion, so decides that such application balances the government's practical interests with the defendant's constitutional concerns." Leaving this determination up to the court's discretion is consistent with the rest of § 1B1.11. Section 1B1.11(b) already gives the court authority to make the initial determination of whether there is an ex post facto consideration. Enabling the court to further this inquiry in cases consisting of multiple "straddled" offense counts is consistent with the rest of the section and the policy considerations behind enabling the court to make that determination in the first place. In addition, the Guidelines have gradually usurped the all too important discretion of the sentencing court in most other

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sentencing areas. In an area as fact specific as ex post facto determinations, where the Commission has already recognized the need for court discretion, the Guidelines should not abandon its rational approach towards this difficult issue on the basis of symbolic uniformity and efficiency.

Accordingly, the NYCDL opposes the proposed amendment to §1B1.11 as presently worded. We do, however, support an amendment which either prevents the application of the most recent version of the Guidelines where it prejudices the defendant's constitutional rights under the ex post facto clause or which leaves the determination in the discretion of the sentencing court, balancing the interests of the government with those of the defendant.

PROPOSED AMENDMENT 5

Fraud, Theft, Tax (Chapter Two, Parts F, B & T) --
deletes "more than minimal planning" adjustment
from fraud and theft guidelines and "use of
sophisticated means" from tax guidelines; restructures
monetary loss tables in fraud, theft, and tax

The NYCDL believes that the proposed changes to the theft and fraud tables are unwise, and that they exacerbate one of the worst aspects of the current sentencing regime: virtual mandatory imprisonment for first offenders who commit relatively minor property offenses.

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Under the present Guidelines, the offense levels for theft and fraud offenses are determined largely by the amount of loss involved as set forth in the dollar tables that are central to the sentencing scheme. See Guidelines § 2B1.1(b)(1), § 2F1.1(b)(1). There is a two-point "bump" for crimes that involve "more than minimal planning." The proposed amendment would eliminate the "more than minimal planning" offense characteristic, and substitute dollar tables with increased offense levels for almost all amounts of dollar loss.

In our view, to enact these proposed changes would be a serious mistake, affecting thousands of cases each year. We believe that one of the worst features of the present Guidelines is the compelled imprisonment of first-offenders in larceny and fraud cases. Under the current provisions, any defendant who steals more than \$10,000 is not eligible for a straight sentence of probation. Absent other mitigating factors in such cases, present law sets a minimum offense level at "9", taking the offender out of "Zone A" of the sentencing table and requiring at least one month of imprisonment, intermittent confinement, community confinement, or home detention. Offenders who cause losses in excess of \$40,000 face offense levels of "11" or higher, taking them out of "Zone B" of the sentencing table and requiring that at least half of the minimum term of the Guideline sentence be satisfied by imprisonment. As a practical matter, therefore,

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under current law any first-offender who steals in excess of \$40,000 must spend at least 4 months in a federal prison.¹

If the proposed changes in the theft and fraud tables are enacted, even more first-offenders will wind up in federal prisons. According to the new tables, any offender who steals more than \$5,000 faces a minimum offense level of "9"; such an offender is out of Zone A and is ineligible for a sentence of straight probation. Similarly, any offense involving a loss of more than \$13,500 generates a minimum offense level of "11", requiring a prison sentence unless some other deduction is applicable.

These changes are unwarranted for a slew of reasons. First, they fly further in the face of the Congressional mandate, contained in 28 U.S.C. § 994(j), that the Commission "insure that the Guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" (emphasis added). If this statute means anything, then persons with no criminal records who steal \$5,000 or \$10,000 or \$15,000 ought not be sent to prison as a routine matter. The typical defendant in such cases

¹ The base offense level for theft cases, pursuant to Guidelines § 2B1.1(a) is "4." A case involving a loss of \$40,000 results in a "7" level increase, for an offense level of "11". First-offenders, i.e., those in Criminal History Category I, face a "Zone C" guideline sentence of 8-14 months. Pursuant to Guidelines § 5C1.1(d)(2), at least one-half of the minimum sentence -- 8 months in this example -- must be satisfied by imprisonment, resulting in at least a 4-month prison term.

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-- an embezzling bank teller, for instance -- commonly faces such collateral consequences as the loss of employment and the difficulty of finding a new job as a convicted felon. The sentencing tables ought not require prison in such relatively non-serious cases, particularly when Congress has indicated that prison generally should not be required in those circumstances. The proposed amendment, which reduces further the loss threshold at the door of the federal prison cell, is unwise and contrary to Congressional intent.

It bears emphasis here that the proposed increase of punishment levels at the low end of the spectrum in theft and fraud cases evidently was not a deliberate policy decision by the Commission or its staff. Rather, the increased punishment levels appear to be an artifact of the proposal to abolish the specific offense characteristic for crimes marked by "more than minimal planning." If the two-point increase for offenses with more than minimal planning is killed, its ashes apparently are to be scattered over the entire theft and fraud tables, resulting in higher sentences for all levels of loss. Ironically, however, when the White Collar Working Group began examining these issues, its "Preliminary Purpose Statement" indicated that it would examine, inter alia, "whether the punishment level is low enough at the low end of the loss spectrum and high enough at the high end." The amended tables drastically increase sentences at the high end -- cases involving multimillion dollar losses -- but they inexplicably

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raise punishment levels even at the low end. Yet, the offenses at the low end of the spectrum -- those involving several thousand dollars of loss -- typically were not the kinds of cases in which sentences were enhanced for "more than minimal planning." The net result, therefore, is that the Commission has proposed doing away with an aggravating factor that typically did not impact low-end cases, and raising sentence levels across the board. The low-end offender winds up facing more prison time, when the question at the outset was whether punishment levels at the low end of the spectrum already were too high.

We emphasize in this regard that the purpose of the Guidelines was to eliminate sentencing disparity, and not to increase prison sentences generally. With the Guidelines, however, have come sharply higher average sentences. According to statistics published by the Department of Justice in September 1992, defendants sentenced for fraud offenses who were released from prison in 1991 had spent, on average, 37% more time in prison than fraud defendants who were released from prison in 1985. Federal Criminal Case Processing, 1980-90, United States Department of Justice, Bureau of Justice Statistics, at 18.² To the extent

² Defendants who were released in 1985 had served an average time until first release of 11.4 months. Defendants released in 1991 for the same offenses had served an average time of 15.6 months until first release. This increase undoubtedly understates the impact of the loss tables in generating increased sentences, because fraud prosecutions tend to involve lengthy investigations, and the statistics for 1991 therefore must include a substantial number of pre-Guidelines cases.

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this phenomenon reflects the imprisonment of first-time offenders who steal relatively minor amounts of money, it is deplorable, and the proposed amendments only make matters worse.³

An additional problem with the proposed loss tables for theft and fraud cases is that they increase the number of gradations calibrated to dollar loss, further complicating a sentencing scheme that already draws unwarranted distinctions between offenders. A case involving a loss of less than \$40,000 would be slotted into one of eleven pigeon holes, rather than one of the nine categories that currently exist. The dollar gradations at the lower end of the spectrum seem almost trivial. In the experience of our membership, the defendant who steals \$3,000 is not a materially different person from the defendant who steals \$5,000 or \$8,000 or \$13,500. Yet, these defendants receive markedly different sentences under the loss tables, particularly as amended. By contrast, an offender who already has stolen \$70,000,000 may steal an additional \$49,999,999 before his offense level jumps by so much as one point. To be sure, a one-point increase in offense level translates into substantially more prison time at the high end of the spectrum, but we question whether the

³ We note that the only low-end offender whose lot would be improved under the amendments is the defendant whose conduct generates a loss of less than \$600. Such defendants would face no increase in the base offense level of their crimes, whereas previously there was some increase for any loss of more than \$100. The impact of this change, at least in the districts in which our members practice, will be less than de minimus.

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Guidelines ought to draw distinctions that turn on whether the defendant steals \$600 as opposed to \$1,000 or \$1,700, as the proposed loss tables would mandate. The NYCDL believes that punishment for property crimes already is myopically focused on the amount of loss involved. The kinds of picayune distinctions that the proposed loss tables draw in low-end cases aggravate this problem and serve no valid purpose. Our members, undoubtedly joined by federal judges all over the country, would prefer tables that draw fewer and broader distinctions, perhaps based on orders of magnitude. Put simply, a \$10,000 thief may perhaps be distinguished from a \$100,000 thief, and a person who steals \$100,000 may commonly be distinguished from a defendant who steals \$1,000,000. But a person who steals \$1,000 ought not be treated differently from one who steals \$1,700. That is just silly.

With respect to the wisdom of doing away with the specific offense characteristic for crimes that involve "more than minimal planning," we agree that this characteristic has resulted in some sentencing disparities because it is both overbroad and ambiguous. However, we also believe that there is a valid distinction to be drawn between sophisticated, carefully calculated criminal conduct and unplanned, opportunistic behavior. Accordingly, we favor redrafting and retaining this characteristic so that it can be applied in appropriate cases, as opposed to abolishing it in favor of across-the-board increases in the offense levels for theft and fraud offenses. An appropriate formulation,

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in our view, would allow for enhancing the sentence where the defendant has engaged in substantial planning beyond that typical of the offense of conviction.

PROPOSED AMENDMENT 6 AND ISSUES FOR COMMENT 7 AND 38

Fraud (§2F1.1) -- invites departure in fraud cases in which loss fails to fully capture the seriousness of the offense or the fraud causes substantial non-monetary harm

Fraud & Theft (Chapter Two, Parts B & F) -- issue for comment about adding offense levels when loss fails to fully capture the harmfulness and seriousness of the conduct

Theft (§2B1.1) -- issue for comment regarding whether downward adjustment should be added for defendants who do not personally profit from the offense

In proposed amendments 6 and 7, the Commission has proposed permitting an upward departure in fraud cases where the defendant's conduct causes substantial nonmonetary harm. The Commission also has asked for comment whether significant nonmonetary harm should be a specific offense characteristic for theft and fraud cases, resulting in a one- or two-level increase in offense level severity.

We agree that there are cases in which the dollar amount of the loss does not appropriately reflect the seriousness of the defendant's crime. The theft of \$50,000 from an elderly couple with no other savings is properly viewed as a more serious crime than a bank officer's theft of a like amount from a commercial

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bank. It is our view, however, that such differences are best handled by considering them on a case-by-case basis, rather than creating another specific offense characteristic. No further amendment is necessary; Application Note 10 to §2F1.1 already addresses these situations, and permits upward departure where the loss table "does not fully capture the harmfulness and seriousness of the conduct."

We are far more concerned with the plethora of cases in which the single-minded focus on financial loss overstates the seriousness of the defendant's crime. A major weakness of the current system, in our view, is that the Guidelines in theft and fraud cases do not distinguish sufficiently between defendants who are and who are not motivated by personal profit. The corrupt president of a savings and loan institution who steals \$10,000,000 to line his pocket deserves a heavy sentence. But the assistant who aids and abets that president, perhaps only in order to keep their job, should not have the severity of his or her offense slavishly determined by the same "dollar loss" yardstick. We realize that in some cases (though by no means all), the assistant may merit a deduction for minor role in the offense. However, where the offense level already has risen out of sight because of the amount of loss involved -- loss that the assistant may not have desired, and from which they may not have profited -- the impact of the mitigating role adjustment is insubstantial.

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The Commission already has taken note of a similar anomaly in narcotics cases. Proposed amendment No. 8 provides for a ceiling for lower-level defendants in drug cases, and the basis for the proposed amendment is, in part, as follows:

Commentators have argued that the guidelines over-punish certain lower-level defendants when the sentence is driven by the quantity of drugs involved in the offense. For such lower-level defendants, the quantity of drugs involved is often opportunistic and may be a less appropriate measure of the seriousness of the offense than when the defendant has assumed a mid-level or higher role.

We believe that precisely the same point applies to lower-level defendants in theft and fraud cases when the sentence "is driven by" the amount of financial loss that the case involves. Accordingly, we strongly endorse the suggestion of the Practitioners' Advisory Group, set forth at proposed amendment 38, that the Guidelines permit a downward adjustment where the defendant did not personally profit from the theft, and we believe that courts should be encouraged to depart downwardly in such cases. Likewise, we agree that there should be a cap on the offense level for minor or minimal participants whose sentences are determined with respect to the theft or fraud loss tables.

