– 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. The relief afford by the mitigating role cap is limited, and the purpose animating its enactment applies with even greater force today

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 purpose 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. <u>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</u>

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.

2. PAG's proposed alternate amendment if the Commission is determined to adjust the mitigating role cap

With all of that said, if the Commission is determined to modify the role cap in a way that would provide less of a reduction for offenders deemed less worthy – which we think it should not – we would conditionally propose that the reduction should be scaled differently based on base offense level, before application of the role reduction itself. **That is, for persons who will receive a role reduction and whose base offense level is 30, the offense level should be capped at 29. For persons who receive a role**

reduction and whose base offense level is 32 or 34, the offense level should be capped at 30. For persons who will receive the role reduction and whose base offense level is 36, the offense level should be capped at 32. For persons who will receive the role reduction and whose base offense level is 38, the offense level should be capped at 34.

We make this proposal conditionally, in the event the Commission is determined to Act, and make plain our belief that the role cap should not be amended at all. However, our proposed conditional amendment would account for any concern that a person at an extremely high offense level of 36 or 38 would receive a more modest benefit from the role cap – a four level reduction at each offense level instead of a six or eight level benefit from the role cap. From what we can tell, there are few drug mules receiving role reductions at offense level 36 or offense level 38, but such an amendment would provide a more scaled and less generous benefit for couriers responsible for such prodigious amounts of drugs. This alternate proposal also conditionally answers the first two issues for comment: if there is a change, the reduction should begin at a lower offense level (the benefit should inure to persons at level 30), and the reduction should be scaled differently.

3. If the Commission adopts amendment 6 as written, it should adopt the greatest "additional reductions" in the proposal as written

Finally, while we oppose the proposed amendment as currently written, if it is enacted as proposed, we urge the Commission to make the "additional reduction" one level at offense level 30, 2 levels at offense levels 32 to 34, and 3 levels at offense levels 36-38. This would be an amendment that would encompass the greatest reduction in the proposed amended USSG §3B1.2(b)(1), (2), (3).

Conclusion

In 2002, less than two years ago, the Commission found that base offense level 30 adequately reflects the culpability of defendants who qualifying for a mitigating role adjustment. That finding is no less true today, and is unchallenged. Given that, and without any indication that the mitigating role cap is operating in a way other than it was intended, and with our demonstration that the cap is modest and is effectively controlled by the Department of Justice, we respectfully urge the Commission to reject amendment 6 in its entirety.

II. Proposed Amendments to Chapter 8 (Amendment #2)

In our February 27th letter, we addressed the issues for comment relating to proposed Amendment #2. In this letter, we address the proposed amendment to the organizational guidelines commentary where this Commission would, for the first time, take an affirmative position on questions concerning waiver of attorney-client privilege,

as well as work product protections. PAG strongly urges the Sentencing Commission not to enact the proposed amendments as currently drafted.

We are aware of the Ad Hoc Advisory Group's Report, issued October 7, 2003. Even that body acknowledged when it presented its report, however, that "[t]his is a topic of hot discussion currently." Oct. 7, 2003 Presentation, at 28. In fact, it noted how "there probably is not a hotter topic right now." *Id.* at 29. As the Report itself also indicates, "there is a significant and increasingly entrenched divergence of opinion between the U.S. Department of Justice and the defense bar as to (1) the appropriate use of, or need for, waivers as a part of the cooperation process, and (2) the value of adding a statement in the organizational sentencing guidelines that would clarify the role of waivers in obtaining credit for cooperation." October 7, 2003 Report, at 103.

We recognize that the Ad Hoc Advisory Group claims to have reached a "consensus" on its recommendations for waivers of privilege and work product protections. The problem with this consensus, however, is that its admittedly "diplomatically articulated language," October 7, 2003 Presentation, at 30, leaves too much undefined and uncertain. *See id.* at 62 (Judge Sessions: noting how provision is "somewhat vague ... in many ways"). The proposed amendments, for example, state that, "in some circumstances waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation." What are these circumstances? Are they frequent or rare? And who is to determine what the circumstances are? More importantly, what standards are to be applied in this determination - or are there even any standards? These crucial questions were apparently passed over in an effort to reach a nominal "consensus," but the result is no real guidance at all.

