Commentary to 8C4.1(Note 2):

"2. Waiver of Certain Privileges and Protections.--If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for departure."

AMENDED TO READ

2. *Waiver of Certain Privileges and Protections.--If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for downward departure ONLY after considering the defendant's efforts relating to appropriate remedial action.*

Thank you very much for the opportunity to have provided the above Public Comments.

Sincerely,

/s/

L.A. Wright
Legal Criminalist/Consulting Expert

/law

[2-222]

U.S. Sentencing Commission
One Columbus Circle, N.E.,
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs
VIA FAX: 202/502-4699

PUBLIC COMMENT ON PROPOSED CHANGES TO ORGANIZATIONAL SENTENCING GUIDELINES

I appreciate the opportunity to provide comments on the proposed amendments to the Guidelines. I am choosing to send these anonymously, with your indulgence.

First, I commend the Advisory Group on delivering such a well thought-out, well-researched, well-articulated fine instrument. It was actually a pleasure to read. The effort that went into its production is evident in the quality of all details, throughout.

I am a compliance/ethics professional and would like to share just briefly my thoughts on the proposals.

1. Sec. 8B2.1(b)(2) The proposal draws in DOJ's call for resources and authority, which is excellent. I respectfully submit, however, that the distinction between the day-to-day designer and manager of an organization's compliance program, and the 'high-level personnel' assigned to ensure implementation, is worth a closer look. In my experience, the latter is often a member of the organization's executive team who has taken on compliance as a secondary function, and is often quite disengaged from the actual on-the-ground challenges involved in the program's implementation.

a. I suggest that the proposal's call for adequate authority and resources should be directed at the individual at the operational helm of the program, rather than at the executive, who generally has easier access and larger discretionary funding. To the extent that granting "authority" and "resources" is intended to facilitate the practical success of the program, it would make sense to clarify that it is the operational head that should have the authority and resources, since that is where the majority of the program challenges lie. The operational head of the program is the person who is the 'face' of the program throughout the organization on a daily basis, the one who must persuade others to support the various initiatives in the cross-functional implementation of the program. On the other hand, the 'high level personnel' typically oversee the results, which the operational head is charged with achieving. In fact, much of the operational head's time may often be spent competing for bandwidth of the necessary support functions (e.g., HR, Security, Training, I.T.), among those functions' other primary initiatives, for which they are measured. For example, if the operational head, the 'brains and brawn' behind the program, is a mid-level manager, consider the increased difficulty in getting a share of the often very limited time of other functions, as opposed to a VP seeking that same interdepartmental assistance. As a practical matter this makes program implementation more difficult (difficult to get meetings with senior management, difficult to get other functions to spend their limited time supporting compliance initiatives, etc.) and less efficient. It seems to me if the on-the-ground compliance lead is less than a VP, there is little appearance of, or actual, authority.

b. In some organizations where the operational head currently reports to the governing authority, requiring the high level personnel to do so separately may have the effect of the governing authority receiving less practical detailed info, from seeing the operational head less.

2. Sec 8C2.5 (f) (3): consider changing the rebuttable presumption that a compliance program is not effective if "an individual within high-level personnel of the organization" is the offender to 'two or more' high-level personnel. The rationale behind this is that a program cannot necessarily prevent every instance of misconduct, particularly if it is well hidden; however, if more than one person is involved, there is at least one additional person beyond the main perpetrator who is aware of the malfeasance. If the second person does nothing it is likely a symptom that that program is not working.

3. General comment: there is some disagreement in the regulated community as to whether the compliance program is responsible for ensuring reasonable response steps to misconduct throughout the organization or just in relation to what comes directly to the attention of the compliance program through the hotline. It seems more appropriate that the program should have visibility into, and the ability

[2-223]

to become involved in further preventing, all illegal/unethical conduct.

4. Consider defining what 'other conduct inconsistent' with an effective program means. Does it include failure to discuss the code of conduct with subordinates? Failing to report a violation to management? Ignoring evidence of misconduct? These clarifications would give teeth to compliance programs. Should this screening also apply to promotions or just to hiring new substantial authority personnel? Finally, since employees take their cues from their immediate managers as well as from those at the top, shouldn't this be true of any person in management as well as those at the high levels of the organization?

Thank you for your consideration of these thoughts -

U.S. Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

VIA FAX: 202/502-4699

PUBLIC COMMENT ON PROPOSED CHANGES TO ORGANIZATIONAL SENTENCING GUIDELINES

I appreciate the chance to provide the following comments on the proposed amendments to the Guidelines. Let me begin by thanking the Sentencing Commission for your efforts at thoughtfully reviewing these vital areas of ethics, law and policy. If recent events have taught us anything, it is that ethics and compliance issues are important to individual, corporate and our country's economic success. Corporate conduct sets an important example for all our citizens – and is a vital influence on the leaders of tomorrow.

As Francis Fukuyama has recently noted, "economic life reflects, shapes and underpins modern life itself." He goes on to note that "a nation's well-being, as well as its ability to compete, is conditioned by a single, pervasive cultural characteristic: the level of trust in society." To the extent that the proposed changes to the Organizational Sentencing Guidelines can help each of us – all of us – increase the level of trust we place in corporations - and the other significant elements of our economy - we will all be the better for it.

I have been a passionate ethics and compliance professional, advisor and teacher for many years and appreciate the opportunity to say a few words concerning the proposed amendments. The comments below are based on a colleague's thoughtful reflections already submitted to you....I have incorporated them herein by my colleague's express permission:

1. Sec. 8B2.1(b)(2) The proposal draws in DOJ's call for resources and authority, which is excellent. We respectfully submit, however, that the distinction between the day-to-day designer and manager of an organization's compliance program, and the 'high-level personnel' assigned to ensure implementation, is worth a closer look. In our experience, the latter is often a member of the organization's executive team who has taken on compliance as a secondary function, and is often quite disengaged from the actual on-the-ground challenges involved in the program's implementation. We suggest that the proposal's call for adequate authority and resources should be directed at the individual at the operational helm of the program, rather than at the executive, who generally has easier access and larger discretionary funding. To the extent that granting "authority" and "resources" is intended to facilitate the practical success of the program, it would make sense to clarify that it is the operational head that should have the authority and resources, since that is where the majority of the program challenges lie. The operational head of the program is the person who is the 'face' of the program throughout the organization on a daily basis, the one who must persuade others to

[2-225]

support the various initiatives in the cross-functional implementation of the program. On the other hand, the 'high level personnel' typically oversee the results, which the operational head is charged with achieving. In fact, much of the operational head's time may often be spent competing for bandwidth of the necessary support functions (e.g., HR, Security, Training, I.T.), among those functions' other primary initiatives, for which they are measured. For example, if the operational head, the 'brains and brawn' behind the program, is a mid-level manager, consider the increased difficulty in getting a share of the often very limited time of other functions, as opposed to a VP seeking that same interdepartmental assistance. . As a practical matter this makes program implementation more difficult (difficult to get meetings with senior management, difficult to get other functions to spend their limited time supporting compliance initiatives, etc.) and less efficient. It seems to us that if the on-the-ground compliance leader is less than a VP, there is little appearance of, or actual, authority.

2. Sec 8C2.5 (f) (3): consider changing the rebuttable presumption that a compliance program is not effective if "an individual within high-level personnel of the organization" is the offender to 'two or more' high-level personnel. The rationale behind this is that a program cannot necessarily prevent every instance of misconduct, particularly if it is well hidden; however, if more than one person is involved, there is at least one additional person beyond the main perpetrator who is aware of the malfeasance. If the second person does nothing it is likely a symptom that that program is not working.

3. General comment: there is some disagreement in the regulated community as to whether the compliance program is responsible for ensuring reasonable response steps to misconduct throughout the organization or just in relation to what comes directly to the attention of the compliance program through the hotline. It seems more appropriate that the program should have the ability to become involved in preventing, all illegal/unethical conduct.

4. Consider defining what 'other conduct inconsistent' with an effective program means. Does it include failure to discuss the code of conduct with subordinates? Failing to report a violation to management? Ignoring evidence of misconduct? These clarifications would give teeth to compliance programs. Should this screening also apply to promotions or just to hiring new substantial authority personnel? Finally, since employees often take their cues from their immediate managers as well as from those at the top, shouldn't this be true of any person in management as well as those at the high levels of the organization?

5. Lastly – give corporations credit for going beyond the minimum requirements of a "compliance program." The most successful programs are those that combine the best elements of an <u>ethics and a compliance program</u> into a coherent and consistent organizational culture. If people are convinced that ethics are truly important to an organization, then they are all-the-more likely to both comply

with law and go beyond the minimum requirements of the law to create positive corporate culture and a strong civil society.

Thank You!

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PRACTITIONERS' ADVISORY GROUP
CO-CHAIRS BARRY BOSS & JIM FELMAN
C/O ASBILL MOFFITT & BOSS, CHARTERED
1615 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, DC 20009
(202) 234-9000 - BARRY BOSS
(813) 229-1118 - JIM FELMAN

March 5, 2004

VIA HAND DELIVERY

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: 2004 Proposed Amendments and Issues for Comment (Supplemental Submission)

Dear Commissioners:

We write to supplement our prior letter of February 27, 2004, and to provide our perspective on two other important issues being considered by the Commission.[1]

I. Proposed Amendments relating to the Mitigating Role Cap (Amendment # 6)

Introduction

Excessive sentences and mandatory minimum sentences have come under heavy fire in the past several years, from all corners. From two Associate Justices of the Supreme Court to the Sentencing Commission itself, reasonable judges, lawyers and citizens recognize that the federal drug sentences and mandatory minimums meted out every day in federal court for low level, first time non-violent offenders are patently excessive.

The Sentencing Commission has understood this for many years – the

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[1] We note with disappointment that the Commission did not promulgate any proposals relating to "compassionate release," pursuant to 18 U.S.C. § 3582(c)(1)(A), notwithstanding that this issue was listed as a "priority" for the 2004 amendment cycle. We hope that the Commission will address this important issue during the next amendment cycle.

excessiveness of mandatory minimum sentences is an open secret among those who practice in federal court. It was this knowledge that drove the Commission to enact the mitigating role cap – Amendment 640, effective November 1, 2002. Amendment 640 was an extremely limited, narrow modification that capped the base offense level at 30 for a narrow class of offenders who received minor or mitigating role adjustments. Amendment 640 was limited not only because it benefitted only a small number of the least culpable offenders who had minor involvement, but because its impact was limited – the base offense level for someone who received this benefit would still be 30, and such offenders would still be subject to the mandatory minimum sentence absent a substantial assistance motion by the government, or application of the safety valve.

Without any indication that there is a problem or that the role cap is not operating as expected, and without any indication that persons who should not benefit from it in fact are, Proposed Amendment 6 ("amendment 6") would effectively repeal and cannibalize the mitigating role cap.

The Practitioners' Advisory Group opposes amendment 6 because: it is inconsistent with the limited relief provided by the mitigating role cap; the mitigating role cap as presently constituted is not overly generous (in fact, it is not generous enough); and, the concern that resulted in the enactment of the mitigating role cap is present to even a greater degree today. Finally, repealing, or replacing the mitigating role cap with the various issues for comment is simply unnecessary, given that only the least culpable, lowest level drug mules qualify for the mitigating role cap presently, and any benefit from the cap is at the pleasure of the government. Proposed Amendment 6 should be rejected.

A. <u>The relief afford by the mitigating role cap is limited, and the purpose animating its enactment applies with even greater force today</u>

1. The current mitigating role cap was a reasoned, limited solution

The synopsis of Amendment 6 makes clear that the proposal is designed to replace the current mitigating role cap with a "more gradual and less generous" approach than the current cap. Unstated but implicit in the synopsis in the proposal is that the current mitigating role cap is too generous. Given the limited relief provided by the current mitigating role cap, as reflected in its enactment at Amendment 640, this premise is severely flawed. It is flawed because the concerns that animated the enactment of the cap in the first place apply with greater – not lesser – force today, and the relief provided by Amendment 640 is extremely limited.

Amendment 640 enacted the mitigating role cap. The <u>purpose</u> of the amendment was clear:

> This part of the amendment responds to concerns that base

> offense levels derived from the Drug Quantity Table in §2D1.1 overstate the culpability of certain drug offenders who meet the criteria for a mitigating role adjustment under §3B1.2.

Amendment 640 (Synopsis of Amendment). The cap at level 30 for offenders receiving downward role adjustments was chosen because it was consonant with the purpose of the amendment, and the Commission could not have made its rationale any clearer:

> The Commission determined that, ordinarily, a maximum base offense level of 30 adequately reflects the culpability of a defendant who qualifies for a mitigating role adjustment.

Id.

The Commission recognized that the relief afforded was limited, because the new cap only:

> somewhat limited the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g., "mules" or "couriers" whose most serious trafficking function is transporting drugs and who qualify for a mitigating role adjustment).

Id. (emphasis added). That is, the Amendment was narrow, because it only "somewhat" addressed the real problem of an unjustified sentencing impact of drug base offense level for couriers. The "somewhat" is not only that the cap was at 30 and not a lower, even more reasonable number, but because, to the extent that the anomalous situation could arise where a person could get a role reduction yet other possible enhancers would apply, those enhancements could be applied to raise the total offense level over 30:

> Other aggravating adjustments in the trafficking guideline (e.g., the weapon enhancement at §2B1.1(b)(1)), or other general, aggravating adjustments in Chapter Three (Adjustments) may increase the offense level about level 30.

Id.

Not only was the solution limited by definition, but it would apply to only those who were the least culpable drug offenders, because "[t]he maximum base offense level is

expected to apply narrowly, affecting approximately six percent of all drug trafficking offenders." Id.

2. The cap has a narrow impact that appropriately caps the base offense level for only the least culpable offenders

Understanding why Amendment 640 was enacted and what it did is essential to understanding why the limited change it made should not be tampered with. Amendment 640 was a reasonable and prudent change to provide some sanity to the unduly harsh base offense levels otherwise applicable to the least culpable federal drug offenders. Mules and couriers are a limited class of offenders who the Commission recognized do not have the same culpability for drug importation or distribution crimes. Part of that limited culpability is reflected by the fact that often, couriers and mules, apart from not having any power within a drug distribution organization, are often unaware of the exact type of substance they are carrying, or the amount of the substance. Most often, they do not package the substance for travel, never see the inside of the package, and universally they receive little remuneration for their efforts.

But the role cap was designed to strike even more narrowly than just couriers or mules: only couriers and mules who played minor or minimal roles would gain the benefit of the enhancement. Put another way, only the least culpable of the least culpable would benefit from the role cap. So, while 25.3 percent of drug offenders received a mitigating role adjustment for fiscal year 2001, the Commission estimated that only six percent of drug trafficking offenders would receive the benefit of the mitigating role cap. We have seen no statistics that indicate that the Commission's estimation was inaccurate, and anecdotal evidence suggests that the Commission's estimate may even have been high.

3. The proposal to mitigate the limited effects of the cap is unreasoned and unnecessary

Against this backdrop, the proposed amendment 6 is wholly unreasoned and unnecessary. While the amendment is defined as "less generous" and "more gradual" than the current mitigating role cap, no reason is given for the proposed amendment. No concerns have been expressed by the Commission that the current role cap is operating in a way other than as it was designed to work. There is no indication that it is being inappropriately or incorrectly applied by District Judges, or that there is an increase in role adjustments to make a defendant eligible for the role cap. There is, so far as we can tell, no increased number of reversals by the courts of appeal for inappropriate role reductions.

To the extent that the current proposal was proposed or initiated by the Department of Justice, it, too, has offered analysis or other information supporting the proposed amendment. In fact, the current practice involving the role cap – where role

reductions are granted by District Judges almost always with the consent of the Department of Justice – renders incredible any concerns the Department of Justice might have – unstated as they may be – about the mitigating role cap.

B. In effect for a less than one and one-half years, the role cap is applied sparingly: only low level offenders, who cooperate, and for whom the government does not oppose the role reduction, actually benefit from the mitigating role cap; in some districts, the cap is used rarely, if ever

While the technical operation of the role cap is easy enough to understand, and there is no claim that is being inappropriately used, and it impacts only a small percentage of all drug offenders, its practical application and its limits might be misunderstood. The cap's impact is further limited in several significant ways.

First, the cap at level 30 makes sense because it is designed to provide a modest reduction for couriers who truly are minor players in the drug distribution or importation enterprise. That is, the typical courier does not know the exact quantity of narcotics they are carrying, and many do not know the type of drug. But experience shows that the typical maximum base offense level for the amount of drugs that couriers who carry a large amount of drugs generally carry falls somewhere in the level 30 or level 32 (5 to 14.99 kg cocaine power; 1 to 2.99 kg heroin; .5 to 1.499 kg methamphetamine) area. Put another way, very few couriers are found carrying amounts of drug that would put them at level 38 (such as 150 kg of cocaine). To the extent that someone is found with that much cocaine, it is extremely unlikely that they are, in fact, simply a drug mule and courier. So, the – again, unstated, unarticulated – idea that there are scores of drug offenders whose base offense level would start at 36 or 38, but now starts at 30 because of the role cap, and thus are receiving runaway offense level reductions, simply does not square with the reality of the amounts of drugs that couriers are normally entrusted with or captured with.

Second, the cap does not allow an offender to be sentenced below the mandatory minimum sentence. A government substantial assistance motion (USSG §5K1.1) or application of the safety valve (USSG §2D1.1(b)(6), USSG §5C1.2; 18 U.S.C. § 3553(f)) is required for a sentence below the mandatory minimum; without either, the role cap's benefits are illusory. We are all familiar with the drug quantity tables and that, generally, the drug amounts required for the 10 year mandatory minimum sentence (21 U.S.C. § 841(b)(1)(A)) line up with the drug weights reflected at base offense level 32 – 5 kg cocaine, 50 g crack, etc.

A real example from a pending case (between plea and sentence) that a PAG member is handling illustrates the application of the mandatory minimum and how it dilutes the role cap. A female drug mule is caught at the border while entering the United States, with just over 1 kg of heroin. She is a first time offender with no previous arrests, did not pack the suitcase she was carrying, never saw the inside of the suitcase, had no

idea how much heroin was involved, and had a minimal role in the offense. The government agrees that she played a minimal role, that the minimal role reduction applies, and that the role cap applies. The sentencing calculations, made in the presentence investigation report, to which neither the defendant nor the government object, are as follows:

•Base offense level, 1-2.99 kg. heroin (USSG §2D1.1(d)(4):	32	=	32
•Reduction by operation of role cap (USSG §3D1.1(a)(3)):	-2	=	30
•Minimal participant reduction (USSG §3B1.2(a)):	-4	=	26

Thus, through application of the role cap, and the role reduction, the sentencing range (before consideration of acceptance of responsibility) at level 26 and Criminal History Category I is 63 to 78 months, instead of the 121 to 151 months that is found at offense level 32 and Criminal History Category I, or the 78 to 97 months at offense level 28 (with the role reduction but with no role cap) and Criminal History Category I. **What all of this overlooks, however, is that this defendant can receive no less than a 120 month sentence of incarceration because of the mandatory minimum.** Thus, even with a role reduction applies and the additional role cap benefit, the Guideline range becomes 120 months, and that will be the sentence, whether or not the role cap is in existence. The defendant, then, will receive no real reduction whatsoever because of her minor role or the role cap. The only way under the mandatory minimum, then, is to cooperate with the government and receive a substantial assistance downward departure motion or the application of the safety valve.

Which leads to the third, and most important point regarding the operation of the role cap: **the government effectively controls which offenders receive the benefit of the role cap, because: 1) experience teaches that most role reductions are awarded only when the government agrees with or does not oppose such a reduction; 2) the benefit only inures when the government makes a downward departure motion for substantial assistance or agrees that the defendant qualifies for the safety valve.** Thus, as currently constituted, the mitigating role cap's application and operation – and attendant benefit – rests exclusively in the hands of the government. The experience of PAG members is that role reductions are rare enough; but where they are granted, they usually are given with the assent of or without opposition by the government. Thus, the agreement of the government – and its view the offender truly played a minor role – is a gateway to any offender receiving a role reduction. But for the offenders who might benefit from the role cap, they will still receive no benefit without cooperating, and without the government making a downward departure motion or the safety valve applying, because the mules/couriers that would benefit from the role cap are almost all subject to the 10 year mandatory minimum sentence.

Thus, any criticism of the current role cap scheme from the Department of Justice does not square with reality, because **the Department of Justice, under the current role cap scheme, is effectively in control of who receives the role cap reduction.** For our defendant whose calculations are outlined above, the sentencing District Judge may find that a minimal role adjustment, and thus the role cap, should apply even if the government does not agree (an extremely rare occurrence), but he will still have to impose a 120 month sentence, unless the government files a downward departure motion or the safety valve applies.

All of this is another way of saying that the mitigating role cap is another arrow in the Department of Justice's quiver: it is another way of encouraging low level defendant drug mules to cooperate and provide substantial assistance to the government. The role cap will **not** benefit drug mules who might benefit from it unless they cooperate with the government, and unless their cooperation is, at the least, complete and truthful (for the safety valve), or helpful (for a substantial assistance downward departure motion). Thus, the concept that the current role cap is too generous certainly misses the point: only those that are deemed worthy of such a reduction by the Department of Justice receive any benefit under the current scheme.

And, while we are not aware of a single instance where the role cap was deemed too generous in the case of a courier drug mule, who escaped the 10 year mandatory minimum because of cooperation with the government, and received the role cap benefit and the role reduction, any such excessive generosity can be mitigated by the government through its assent to a lesser role reduction (a 2 level reduction instead of 4 level reduction).

If all of these things fall into place for the lowest level courier/mule offenders, with the assent of the government, we hardly think that the reduction (usually two (from level 32 to 30) or, at most 4 levels (from level 34 to 30)) that the role cap provides can be deemed excessive.

The inducement that the role cap provides – to facilitate cooperation from low level drug mules – works in practice. For example, for our actual offender whose calculations are outlined above, with the additional reductions engendered by her cooperation, her final offense level and sentencing range appear as follows – all with consent of and because of the government's downward departure motion:

•Base offense level, 1-2.99 kg. heroin (USSG §2D1.1(d)(4):	32	=	32
•Reduction by operation of role cap (USSG §3D1.1(a)(3)):	-2	=	30

.

•Minimal participant reduction (USSG §3B1.2(a)):	-4	=	26
•Safety valve application (USSG §2D1.1(b)(6)):	-2	=	24
•Acceptance of responsibility (USSG §3E1.1(a)):	-2	=	22
•Acceptance of responsibility (USSG §3E1.1(b) (pre-April 30, 2003 factual conduct):	-1	=	21
•Government motion for downward departure based on substantial assistance (USSG §5K1.1)):	-2	=	19
•ADJUSTED TOTAL OFFENSE LEVEL =	19		
•CRIMINAL HISTORY CATEGORY:	I (zero points)		
•SENTENCING RANGE:	30 to 37 months		

Thus, this actual first offender/drug mule, who the government agreed played a minimal role, and who the government affirmed qualified for a downward departure based on her substantial assistance to the government, **still** faces a sentence of between two and one-half and three years in federal prison. For a first time drug courier, reasonable people must agree that such a sentence is extremely stiff and, perhaps, still too harsh.

Nor can the role cap be deemed overly generous: without operation of the role cap for this defendant, she would face a sentencing range of 37 to 46 months instead of 30 to 37 months. The overlapping point in these two ranges at 37 months is a hands on, end-user confirmation that the role cap not is not overly generous.

Notably, even under one of the machinations of proposed amendment 6, providing for two level reduction for offense levels 32 to 34, the outcome for this defendant would be the same: a two level benefit because of the role cap and **the same adjusted total offense level and sentencing range.**

The bottom line is that only the lowest level drug mule/couriers, who cooperate truthfully and completely with the government, as determined by the government, receive any benefit under the role cap system currently in place. There has not been excessive use or incorrect application of the role cap. It is working as designed by the Commission, to reward the least culpable, first time offenders who actively assist the government and confess their crime. The Department of Justice is firmly in control of which offenders will receive any benefit from it. Moreover, from our own experience and talking to supervising probation officers and Sentencing Guidelines Specialists in the districts in which we practice, there are many districts where the

application of the role cap is virtually unknown because there are few role reductions, or few drug mules who would qualify, or both.

And most importantly, **the role cap as currently constituted is not overly generous.** It will benefit only those who are the most minor or minimal offenders, who cooperate and help the government by providing truthful and complete information, and who are deemed worthy of such a modest benefit by the prosecution. Because the benefits of the current role cap are modest, apply to only the most deserving of offenders, and the benefits do not inure without cooperation and government approval, and the role cap is working as designed, Amendment 6 should be rejected in its entirety.

D. The issues for comment, and the proposed additional revisions that they encompass, should be rejected

1. The issues for comment and proposed additional revisions should be rejected

The evidence that the role cap's benefits are limited, it is working as intended, and its application is controlled by the government is compelling. This necessarily leads PAG to conclude that not only should amendment 6 be rejected, but the issue(s) for comment following amendment 6 (and attendant proposed modifications to the role cap) also should be rejected. We address the specific issues seriatim, and provide one alternate proposal to the extent the Commission is determined to tinker with the role cap.

We do not think that certain offenses and/or offenders should be disqualified, for the simple reason that offenders who use weapons, threaten violence or use minors in the commission of drug distribution and importation offenses are almost certainly not minor or minimal participants, and thus will not even qualify for a role adjustment, let alone the role cap. We are confident that the Department of Justice has and would oppose the application of a role reduction for any such offenders, and would not make a downward departure motion (thus allowing the role cap to kick in as an actual benefit) unless those offenders provided substantial assistance to the government in its investigation of others. Moreover, other enhancements under the Guidelines, for using a weapon, involving a minor, and the like, would still apply to enhance the offense level of the rare defendant who took such actions yet was deemed to be a minor participant. Again, the government can effectively halt the benefit of the role cap by opposing a role reduction, declining to allow the defendant to cooperate, asking for such enhancements, and moving for upward departures where appropriate.

Encompassed by our opposition to amendment is that the Commission should not repeat the current mitigating role cap without providing any alternative method. Such an action would be a large step back from the limited sanity that Amendment 640 brought to the sentencing of the least culpable offenders.