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PROPOSED AMENDMENT 23

Abuse of Position of Trust
(\$3B1.3) -- guideline reformulated
to better distinguish intended scope
of adjustment for abuse of "special" trust

We strongly support the proposed amendment. The addition of the word "special" and the proposed additional Commentary make it plain that the "position of trust" necessary as a predicate for the enhancement may not be, for example, the ordinary employee-employer relationship (such as the relationship abused in ordinary embezzlement or postal employee theft cases)⁴ but rather must involve the abuse of a trust that has been specially placed in the defendant, a trust that does not involve a merely ministerial function.

In applying the current § 3B1.3, the courts have considered a number of factors, including (1) the extent to which the position of trust provided the freedom to commit a difficult-to-detect crime, United States v. Hill, 915 U.S. 502, 506-7 (9th Cir. 1990); (2) defendant's duties as compared to those of other

⁴ In this connection we strongly oppose proposed amendment 46, propounded by the United States Postal Service, precisely because it provides for an automatic enhancement for certain offenses, based exclusively on the status of the defendant (employee of the USPS) without regard to the particular circumstances of the offense or defendant. There is no reasoned basis to enhance the penalties for USPS employees, and for the same reason that the "ordinary bank teller" is not subject to enhancement, the "ordinary postal employee" should not be subject to enhancement.

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employees, United States v. Lange, 918 F.2d 709-10 (8th Cir. 1990); (3) defendant's level of specialized knowledge, United States v. Mulligan, 958 F.2d 345, 346 (11th Cir. 1992); (4) defendant's level of authority in the position, United States v. Gerqiadis, 933 F.2d 13219, 1227 (3d Cir. 1991); and (5) the level of public trust involved in the offense, United States v. Rehal, 940 F.2d 1, 5 (1st Cir. 1991). However, a large number of courts have struggled to apply the provision's general language, (which appears to focus on the abuse of any trust) with the exception carved out in the current Commentary for "embezzlement by an ordinary bank teller." See e.g. United States v. Odoms, 801 F. Supp. 59 (N.D. Ill. 1992). To resolve that conflict many courts have turned to the analysis offered in United States v. Hill, *supra*, which applies only the first of the above-listed factors and seems to ignore the others, particularly those which focus on the nature of the position of trust in question.

We believe that the proposed amendment would encourage courts to apply all of the above-listed factors and, thus, would promote careful distinctions between those cases where the abuse of trust is critical to the commission of the crime and the extent of the harm to the victim from those cases where the abuse of trust is not central to the crime. It would induce the courts to examine all facts which speak to the question of whether the defendant's abuse goes beyond the ordinary elements of the crime in question.

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However, it would do so without rejecting the useful (though not exclusive) analysis offered in United States v. Hill, supra.

An amendment just to §§ 2B1.1 and 2B1.2 to deal with simple embezzlement cases (as suggested by the additional issue for comment) would not address the concern posed by the Hill case in an across-the-board manner. For example, such a limited amendment would leave simple mail fraud cases in which employees defraud their employers (where no "special" trust is abused) in the same posture as the simple embezzlement cases have been in under the current section. We do not believe the issues posed in the embezzlement cases are limited simply to embezzlement cases and would recommend a broader approach.

We urge the Commission to adopt the proposed amendment.

PROPOSED AMENDMENT 20

Money Laundering (Chapter Two, Part S) --
consolidates §§2S1.1 and 2S1.2 and §§2S1.4 and 2S1.4;
ties offense level closer to seriousness of offense

The NYCDL generally supports the proposed modifications to the money-laundering Guidelines. Money-laundering charges have become the latest "darling in the prosecutor's nursery"; given the breadth of the money-laundering statutes, and the government's prevalent threatened and actual use of those statutes in imaginative (and frequently inappropriate) ways, the existing base

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offense levels clearly need to be changed in order to prevent manifest injustice.

We must question, though, why the base levels remain as high as they are even under the amendments. Under proposed Guideline § 2S1.1(a)(3), for instance, the base offense level for a defendant who launders money that has been stolen is "8" plus the number of offense levels from the fraud table. However, it is not evident that the defendant who launders stolen funds should be punished more severely than the defendant who stole the money in the first place. The thief starts with a base level of "6", after which the fraud table comes into play. Additionally, for many defendants, including personnel at financial institutions, the amount of funds laundered (or the amount of funds not reported as required) may not be an appropriate measure of the seriousness of the crime. Courts generally should have the ability to depart downward where the dollars involved seriously overstate the magnitude of the defendant's offense.

Subject to these criticisms, however, we support the changes to the money-laundering Guidelines, and urge that the amendments be presented to Congress.

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PROPOSED AMENDMENT 21

Tax (Chapter Two, Part T) --
consolidates §§2T1.1, 2T1.2, 2T1.3, and
2T1.5; adopts uniform definition of tax loss

We endorse proposed amendment 21's efforts to simplify the tax Guidelines, and eliminate inherent confusion in their application. We also endorse the efforts made in this amendment to allow deviations from the pure percentage calculation of tax loss in appropriate circumstances by stating that the percentages are subject to a rebuttable presumption.

We oppose the additional issue for comment which asks whether the tax table levels should be increased one level to account for a change in the sentencing table which increased the available levels for probation. If a defendant is within levels 7 or 8 already, and the court believes some type of confinement (community or otherwise) is appropriate, the court has the authority to impose such a sentence. If the tax tables are increased in response to the changes in the sentencing tables, the salutary purpose of the change in the sentencing table -- to increase the number of defendants for whom straight probation is available -- will be lost since those defendants will no longer fall within the new ranges. In sum, we think the change is ill-advised and defeats the purpose of the 1992 amendment.

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PROPOSED AMENDMENT 8

Drug Trafficking & Role in the Offense
(§§2D1.1, 3B1.2) -- provides offense level
ceiling in drug trafficking guideline for
defendants who receive a mitigating role adjustment

While we believe it entirely appropriate to limit the offense level for "lower-level defendants," as proposed § 2D1.1 would achieve, we question whether the proposed "cap" for defendants who receive a mitigating role adjustment, that is, level 32, is low enough to reflect the truly mitigated role that some lower-level poor and financially desperate defendants play in concerted activity.

For defendants who receive a "minimal role" adjustment, the "cap" should be even lower than for those who receive a minor role adjustment. Further, as suggested in other proposed amendments (specifically, 39 and 48), the "cap" should be lower depending on the type of controlled substance involved -- with a lower cap for less dangerous controlled substances. Such differentiation would further achieve the purposes of the proposed amendment in the first place, which is differentiating between defendants whose culpability is not appropriately measured by reference to whatever quantity of drugs may be involved, but rather by the economic and social circumstances in which they find themselves.

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While we reach no determination on the precise "cap" that ought to be applied in each circumstance (as to which experience under some "cap" may be the best guide), we do wish to comment on another aspect of the proposed change in the Guideline, which is unjustified regardless of whether there is a "cap" or not. Thus, the NYCDL strongly objects to the proposed Application Note 7 to the proposed revision of the Mitigating Role Guideline, § 3B1.2. Both proposed Options of the proposed Application Note specifically exclude from the class of defendants who are eligible to receive a mitigating role adjustment, any "defendant who is entrusted with a quantity of contraband for purposes of transporting such contraband (e.g., a courier or mule, not an offloader or deckhand)."

It is our view that this exclusion of all "mules," without regard to characteristics of the individual defendant and transactions is an unjustified exclusion. The culpability levels of any individual "mule" is not necessarily higher than other minimal participants in a narcotic distribution scheme. More significantly, the exclusion is entirely inconsistent with Proposed Application Note 5, which lists characteristics "ordinarily . . . associated with a mitigating role" that can be said to apply to many courier-defendants, and with Note 3, which directs that, whenever certain characteristics exist, a minimal role adjustment is appropriate. When such characteristics exist with a "mule"-

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defendant, there is no valid reason to deny a minimal role adjustment as to that defendant too.

Proposed Application Note 3 thus provides that the 4-level reduction "applies" to a defendant who is "one of the least culpable of the participants in the criminal activity," and that, to be considered one of the least culpable, such defendants "ordinarily must have all of the characteristics consistent with a mitigating role listed in Application Note 6 below." Application Note 6 provides that no defendant is entitled to a mitigating role adjustment if he or she

- (a) sold, or played a substantial part in negotiating the terms of the sale . . . ;
- (b) had an ownership interest in any portion of the contraband; or
- (c) financed any aspect of the criminal activity.

Application Note 3 also suggests consideration -- "though not determinative" -- of the fact of a defendant's "lack of knowledge or understanding of the scope and structure of the criminal activity and of the activities of others" in determining whether a defendant played only a "minimal role."

In our experience, many mule-defendants -- generally including the "intestinal tract smugglers, a class of defendant often seen in the Districts in which we practice -- meet the qualifications of Application Notes 3 and 6. Indeed, the vast majority of these defendants are not sellers or negotiators of the

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terms of any sale, have no ownership interest, and have not financed the transaction. Indeed, the vast majority of the defendants we encounter in the Districts in which we practice are from foreign countries, often from rural environments, who are driven by some of the worst economic hardship to undertake activity of the most offensive and dangerous nature (swallowing drugs), and who have no idea of American culture or of the significance and effect of their conduct on our American culture. Not only do they have no "knowledge or understanding of the scope and structure of the criminal activity and of the activities of others," as Application Note 3 discusses, but they are exploited by traffickers who lie to them about quantity so that they can underpay them for their piecemeal work.

Not only do these individuals meet the qualifications of Application Note 6 for "minimal role" attribution, but they also meet the qualifications of Application Note 5. That Note provides "a non-exhaustive list of characteristics that are ordinarily associated with a mitigating role," as follows:

- (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).

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While there may be mule-defendants who possess none of these qualifications (or not all of them), the vast majority meet the characteristics which the Note recognizes as defining "the least culpability." The task they perform is not only unskilled and unsophisticated, but it is disgusting and dangerous. There is no decision-making responsibility on the part of these individuals at all, and indeed, most are escorted to the airport in the foreign country of origin and met in this country at the airport. They are totally supervised, and not supervisory in any sense of the word. And though the compensation paid to these defendants is often dependent on weight, it is small compensation, and, because the principals wish to limit their financial outlay, they often lie to the mules about the weight they are carrying. In a weight-driven scheme of sentencing, culpability is often overstated for this reason alone.

There is no reason to deny an adjustment to a courier as a matter of justice because the characteristics set forth elsewhere to qualify criminal conduct applies no less to a courier who fits the characteristics, than to any other participant in a drug operation who possesses these characteristics. There is no reason to deny the adjustment as a matter of policy because, as a very real matter, there is no real deterrent effect of increasing the sentence for the many foreign offenders who have no knowledge or understanding of the laws, or of the risk that they take in performing the task of carrying drugs. (Indeed, though there are

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repeat couriers, we have rarely, if ever, seen a defendant who is a "second-offender" courier.)

In sum, because most couriers, including almost all intestinal tract smugglers, meet all of the inclusive definitions of minimal role, and none of the exclusions, it makes no sense to have a categorical bar to treating them as any other defendant.

PROPOSED AMENDMENT 9

Drug Trafficking (\$2D1.1) -- reduces upper limit of Drug Quantity Table; adds adjustments to further reflect defendant culpability and risk of harm

We endorse the concept of reducing the upper limit of the Drug Quantity Table. We believe that adjustments by virtue of specific offense characteristics more appropriately deal with gradations of seriousness in offenses than increases due solely to quantity of drugs involved.

As to the suggested adjustments for firearm possession and use, we oppose any expansion of the adjustment from the current 2-point adjustment to 4 or 6 points. This adjustment could potentially alter a defendant's sentence by some 150%. Such a huge adjustment is inappropriate where the adjustment is based on conduct that constitutes a separate substantive offense, as these firearms adjustments do. Use of a firearm during a drug transaction could be charged as a violation of 18 U.S.C. 924(c). Discharge could be charged as attempted murder or assault, if

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warranted. Causing injury could be charged as assault or attempted murder, and killing someone as murder.

The impact of transferring separate substantive offenses into offense characteristics is to dilute the government's burden of proof. We believe that substantive crimes, such as those represented by the firearms adjustments, should be tried to factfinders with the standard trial burden of proof and with the evidentiary protections that Due Process require in a criminal trial.

Accordingly, we oppose the portion of proposed amendment 9 (and the similar portion in proposal 39, which we separately address, infra, at pp. 29-31) that would allow firearms enhancements ranging from 2 to 6 points. We all agree that those who brandish or fire guns should be punished severely, but we believe that they should be tried and convicted for the offense first.

We further believe that there should be no adjustment when a defendant has been convicted of § 924(c) or any substantive offense that is premised on the use of a weapon in a drug transaction. Additionally, we believe that, wherever there is an adjustment because of the use or discharge of a weapon, the adjustment should be applied, as proposed amendment 39 suggests, only when the defendant himself "actually possessed" or discharged the gun, or where he "induced or directed another participant" actually to do so. Given the statements of various courts that

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"guns are tools of the narcotics trade", any adjustment that is not so limited is potentially abusive in its overinclusiveness.

We also approve of the decrease for defendants who "did not own or sell the drugs, did not exercise decision-making authority, did not finance the operation, and did not use relevant special skills." We would not approve any limitation on the type of defendant for whom that decrease could be made -- specifically, the limitations in other proposed amendments for couriers. Where such couriers -- or indeed any participant -- in drug activity meets the criteria for a decrease, the court should have discretion to award the decrease regardless of whether the defendant "carried" the drugs or not, for the same reasons as are stated in our comments to proposed amendment 8.

We also oppose the sliding scale of upward adjustments for a defendant who was "the principal organizer or leader of the criminal activity or was one of several such principal organizers or leaders," based on the number of participants "involved." Aside from the difficulty in counting "participants," we believe that the number of participants "involved" does not necessarily increase true culpability, unless the defendant was responsible for procuring the participation of those others. The quality of the leadership function, rather than the absolute number of followers, is, we think, the better measure of culpability.

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PROPOSED AMENDMENT 39

Drug Trafficking and Role in the Offense
(§§2D1.1, 3B1.2) -- revises drug and role
guidelines by reducing maximum offense level
in drug quantity table, adding enhancements
for weapon usage and high-level organizers,
and capping offense levels for defendants
receiving mitigating role adjustments;
increases reduction for minimal participants

As with proposed amendment 8, we agree that there should be a "cap" for those who qualify for a mitigating role adjustment. We approve of a lower "cap" where less dangerous controlled substances are involved, as this proposal provides.

As we stated in our comment to proposal 9, we oppose expansion of the firearm enhancement from the current 2 points to a 6-point range. We believe that for such substantial adjustment to be applied for conduct that in essence constitutes a separate crime, the defendant should first be tried and convicted for the offenses.

We further believe, however, as stated in our comment to proposal 9, that any adjustment for weapon use should focus on what the defendant himself did -- not on whether weapons "were used". In this regard, this proposed amendment, number 39, is far better than 9, because it indicates that an adjustment should apply only where the defendant himself possessed a weapon, or where he is equally culpable because he "induced or directed another participant" to actually do so. Given the by now-familiar

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maxim that guns are tools of the trade, "looser" language, that does not focus on individual conduct, has the potential to add points to defendants who are not truly culpable for the offending weapons conduct.

As with proposal 9, we disagree with an increase for a principal organizer or leader of criminal activity "that involved 15 or more participants." Where the organizer or leader does not himself bring in participants, the exact number of participants may not be a fair measure of actual culpability.

Finally, we oppose a 2-level increase for a defendant who qualifies for an aggravating role adjustment where he or she "obtained substantial income or resources" from the criminal activity. First, the use of this definition in essence constitutes "double counting." Larger quantities entail large profits, and also higher offense levels. So, an increase keyed to profits counts the same increase in culpability that is already accounted for in increased offense levels.

Moreover, when applied to convictions premised on § 848 -- which includes such an element of the obtaining of "substantial income or resources" -- there is also a factor of double counting. For these reasons, we oppose the adjustment.

Further, the term is too ambiguous for proper application. A proposed Application Note 16 would direct a court that must interpret "substantial income or resources" to refer to the law that has developed under 21 U.S.C. § 848(c)(2)(B). Cases

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interpreting those words, however, have shown that the term is ambiguous. For instance, the Second Circuit held in one case that the sum of \$2000 constituted "substantial income or resources" sufficient to render § 848 applicable. United States v. Losada, 674 F.2d 167 (2d Cir. 1982). If \$2000 constitutes "substantial income or resources," then anything can be, and the term is too ambiguous for legitimate use.

This proposed amendment also contains three different mitigating role adjustments instead of two -- or actually, five adjustments, since the proposal contemplates cases "falling between" the adjustment levels provided. While we applaud larger decreases for truly minimally-involved defendants, we wonder how a "significantly minimal participant" is different from a "minimal participant." We would welcome the amendment, however, so that a district judge can exercise this added discretion in an appropriate case.

To the extent that the proposed application note 7 provides that a defendant who transports contraband "shall not receive" any of the mitigating role adjustments as to the amount of contraband transported, we object for the reasons expressed in our comment to proposed amendment 8, supra, pp. 21-26; couriers are, in fact, often "minimally" involved, even if they carry contraband.

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PROPOSED AMENDMENT 48

**Drug Trafficking (§2D1.1) --
established ceiling on offense levels
for minor and minimal participants**

We again approve of the concept of a "cap" for minor and minimal participants. This proposal specifically sets forth lower caps for those minimally involved than for those who are minor participants, and specifically sets forth lower caps for certain kinds of controlled substances. We approve of these further distinctions, and favor the formulation in this proposal over the others. These proposals promote the policy of the Guidelines in recognizing further distinctions based on the level of participation of the defendant and the nature of the controlled substance involved.

PROPOSED AMENDMENT 60

**Mitigating Role (§3B1.2) --
prohibits mitigating role adjustments
for defendants held responsible under
relevant conduct only for the quantity
of drugs in which they actually trafficked**

For the same reasons as are expressed in our comment to proposal 87 we object to this DOJ proposal, which prohibits any mitigating role adjustment as to drugs "in the defendant's actual possession."

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PROPOSED AMENDMENT 51

Drug Trafficking (§2D1.1) -- clarifies
that term "cocaine base" means "crack"

We specifically endorse this proposal, because it remedies a defect in both the Guidelines and the statutes. It is clear that Congress and the Commission meant to punish "crack" offenses more heavily than other offenses. At present, "crack" is subsumed into the term "cocaine base." There is, however, another substance that falls within the definition of "cocaine base" which, unlike crack, is a precursor to cocaine, and is unlike crack in nature or dangerous effect.

We strongly believe that, regardless of any other amendments, the Commission should adopt this amendment, to make it clear that it is "crack" to which heavier penalties are meant to apply, not the type of cocaine base that is also covered by present definitions.

ISSUES FOR COMMENTS 24, 31 AND 47:

Modification or deletion of Government
motion requirement for 5K1.1 downward departure

We strongly endorse issues for comment 31 and 47, which would eliminate the need for a government motion as a predicate for a § 5K1.1 "substantial assistance" departure. Access to this most important of departures should not be controlled by the

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prosecution. While we applaud the Commission's solicitation of comment in this area (see issue for comment 24), we do not agree with its suggestion that elimination of government control might be limited to cases involving non-violent first offenses. We believe that courts are fully able to assess the extent and value of a defendant's cooperation, and that the nature of the crime and the offender's history should not preclude the court, in appropriate cases, from adjusting the sentence downward.

PROPOSED AMENDMENTS 25 AND 36

Standards of Acceptance of Plea Agreements
(\$6B1.2) -- adds commentary recommending
that the government disclose to the defendant
information relevant to application of the
guidelines prior to entry of a guilty plea

We endorse proposed amendments 25 (Commission) and 36 (Practitioner's Advisory Group) regarding disclosure by the government of information known to it in the context of plea discussions so the parties can have a realistic perception of probable sentencing out-comes. This practice is already encouraged in the Second Circuit by virtue of that Court's suggestions in United States v. Pimental, 932 F.2d 1019, 1034, (2d Cir. 1991), and as practitioners in the Second Circuit we have found it extremely helpful in plea discussions. By engaging in those discussion many factual disputes between the parties have been resolved, eliminating the necessity of pre-sentencing factual

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hearings, and defendants have been able to enter the plea process with some level of knowledge of the likely sentence.

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Respectfully submitted,

NEW YORK COUNCIL
OF DEFENSE LAWYERS
530 Fifth Avenue
New York, NY 10036