The Ad Hoc Advisory Committee's Report suggests that the defense bar wanted the Commission to "explicitly clarify the role of waivers in obtaining credit for cooperation." Report at 103. While it is true that many in the defense bar asked the Commission to clarify that waivers should never be required, this statement is not accurate if it is meant to suggest that the defense bar wanted a clarification at all costs, even if it meant that the defense's requested clarification was rejected, and a green light would be given to some coerced waivers. While we appreciate the Ad Hoc Committee's willingness to state that waivers cannot always be required in this context, the language that follows and blesses waivers in "some" circumstances essentially vitiates any help this language might provide, particularly when no parameters are placed on what those circumstances are, or how often "some" acceptable circumstances may exist. If the Commission were to simply enact the provisions stating that waivers are not required in order to get a cooperation adjustment or substantial assistance departure, we would concur that this would represent the true clarification the defense bar sought. If the Ad Hoc Committee's entire current recommendation is considered, however, including its blessing of waivers in some circumstances, this is not a clarification at all. *We would rather that the Commission do nothing at this time than do this.*

As the Commission noted during the Ad Hoc Committee's presentation, the Justice Department plans to issue a memorandum soon detailing what it considers "best practices in regard to the waiver of privilege as a basis for cooperation." Presentation at 62. We concur with Judge Sessions that the Commission "need[s] to know specifically what the Justice Department's position is," *id.* at 62, before it codifies these amendments and buys into a process whose parameters could soon change, perhaps even dramatically. At present, there is apparently "a great divergence of opinion" on this issue even among U.S. Attorneys around the country. *Id.* at 63. It is unclear what position will ultimately prevail, particularly when some agencies, such as HHS, have policies that "appear to rule out waiver as a factor in leniency as it pertains to Medicare and other civil fraud investigations," Report at 97 - a significant segment of current organizational guidelines cases. This Commission should not affirmatively bless waivers in the face of such contrary regulations, effectively overruling them and siding with the DOJ.

Moreover, even if this Commission were to decide to bless waivers over our objections, we strongly submit that additional specific limitations should be codified in any such amendment. For example, in arguing why such waivers should not always be prohibited, the Justice Department told the Ad Hoc Committee of circumstances in which such waivers were supposedly "the only means by which a cooperating organization can disclose critical information." Report at 100. The current proposal does not codify this "last resort" exception, however – as would be far preferable. Instead, the proposed amendment does not even build into the new language even the minimal protection expressed in Deputy Attorney General Thompson's Justice Department memo, that any waivers "should be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue," as opposed to advice concerning the criminal investigation itself. Report at 95. Worst of all, the proposed amendments fail even to codify the present state of affairs - that waivers are, and should remain, the "exception rather than the rule." Report at 98. Were these alternatives rejected by the Ad Hoc Committee? If so, why? If not, why not? The answers are unclear.

We recognize the natural tendency for the Commission to view favorably any "consensus" language reached by a committee that has worked for 18 months, even if the Ad Hoc Committee did also work on many other issues during that time. Nevertheless, doing "something" is not always preferable to doing nothing, particularly when it may bring unintended consequences. Even the Ad Hoc Committee's report suggests that its recommendations would be merely the beginning, and not the end, of discussion on this subject. *See* Report at 5 ("the Advisory Group has identified *a possible approach* to modifying the organizational sentencing guidelines in this regard."); *id.* at 103 ("the Advisory Group suggests [this as] a *possible solution* for *further consideration* by the Sentencing Commission"); Presentation at 30 ("we would expect, *if the Commission does decide to promulgate a proposal based on our report,* that this particular section will engender much discussion during your process.... I'll leave it at that.").

For its part, the Justice Department told the Ad Hoc Committee "that there is no need for language to be added to the organizational sentencing guidelines" on this point. Report at 103. The proposed amendments do the defense bar no great favors, and we submit at a minimum that they should be deferred for further study. *Cf.* Presentation at 55 ("[W]e did run into some real data problems and there just isn't a lot of data out there.... So it's hard to draw any conclusions."). *See also* Report at 98 (only 35 surveys received from U.S. Attorney's offices, with most responders prosecuting only about 2 corporations a year). With only 39% of only 238 organizations last year even subject to the organizational guidelines, Report at 25, the urgency of adopting an amendment on this divisive issue at this time, based on less than complete information, is not apparent.

More time and consideration should be given to the unresolved, and currently unresolvable "litigation dilemma," which currently subject litigants asked to waive privileges in a criminal case "to potentially crippling civil damages in addition to criminal penalties," Report at 102.[2] Greater consideration should be given to defining parameters and specifying limits – so that, if allowed at all, waiver coercions should be permitted, at most, only as a matter of last resort. The Commission should also consider whether further distinctions might be drawn between waivers permitted in the departure context, U.S.S.G. § 8C4.1, and those affecting an organization's mere culpability score, U.S.S.G. § 8C2.5, where we strongly submit none should be allowed. Concern should also be focused on whether any authorization of waivers in these organizational guidelines might be cited in the future as establishing Commission precedent for a change in other guidelines, with individuals perhaps to be asked in the future to waive attorney-client and work product protections in order to receive a U.S.S.G. § 5K1.1 benefit, or even to receive acceptance of responsibility. Given the gravity of these issues, the admitted limits on empirical data, and the divisiveness of debate, we ask that the Commission not enact these provisions at this time.

Again, we appreciate the opportunity to provide the Commission with our perspective on these important issues.

Sincerely,

James Felman & Barry Boss
Co-chairs, Practitioners' Advisory Group

cc: Charles Tetzlaff, Esq.
Timothy McGrath, Esq.

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[2] As the Committee seemed to recognize, this "dilemma" cannot be alleviated without passage of new federal legislation, and even the SEC's proposed legislation now before Congress would exempt from a general waiver only disclosures made to the SEC—not to all federal prosecutors or investigators.

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March 8, 2004

Members of the United States Sentencing Commission
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002

Dear Sentencing Commissioners:

The Judicial Conference Committee on Criminal Law reviewed with great interest all of the proposed amendments to the sentencing guidelines published on January 13, 2004, for public comment. We offer the following general and specific comments to the amendment proposals.

The Committee fully supports the proposal to consolidate U.S.S.G. §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) and §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). We also support the proposal to consolidate all four sections of U.S.S.G. §2C1.1 with §2C1.7, and §2C1.2 with §2C1.6. We believe such consolidation efforts may simplify sentencing guideline applications in these cases.

As you may know, in 1995, recognizing the complexity of the sentencing guideline system, the Committee urged the Commission to undertake an extensive assessment of the sentencing guidelines to determine how they might be streamlined or simplified. We understand this effort stalled after extensive Sentencing Commissioner turnover and a prolonged period of vacancies on the Commission. In any event, we support any new efforts in this regard.

With respect to whether the Commission should provide an enhancement in U.S.S.G. §2C1.1 for solicitation of a bribe, and in §2C1.2 for solicitation of a gratuity, the Committee believes that the Commission should not include such an enhancement because it is likely to invite protracted disputes at sentencing over which party initiated the solicitation, which we do not view as vital in terms of relative culpability.

The Committee also opposes any attempt to modify the mitigating role cap. As you know, in November of 2002, after receiving input from the Committee, the Commission created a sentencing cap at a base offense level 30 for drug traffickers who receive a mitigating role adjustment under U.S.S.G. §3B1.2. The Committee does not believe that the current application of this guideline is problematic, and we are unaware of any need to change it.

Likewise, the Committee opposes any attempt to further limit the courts' discretion with respect to aberrant behavior departures. As you may recall, in December of 1999 the Committee determined that the majority view of the circuits was correct that for this departure to apply there must be some element of abnormal or exceptional behavior: "[a] single act of aberrant behavior...generally contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable."