

U.S. Department of Justice  
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# Handbook on the Anti-Drug Abuse Act of 1986

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HANDBOOK ON THE ANTI-DRUG ABUSE  
ACT OF 1986

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## FOREWORD

This handbook on the Anti-Drug Abuse Act of 1986 has been prepared to assist federal prosecutors and investigators, as well as other persons with federal criminal justice responsibilities, in their review and implementation of this major new law.

This handbook describes seriatim the provisions of the Act which bear on our practice. For each subpart, the handbook sets forth a summary, analysis, and discussion explaining the new provisions in some detail, a separate discussion of any departmental policies affecting the implementation of these provisions, and the name and telephone number of an attorney in the Criminal Division who is familiar with the new provisions and who has been assigned to assist in resolving questions concerning them. The Criminal Division will also be compiling a list of possible corrective amendments to the Act.

William F. Weld  
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## Preface

To all who assisted in the preparation of this handbook, we wish to express our sincere thanks and gratitude.

Special thanks are accorded current and former Narcotic Section Attorneys John Kuray, Jack Geise, Dale Zusi, Jorge Rios-Torres, William Corcoran, Jeff Russell, Peter Djinis, and June Seraydar for their hard work in drafting sections of this handbook. We gratefully acknowledge the important substantive contributions made by Karen Skrivseth and Vicki Portney, of the Appellate Section and Office of Legislation, respectively. We would additionally like to thank Deputy Associate Attorneys General James Knapp, Charles W. Blau, and William J. Landers for their review of the handbook, particularly the chapter on the Money Laundering Control Act. We are also eternally grateful to Roger A. Pauley, Director, and the entire Office of Legislation, as well as Cary Copeland and the entire Office of Legislative Affairs, for the endless hours spent to ensure the passage of the Anti-Drug Abuse Act of 1986.

To Kathy Carlton, Clara Davis, Mary Anne Linane, Gloria Berry, Ann Gillespie, Maria Hahn, Chrystal Meadows, Michele Payne, and the entire clerical staff of the Narcotic and Dangerous Drug Section, we extend our sincere appreciation for their dedicated assistance in preparing this handbook.

This handbook is not intended to create or confer any rights, privileges, or benefits on prospective or actual witnesses or defendants. It is also not intended to have the force of law or of a United States Department of Justice directive. See United States v. Caceres, 440 U.S. 741 (1979).

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## EFFECTIVE DATES

The Anti-Drug Abuse Act of 1986 was signed by President Reagan on October 27, 1986, at 2:42 P.M. (EST). This legislation, Public Law Number 99-570, was to a large extent effective as of the President's signature. There are, however, several provisions which have effective dates other than the date of enactment. This handbook, as well as the actual language of the Act, should be consulted to determine whether there is a different effective date than the date of enactment. The following list of effective dates for the offenses created or amended by the Act, which relate to Title I (the Anti-Drug Enforcement Act) unless otherwise indicated, should be of assistance in this determination:

Subtitle A - all penalty provisions were effective on signature by the President; certain provisions relating to sentencing procedures are delayed until the sentencing provisions of the Comprehensive Crime Control Act of 1984 become effective on November 1, 1987.

Subtitle H - new 18 U.S.C. §§ 1956 and 1957 were effective on signature by the President; provisions on "structuring" (new 31 U.S.C. § 5324) and related provisions were delayed for three months from the date of enactment, as were provisions relating to amendments to 31 U.S.C. § 5317 (seizure and forfeiture of monetary instruments in CMIR violations) and provisions requiring banking regulatory agencies to issue regulations relating to their supervision of financial institution recordkeeping systems (and included civil penalties).

Subtitle I - effective on signature by the President [but note that shift of 18 U.S.C. Appendix § 1202 to 18 U.S.C. § 924, which is amended further by this subtitle, did not take place until November 15, 1986, pursuant to Pub. L. 99-308].

Subtitle O - effective 90 days after the enactment of the Act.

Other proscriptive provisions of Title I - in Subtitles B, C, D, E, F, G, M, P, Q, T, and U - were effective as of the signing of the Act.

The enforcement-related provisions in Title II (International Narcotics Control), including the revisions to the "Mansfield Amendment," were effective as of the President's signature.

The proscriptions contained in Title III (Interdiction) and Title XV (relating to "boobytraps" in national forests) also

became effective as of the signing of the Act. All offenses created or amended by Title X (Ballistic Knife Prohibition) were effective 30 days after the enactment of the Act.

Additional information regarding the effective dates of these provisions may be obtained from the Narcotic and Dangerous Drug Section of the Criminal Division, FTS 786-4699 or 786-4700.

Title I, Subtitle A - Narcotics Penalties and Enforcement Act of 1986

Title I, Subtitle G - Controlled Substances Import and Export Act Penalties Enhancement Act of 1986

Summary

Subtitles A and G of Title I of the Anti-Drug Abuse Act of 1986 substantially increase the maximum penalties -- terms of imprisonment, fines, and special parole terms (now called "terms of supervised release" in the new penalty statutes, and to be changed as to all of Title 21 on November 1, 1987) -- which may be imposed for offenses under Section 401(a) of the Controlled Substances Act (21 U.S.C. § 841(a)) and Section 1010(a) of the Controlled Substances Import and Export Act (21 U.S.C. § 960(a)) (hereafter collectively referred to as "drug-trafficking offenses"). There are now three levels of penalties for such offenses which vary in severity according to the kind and quantity of controlled substance involved in the particular offense, the defendant's prior record of drug-related convictions, and whether death or serious bodily injury has resulted from use of the substance in question. The three levels of penalties are: (i) penalties involving 10-year or greater mandatory jail terms; (ii) penalties involving 5-year or greater mandatory jail terms; and (iii) penalties involving primarily non-mandatory jail terms. Each of these levels of penalties is described below.

Analysis and Discussion

A. Penalties Involving 10-Year or Greater Mandatory Jail Terms [21 U.S.C. § 841(b)(1)(A); 21 U.S.C. § 960(b)(1)]

The most severe penalties under the new Act are reserved for drug-trafficking offenses involving the following Schedule I and II controlled substances in the following quantities:

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine,

ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide [commonly known as fentanyl] or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; or

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana. 1/

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1/ The term "marihuana," as defined in 21 U.S.C. § 802(15), encompasses the various forms of the plant as well as such common marihuana derivatives as hashish and hashish oil. See, e.g., United States v. Gagnon, 635 F.2d 766, 770 (10th Cir. 1980), cert. denied, 451 U.S. 1018 (1981); United States v. Kelly, 527 F.2d 961, 963-64 (9th Cir. 1976). Except where hashish and hashish oil are separately treated in the Controlled Substances Act and Controlled Substances Import and Export Act -- see, e.g., 21 U.S.C. §§ 841(b)(1)(D), 960(b)(4) -- Government counsel should refer to the penalties applicable to offenses involving marihuana in determining the penalties applicable to these marihuana derivatives.

Subsections 841(b)(1)(A) and 960(b)(1) of Title 21, United States Code, now provide that persons convicted of drug-trafficking offenses involving such large quantities of these controlled substances who have no prior, final drug-related felony convictions must be sentenced to a mandatory minimum term of imprisonment of ten years and may be sentenced up to life imprisonment. If death or serious bodily injury 2/ has resulted from use of the substance involved in a particular case, such "first-time drug offenders" must be sentenced to a mandatory minimum term of imprisonment of twenty years with a maximum of life imprisonment. In addition to imposing the mandatory term of imprisonment, courts may fine such "first-time drug offenders" an amount not to exceed the greater of that authorized under Title 18, United States Code, 3/ or \$4,000,000 if the defendant is an

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2/ The new Act defines "serious bodily injury" as an injury involving (i) a substantial risk of death, (ii) protracted and obvious disfigurement, or (iii) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. This definition is codified at 21 U.S.C. § 802(25).

3/ Subsections 841(b)(1)(A) and 960(b)(1) -- and several other subsections of 21 U.S.C. §§ 841 and 960 discussed infra -- provide that a court may impose a fine not to exceed the greater of either (i) that authorized under Title 18, United States Code (or twice that amount if the defendant is a "repeat drug offender") or (ii) a specified (often multi-million-) dollar amount. The reference to Title 18 enables courts to apply the alternative fine provisions of 18 U.S.C. § 3623, as enacted by Section 6(a) of Pub. L. 98-596. The alternative fines authorized by 18 U.S.C. § 3623 are generally (but not always) lower than the "specified dollar amount" fines authorized under the various fine provisions of Title 21, as amended by the Anti-Drug Abuse Act of 1986. However, a defendant who has derived pecuniary gain from an offense may be fined under 18 U.S.C. § 3623(c)(1) up to twice the amount of the gain (which amount may again be doubled under certain provisions of 21 U.S.C. §§ 841(b) and 960(b) if the defendant is a "repeat drug offender"). Such a fine may occasionally exceed the "specified dollar amount" fine under the applicable provision of Title 21 and Government counsel should be alert for such cases.

Counsel should note, however, that the fine provisions of the Sentencing Reform Act of 1984 (18 U.S.C. §§ 3571-3575, as enacted by Pub. L. 98-473) are currently scheduled to replace existing law (including 18 U.S.C. § 3623) on November 1, 1987. The new fine provisions will include an alternative fine scheme similar to that under 18 U.S.C. § 3623 (which is to be codified as 18 U.S.C. § 3571), but will not include a provision comparable to 18 U.S.C. § 3623(c)(1) authorizing a court to double the

(Footnote Continued)

individual and \$10,000,000 if the defendant is other than an individual. A court must also impose a "term of supervised release" of at least five years on such "first-time drug offenders."

Persons convicted of such offenses who have prior, final state, federal, or foreign drug-related felony convictions <sup>4/</sup> must be sentenced to a mandatory minimum term of imprisonment of twenty years with a maximum of life imprisonment. If death or serious bodily injury <sup>5/</sup> has resulted from use of the substance in question, such "repeat drug offenders" must be sentenced to life imprisonment. In addition to imposing the mandatory term of imprisonment, courts may fine such "repeat drug offenders" an amount not to exceed the greater of twice that authorized under

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(Footnote Continued)

amount of pecuniary gain derived from an offense in determining the maximum fine. The Department has proposed amendments to the Sentencing Reform Act that will re-enact the "gain doubling" fine provision in Title 18.

Counsel should also note that 21 U.S.C. § 855 (which will not be affected by the new Act) serves the same purpose as 18 U.S.C. § 3623(c)(1) by providing that "[i]n lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds." The only drawback in using this provision of Title 21 instead of 18 U.S.C. § 3623(c)(1) is that the amount of gain doubled thereunder cannot again be doubled in the case of "repeat drug offenders" because the applicable penalty provisions of 21 U.S.C. §§ 841 and 960 only provide that such "repeat drug offenders" are subject to "twice [the fine] authorized [under] Title 18." See, e.g., 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1), as amended. See also Appendix B.

<sup>4/</sup> Such convictions could include: (i) convictions under the provisions of either 21 U.S.C. § 841 or 21 U.S.C. § 960; (ii) felony convictions under any other provisions of Title II (the Controlled Substances Act) or Title III (the Controlled Substances Import and Export Act) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 or any other federal law relating to narcotic drugs, marihuana, or depressant or stimulant substances (see, e.g., the Act of September 15, 1980, Pub. L. 96-530, as amended by Section 3202 of the Anti-Drug Abuse Act of 1986, formerly codified at 21 U.S.C. § 955a et seq. and now codified at 46 U.S.C. App. § 1901 et seq.); or (iii) felony convictions under any state or foreign law relating to narcotic drugs, marihuana, or depressant or stimulant substances.

<sup>5/</sup> See note 2, supra.



Title 18, United States Code, 6/ or \$8,000,000 if the defendant is an individual and \$20,000,000 if the defendant is other than an individual, although some defendants may argue that these particular fine provisions apply only in cases where death or serious bodily injury has resulted from use of the substance in question. 7/ A court must also impose a term of supervised release of at least ten years on such "repeat drug offenders."

B. Penalties Involving 5-Year or Greater  
Mandatory Jail Terms [21 U.S.C. § 841(b)(1)(B);  
21 U.S.C. § 960(b)(2)]

Penalties involving mandatory jail terms of five years up to 40 years will be imposed for drug-trafficking offenses involving the following quantities of the same controlled substances set forth in 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1):

(i). 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP)

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6/ See note 3, supra.

7/ This argument, which may also be made with respect to several other fine provisions under 21 U.S.C. §§ 841(b) and 960(b), has little or no merit. See discussion in subpart "vi," infra.

or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; or

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana. 8/

Subsections 841(b)(1)(B) and 960(b)(2) of Title 21, United States Code, now provide that persons convicted of such drug-trafficking offenses who have no prior, final drug-related felony convictions must be sentenced to a mandatory minimum term of imprisonment of five years, with a maximum of forty years in prison. If death or serious bodily injury 9/ has resulted from use of the substance in question, such "first-time drug offenders" must be sentenced to a mandatory minimum term of imprisonment of twenty years and a maximum of life imprisonment. In addition to imposing the term of imprisonment, a court may fine such "first-time drug offenders" an amount not to exceed the greater of that authorized under Title 18, United States Code, 10/ or \$2,000,000 if the defendant is an individual and \$5,000,000 if the defendant is other than an individual. A court must also impose a term of supervised release of at least four years on such "first-time drug offenders."

Persons convicted of such offenses who have prior, final state, federal, or foreign drug-related felony convictions must be sentenced to a mandatory minimum term of imprisonment of ten years with a maximum of life imprisonment. If death or serious bodily injury 11/ has resulted from use of the substance in

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8/ See note 1, supra.

9/ See note 2, supra.

10/ See note 3, supra.

11/ See note 2, supra.

question, such "repeat drug offenders" must be sentenced to life imprisonment. In addition to imposing a term of imprisonment, a court may fine such "repeat drug offenders" an amount not to exceed the greater of twice that authorized under Title 18, United States Code, 12/ or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, although it is arguable that these particular fine provisions apply only in cases where death or serious bodily injury has resulted from use of the substance in question. 13/ A court must also impose a term of supervised release of at least eight years on such "repeat drug offenders."

C. Penalties Involving Primarily Non-Mandatory Jail Terms [21 U.S.C. § 841(b)(1)(C); 21 U.S.C. § 960(b)(3)]

Subsections 841(b)(1)(C) and 960(b)(3) of Title 21, United States Code, now impose penalties involving primarily non-mandatory jail terms for drug-trafficking offenses involving lesser quantities of the foregoing controlled substances or any other Schedule I or II controlled substance (except where 21 U.S.C. §§ 841(b)(1)(D) and 960(b)(4) require lesser terms for offenses involving less than 10 kilograms of hashish or less than 1 kilogram of hashish oil or less than 50 kilograms of marihuana (unless the offense involves 100 or more marihuana plants regardless of weight)). Persons convicted of such offenses who have no prior, final drug-related convictions may be sentenced to a term of imprisonment of up to twenty years. If death or serious bodily injury 14/ has resulted from use of the substance in question, however, such "first-time drug offenders" must be sentenced to a mandatory minimum term of imprisonment of twenty years with a maximum of life imprisonment and may also be fined according to the foregoing amounts. Any "first-time drug offender" who is sentenced to a term of imprisonment under either Subsection 841(b)(1)(C) or 960(b)(3) must also be sentenced to a term of supervised release of at least three years.

Persons who have prior, final drug-related felony convictions may be sentenced to a term of imprisonment of up to thirty years. If death or serious bodily injury 15/ has resulted from use of the substance in question, such "repeat drug offenders" must be sentenced to life imprisonment. The court must impose a term of supervised release of at least six years on

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12/ See note 3, supra.

13/ See note 7, supra.

14/ See note 2, supra.

15/ Id.

all "repeat drug offenders" who are sentenced to a term of imprisonment.

All "first-time drug offenders" are subject to a discretionary fine not to exceed the greater of that authorized under Title 18, United States Code, 16/ or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, and all "repeat drug offenders" are subject to a discretionary fine not to exceed the greater of twice that authorized in accordance with Title 18, United States Code, 17/ or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual. However, some may argue that the statute limits such fines to only those cases where death or serious bodily injury has resulted from use of the substance in question. 18/

#### D. "Work-Off" Provision

The new Act includes a "work-off" provision (to be codified as 18 U.S.C. § 3553(e)) which allows a court to impose a term of imprisonment less than the applicable mandatory minimum term upon motion by the Government seeking such a reduced sentence and demonstrating that the defendant has rendered substantial assistance in the investigation and/or prosecution of another criminal offender. 19/ Any sentence so reduced must still comport with the guidelines to be established by the Sentencing Commission. Both 28 U.S.C. § 994 and Fed.R.Crim.P. 35 have been amended to make this latter restriction explicit.

A minor enforcement problem is presented by the fact that those sections of the new Act implementing the "work-off" provision will not become effective until 18 U.S.C. § 3553 and the amendments to Fed.R.Crim.P. 35 take effect. The latter section and the amendments to Rule 35 are currently scheduled to become effective on November 1, 1987. In the interim, the only practical means by which a cooperating defendant can avoid an otherwise applicable mandatory minimum term of imprisonment is to plead to a "lesser included offense" in which the quantity of the

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16/ See note 3, supra.

17/ See note 3, supra.

18/ See note 7, supra.

19/ Counsel should note that this "work-off" provision applies not only to any provision of Title 21 requiring imposition of a mandatory minimum term of imprisonment but also to any other federal law requiring imposition of mandatory minimum terms of imprisonment. See, e.g., 18 U.S.C. § 924(c).

controlled substance in question is not specified (and assuming that the court does not rely upon the pre-sentence investigation or other means to make its own determination as to the type and quantity of drug involved) or to plead to a conspiracy charge, 21 U.S.C. § 846 or § 963, to which the mandatory minimum provisions do not apply. The defendant will then be sentenced under the provisions of 21 U.S.C. § 841(b)(1)(C) or § 960(b)(3), which contain no mandatory minimum terms of imprisonment unless death or serious bodily injury has resulted from use of the substance in question. Of course, the court may still sentence the defendant to a jail term greater than the mandatory minimums set forth in Subsections 841(b)(1)(A) and (B) and 960(b)(1) and (2), but it will also have discretion to impose less than the otherwise applicable mandatory minimum jail term.

Counsel should note that the "work-off" provision can be triggered only upon motion by the Government and that such motions are to be filed pursuant to Fed.R.Crim.P. 35(b), as amended by Section 215(b) of Pub. L. 98-473 (which currently is scheduled to take effect on November 1, 1987). The amended rule will require that all motions pursuant thereto be filed "within one year after imposition of...sentence." 20/ This, of course, places a time limit on the Government's ability to benefit a defendant who decides after conviction and sentencing to cooperate in the hope of having his/her jail term reduced to less than the applicable mandatory minimum. Defense counsel should be advised of this time limit.

Counsel should also note that the "work-off" provision permits a court to impose less than the otherwise applicable mandatory minimum jail term only where a defendant has rendered "substantial assistance in the investigation or prosecution of another [criminal offender]." There is, however, no guidance in either the statutory language or the legislative history of the new Act as to what degree of cooperation constitutes such "substantial assistance." It can be expected that the forthcoming sentencing guidelines will address this issue.

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20/ The one-year period under the amended rule will extend by approximately eight months the time in which a motion to reduce sentence may be filed in cases where the defendant has entered an unconditional guilty or "nolo" plea because the pre-amendment rule required that motions in such cases be filed within 120 days of sentencing. In cases where the defendant either entered a conditional plea or was found guilty at trial and then appealed his conviction, the pre-amendment rule permitted the filing of motions to reduce sentence within 120 days of affirmance of the conviction by either the court of appeals or the Supreme Court. This latter provision will be eliminated when the amended rule takes effect and all motions filed pursuant to the amended rule will have to be filed "within one year after the imposition of...sentence" irrespective of whether an appeal is taken.

Because the "work-off" provision is triggered only upon motion by the Government, it is the federal prosecutor who must determine in the first instance whether a defendant has rendered (or is willing to render) the "substantial assistance" entitling him/her to the benefit of the "work-off" provision. This determination will necessarily be somewhat subjective (although it must be exercised in good faith) and will vary from defendant to defendant and case to case. Because the "work-off" provision gives defendants facing mandatory minimum jail terms a powerful incentive to cooperate, Government counsel are urged to seek the maximum degree of cooperation from such defendants before agreeing to file a motion triggering the "work-off" provision.

It appears that a court is powerless to impose less than the applicable mandatory minimum jail term in the absence of a motion by the Government triggering the "work-off" provision. What, then, of the cooperating defendant who claims to have given "substantial assistance in the investigation or prosecution of another [criminal offender]" but who cannot persuade the Government to file the motion triggering the "work-off" provision? The answer to this question depends entirely on whether there is a plea agreement embodying a Government promise to file a triggering motion in exchange for the defendant's cooperation and whether the defendant has entered a plea pursuant to that agreement.

Where such a plea agreement exists and a plea has been entered pursuant to that agreement, 21/ the defendant may seek to enforce the Government's obligations under the agreement through a motion to the sentencing court under Fed.R.Crim.P. 32(d) 22/ or 35(a), 23/ through a direct appeal to the court of appeals, 24/ or through collateral attack pursuant to 28 U.S.C. § 2255. 25/

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21/ If a plea agreement is offered by the Government and "accepted" by the defendant, it may still be unilaterally revoked by the Government at any time prior to actual entry of the plea. See Mabry v. Johnson, 467 U.S. 504, 509-11 (1984). Courts will not enforce such revoked agreements.

22/ See, e.g., United States v. Bullock, 725 F.2d 118 (D.C. Cir. 1984).

23/ See, e.g., United States v. Brummett, 786 F.2d 720, 721 (6th Cir. 1986); United States v. Vocolla, 600 F. Supp. 1534, 1536 (D.R.I. 1985).

24/ See, e.g., United States v. Reardon, 787 F.2d 512 (10th Cir. 1986); United States v. Travis, 735 F.2d 1129 (9th Cir. 1984).

25/ See, e.g., United States v. Quan, 789 F.2d 711, 713 (9th Cir. 1986).

The legal basis for such an enforcement action is the Supreme Court's oft-cited holding in Santobello v. New York, 404 U.S. 257, 262 (1971): "when a plea rests in any substantial degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." A defendant who prevails in such an enforcement action is entitled either to specific enforcement of the plea agreement or to withdrawal of the plea. Id. at 263. Accord United States v. Martin, 788 F.2d 184, 187 (3rd Cir. 1986); United States v. Voccola, 600 F. Supp. 1534, 1537 (D.R.I. 1985). If the court finds that the defendant did not render the requisite "substantial assistance," the Government is relieved of its promise to file the triggering motion. See, e.g., Reardon, supra, n.24, 787 F.2d at 516; United States v. Baldachino, 762 F.2d 170, 179 (1st Cir. 1985).

Plea agreements are contracts and, in interpreting such agreements, courts generally apply principles of contract law. See, e.g., United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986); Reardon, 787 F.2d at 516; United States v. Read, 778 F.2d 1437, 1441 (9th Cir. 1985); United States v. Field, 766 F.2d 1161, 1168 (7th Cir. 1985). Thus, if the court finds that the terms of the plea agreement are unambiguous, and there is no evidence of overreaching or bad faith on the part of the Government, the court must resolve the dispute according to the unambiguous terms of the agreement. Harvey, 791 F.2d at 300. If, however, there are ambiguities or imprecisions in any terms of the agreement, such terms will be read in favor of the defendant and against the Government. Id. at 300, 303; Fields, 766 F.2d at 1168. 26/ This is true even where defense counsel has contributed to the ambiguity or imprecision in the agreement: "derelictions on the part of defense counsel that contribute to ambiguities and imprecisions in plea agreements may not be allowed to relieve the Government of its primary responsibility for insuring precision in the agreement." Harvey, 791 F.2d at 301. It is essential, therefore, that federal prosecutors strive for clarity, precision, and detail in defining the obligations

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26/ Courts vary in the degree to which they interpret ambiguities in favor of the defendant and against the Government. Compare In re Arnett, 804 F.2d 1200, 1204 (11th Cir. 1986) (holding that the Government breached plea agreement -- providing that defendant would plead guilty and forfeit \$3000 cash found on his person at time of arrest -- when it sought forfeiture of defendant's house and farm) with United States v. Fitzhugh, 801 F.2d 1432 (D.C. Cir. 1986) (DEA is not precluded from pursuing administrative action to revoke appellant's registration to dispense Schedule III, IV, and V controlled substances where appellant had pleaded guilty pursuant to a plea agreement in which he voluntarily agreed to surrender his registration to dispense Schedule II drugs).

and undertakings of each party to a plea agreement. Fields, 766 F.2d at 1168 (citing cases).

This need for precision and detail in drafting plea agreements is particularly strong when dealing with such inherently ambiguous statutory language as "substantial assistance in the investigation or prosecution of another person who has committed an offense." A prosecutor who simply employs such ambiguous statutory language in defining a defendant's obligations under a plea agreement (e.g., "defendant agrees to provide substantial assistance in the investigation or prosecution of another person") leaves the defendant free to argue, and the court free to decide, that whatever the defendant did constituted "substantial assistance." The prosecutor must, therefore, spell out in the plea agreement exactly what the Government requires in terms of "substantial assistance." By entering a plea pursuant to such an agreement, the defendant undertakes to fulfill all of those requirements and an unexcused failure to fulfill any such requirement will relieve the Government of its promise to file a triggering motion.

Where there is no plea agreement embodying the Government's promise to file a triggering motion in exchange for the defendant's substantial assistance - or where the Government has revoked such an agreement prior to entry of the plea - there apparently is nothing the defendant or the court can do to compel the Government to file the motion triggering the "work-off" provision and there is no other authority under which the court may impose less than the applicable mandatory minimum jail term. This is true even if the defendant has provided the Government with valuable information concerning the criminal conduct of others and even has testified against such persons.

#### E. General Comments on Mandatory Minimum Sentencing Provisions

The New Act provides that a court may not place on probation or suspend the sentence of any person sentenced under any provisions providing for imposition of mandatory minimum terms of imprisonment. It also provides that such persons may not be released on parole during the term of imprisonment imposed. Thus, a person sentenced to a term of imprisonment in excess of the applicable mandatory minimum must serve the entire term of imprisonment imposed, not merely the applicable mandatory minimum.

\* \* \* \*

There are some minor ambiguities in the language of the new Act which could conceivably lead to enforcement problems in some cases. First, the provisions imposing what have been described above as "mandatory minimum terms of imprisonment" provide that offenders sentenced thereunder "shall be sentenced to a term of imprisonment which may not be less than...years, a fine..., or



oth." The underscored language arguably would permit a court to impose either (i) the applicable mandatory minimum term of imprisonment; (ii) a fine in lieu of a term of imprisonment; or (iii) a fine in addition to a term of imprisonment. Thus, defense counsel may argue that these provisions permit the court to impose a fine instead of a term of imprisonment. This argument is clearly without merit for the reasons set forth below.

First, the argument is completely inconsistent with the statutory language as a whole. Each of the mandatory minimum imprisonment provisions precludes placing the defendant on probation and expressly provides that "[n]o person sentenced... shall be eligible for parole during the term of imprisonment imposed...." (Emphasis supplied.) Those provisions also require that "any sentence" imposed thereunder include a "term of supervised release." Compare with 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3), also added by this Act, which allow for terms of supervised release only as to "[a]ny sentence imposing a term of imprisonment...." (Emphasis added.) Under 18 U.S.C. § 3583 (which currently is scheduled to become effective on November 1, 1987), a "term of supervised release," as the name suggests, may only follow a term of imprisonment. Finally, Subtitle C of the new Act -- the "Juvenile Drug Trafficking Act of 1986" (which is to be codified as 21 U.S.C. § 845b) -- specifically states that a person convicted thereunder "of an offense for which a mandatory minimum term of imprisonment is applicable shall not be eligible for parole...until the individual has served the mandatory term of imprisonment required by section 401(b) [21 U.S.C. § 841(b)] as enhanced by this section."

The defense argument is also contradicted by the legislative history of the new drug bill. In discussing the mandatory minimum sentencing provisions of that bill, then-Senate Minority Leader Robert Byrd stated:

[A major drug offender] must know that there will be no escape hatch through which he can avoid a term of years in the penitentiary. He must know in advance exactly how lengthy that prison term is going to be. He must know that no matter how good a lawyer he gets, how experienced, how expensive, how well-known, and how clever and sharp, that lawyer will not be able to keep him out of jail once he has been found guilty in a court of law. And that will be because the laws we

pass will henceforth make it abundantly clear that a jail term must be imposed and must be served.

\* \* \* \*

[Those laws]...will require that for certain crimes involving drugs, the convicted defendant, must -- I repeat must --- be sentenced to the penitentiary. He must serve jail time.... It will not be a matter for judge's discretion for these types of crimes. It will be a requirement imposed by law on the sentencing judge.

\* \* \* \*

We divide these major drug dealers into two groups for purposes of fixing what their required jail terms shall be:

For the kingpins -- the masterminds who are really running these operations -- and they can be identified by the amount of drugs with which they are involved -- we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. If it is their second conviction, the minimum term is 20 years. Again, let us remember, they would have to serve that amount of time, at a minimum, without any chance of parole. This new law would also provide that the judge, if he felt the circumstances warranted, could sentence them to a lot more time than that. In fact, the judge could see to it that they were locked up for life.

Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail -- a minimum of 5 years for the first offense and 10 years for the second. As is the case for the kingpins, those 5- and 10-year

terms are only the mandatory minimums; the judge could, if he believes the circumstances dictate, sentence the middle-level drug dealer to 40 years for a first offense and life imprisonment for a second offense. In no event would such offenders ever become eligible for parole.

132 Cong. Rec. S14301 (daily ed. September 30, 1986).

Similarly, Senator DeConcini, a sponsor of the bi-partisan Senate version of H.R. 5484, stated:

When the penalty structure contained in the bill is in place, the sentences imposed under our criminal code will be served in their entirety. Judges will no longer be able to suspend and offer probation to professional criminals. I believe that the penalties in this bill are severe. But I also believe that the penalties for drug dealers must be severe. If we are to take effective action to reduce drug trafficking, we must let drug dealers know that punishment will be severe, quick, and final.

Id., at S14270. And the section-by-section analysis of the Senate version of H.R. 5484, in describing Title I of the bill (the Drug Penalties Enhancement Act of 1986), states:

The most serious drug traffickers, so-called "drug kingpins," would face a mandatory minimum of ten (10) years, and up to life imprisonment. This bill also increases fines, to reflect the enormous profits generated by drug dealing. [This section also] prohibits suspension of sentences and prohibits probation and parole.

132 Cong. Rec. S13779 (daily ed. September 26, 1986). See also 132 Cong. Rec. S14001 (daily ed. September 27, 1986) (statement of Sen. D'Amato: "this bill provides mandatory prison terms for persons -- 20 years to life for repeat offenders, or if death or serious bodily injury results -- trafficking in specified amounts of certain drugs").

Finally, counsel should note that interpreting the statute to permit the judge to impose a fine instead of the mandatory prison term would lead to an illogical result. The statute

provides maximum, but no minimum, fines. Thus, if the defense argument were correct, the judge could impose a token fine instead of a multi-year prison term with no early release. It is difficult to imagine a court accepting an argument that Congress intended such a result. Similarly, the defense argument would leave the courts with a choice of either imposing no jail term at all or imposing a minimum 5-year jail term (or whatever other minimum jail term applies to the particular offense). The courts would never be free to impose a jail term of between one day and the applicable mandatory minimum. There is no conceivable rationale for this "gap." If Congress had intended to provide the courts with discretion to impose no term at all, it presumably would have done so in the same manner in which it accomplishes this result in practically all criminal statutes, i.e., by permitting the court to impose no term at all or any term up to the statutory maximum.

\* \* \* \*

Another minor ambiguity arises from the distinction drawn between the quantities of "cocaine base" and those for other forms of cocaine in the provisions imposing either the "heavy" (10 years or more) or the "lesser" (5 years or more) mandatory jail terms. For example, the provisions imposing 10-year or greater mandatory jail terms apply not only to offenses involving 5 kilograms or more of a mixture or substance containing a detectable amount of coca leaves, cocaine, or other coca derivatives but also to offenses involving only 50 grams or more of a mixture or substance containing a detectable amount of "cocaine base." "Cocaine base" is the alkaloid form of cocaine, commonly referred to as "crack" or "rock" or "cocaine paste." The reason for the quantitative distinction drawn in the new Act between "cocaine base" and all other forms of cocaine is that the alkaloid forms of cocaine such as "crack" are far more potent and addictive at much lower dosages than the other forms of cocaine, including cocaine hydrochloride (the commonly abused powder form of cocaine). DEA advises, however, that detectable quantities of cocaine base frequently are found in large quantities of cocaine hydrochloride caused by laboratory errors in converting the alkaloid into cocaine hydrochloride. Thus, it is quite possible that a quantity of cocaine hydrochloride weighing more than 50 grams but less than 5 kilograms would contain a detectable, although trace, amount of cocaine base, making it unclear whether a person convicted of a trafficking offense involving such cocaine should be subject to a 10-year or greater mandatory jail term because the mixture or substance weighs more than 50 grams and contains a detectable amount of cocaine base. The other options are either the 5-year or greater mandatory jail term or up to 20 years in prison with no mandatory term depending on whether the mixture or substance consists almost entirely of cocaine hydrochloride and weighs, respectively, between 500 grams and 5,000 grams or under 500 grams. In order to eliminate this uncertainty and because DEA has advised that its laboratories do

not have the resources necessary to determine whether there is a detectable amount of cocaine base present in every exhibit of cocaine hydrochloride they receive, the Department recommends that the lesser quantities applicable to "cocaine base" be used only in cases where the mixture or substance consists primarily of cocaine base (e.g., "crack" or cocaine paste). All other offenses should be charged using the requisite greater quantities applicable to other forms of cocaine. This approach appears to be consistent with the legislative intent. See, e.g., 132 Cong. Rec. S14288 (daily ed. September 30, 1986) (statement of Sen. Chiles: "I am very pleased that the...bill recognizes crack as a distinct and separate drug from cocaine hydrochloride with specified amounts of 5 grams and 50 grams for enhanced penalties.").

There is some question as to whether the mandatory minimum terms of imprisonment under revised 21 U.S.C. §§ 841(b)(1)(A) and (B) and 960(b)(1) and (2) carry over and apply, where otherwise applicable to the underlying offense, to persons convicted of conspiracy or attempt offenses. Both 21 U.S.C. §§ 846 and 963 expressly provide that persons convicted of "conspiracy" or "attempt" thereunder are "punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy" (emphasis added). There is no mention in either section of mandatory minimum terms of imprisonment. While it is clear, therefore, that the maximum terms of imprisonment under 21 U.S.C. § 841(b)(1) or § 960(b) carry over and apply under 21 U.S.C. § 846 or § 963, the same cannot be said with respect to the new mandatory minimum terms of imprisonment. A review of the legislative history of the Anti-Drug Abuse Act of 1986 sheds no light on this issue. Thus, it is necessary to resolve this issue through application of rules of statutory construction. For the reasons set forth below, the Department is taking the position that the mandatory minimum terms of imprisonment (plus the provisions calling for no suspension of sentence nor imposition of probation) under 21 U.S.C. §§ 841(b)(1) and 960(b) do not carry over and apply to conspiracy and attempt offenses. (An open question remains, however, as to whether the maximum term of imprisonment which may be imposed for conspiracy/attempt offenses involving activities punishable under 21 U.S.C. § 841(b)(1)(A) and (B) or § 960(b)(1) and (2) (which all include a specific prohibition on the availability of parole) is the otherwise applicable maximum under those subsections without parole.)

"Rule of Lenity": As a matter of statutory construction, penal statutes are "strictly construed against the Government or parties seeking to exact criminal penalties and in favor of persons on whom such penalties are sought to be imposed." 3 Sutherland Statutory Construction § 59.03, at 6-7 (4th ed. 1974). This principle has been adopted by the Supreme Court as a "rule of lenity" under which "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971). See also Bifulco v. United States, 447 U.S. 381, 387 (1980) (rule of

lenity "applies not only to interpretations of criminal prohibitions but also to the penalties they impose").

In Bifulco, supra, a majority of the Supreme Court applied the "rule of lenity" in holding that "special parole terms" under 21 U.S.C. § 841(b) do not carry over and apply to conspiracy and attempt offenses under 21 U.S.C. § 846. The majority based its decision on the facts that (1) 21 U.S.C. § 846 expressly provides that persons convicted thereunder are "punishable by imprisonment or fine or both" but fails to make any mention of "special parole terms," and (2) the legislative history of the Controlled Substances Act is silent on whether Congress intended that special parole terms carry over and apply. Id., at 388-98. The same may be said with respect to mandatory minimum terms of imprisonment under 21 U.S.C. §§ 841(b)(1) and 960(b): both 21 U.S.C. §§ 846 and 963 provide for imposition of terms of imprisonment up to the maximum set forth for the underlying offense but say nothing of mandatory minimum terms of imprisonment nor do they address probation, parole, or suspension of the sentence; moreover, the legislative history of the Anti-Drug Abuse Act is silent on whether Congress intended that "mandatory minimums" be imposed for conspiracy and attempt offenses. Thus, Bifulco is strong persuasive authority that mandatory minimum terms of imprisonment should not carry over and apply to such offenses.

Expressio unius es exclusio alterius: One might attempt to distinguish Bifulco by arguing that (1) while neither 21 U.S.C. § 846 nor § 963 provide for imposition of "special parole terms," both provide for "imprisonment" up to the statutory maximum, and (2) because mandatory minimum terms of imprisonment under 21 U.S.C. §§ 841(b)(1) and 960(b) are terms of "imprisonment" well within the statutory maximum, they can -- and must -- be imposed under 21 U.S.C. §§ 846 and 963. But this argument simply ignores the fact that where Congress intended mandatory minimum terms of imprisonment under 21 U.S.C. § 841(b) to apply to other sections of the Controlled Substances Act it made its intent explicit. See, e.g., 21 U.S.C. § 845b(b) (providing that persons convicted thereunder shall be subject to up to twice the term of imprisonment, fine, and term of supervised release otherwise authorized for the underlying offense and adding that "[e]xcept to the extent a greater minimum sentence is otherwise provided, a term of imprisonment under this subsection shall not be less than one year") (emphasis added); 21 U.S.C. § 845b(c) (same); 21 U.S.C. § 845b(e) ("[a]n individual convicted under this section of an offense for which a mandatory minimum term of imprisonment is applicable shall not be eligible for parole...until the individual has served the mandatory term of imprisonment required by section 401(b) [21 U.S.C. § 841(b)] as enhanced by this section"). There is a canon of statutory construction, generally referred to as "expressio unius es exclusio alterius," which provides that "where Congress includes particular language in one section of a statute but omits it in

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." 27/ Thus, the express inclusion of provisions in 21 U.S.C. § 845b incorporating the mandatory minimum terms of imprisonment under 21 U.S.C. § 841(b) and the omission of any similar provisions in 21 U.S.C. §§ 846 and 963 create a presumption that Congress intended that the mandatory minimum terms of imprisonment should not apply under the latter sections.

Legislative intent: Neither of the foregoing rules of statutory construction may be so rigidly applied as to defeat the intent of Congress. See, e.g., Liparota v. United States, \_\_\_ U.S. \_\_\_, 105 S.Ct. 2084, 2089 (1985) ("rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress"); Campbell v. Wells Fargo Bank, N.A., 781 F.2d 440, 442 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2279 (1986) ("controlling consideration is legislative intent and the maxim ["expressio unius..."] can be overcome by a strong indication of contrary congressional intent"). Unfortunately, the legislative history of the Anti-Drug Abuse Act of 1986 affords no guidance as to whether Congress intended that the mandatory minimum jail terms under 21 U.S.C. §§ 841(b) and 960(b) carry over and apply to "conspiracy" and "attempt" offenses under 21 U.S.C. § 846 or § 963.

A colorable argument can be made, of course, that Congress, in amending 21 U.S.C. §§ 841(b) and 960(b), clearly intended that persons who traffic in major quantities of certain controlled substances be subject to substantial and mandatory jail terms and, therefore, must also have intended that persons who conspire or attempt to traffic in such major quantities of the same controlled substances be subject to the same mandatory jail terms. Unfortunately, the Bifulco majority rejected a similar argument made with respect to "special parole terms." First, it noted that "[w]hen one focuses on the fact that [21 U.S.C. § 846] penalizes attempts as well as conspiracies, it is not surprising that Congress would provide for less stringent sanctions to be imposed for violations of that provision than for a completed substantive offense." Bifulco, 447 U.S. at 399.

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27/ United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972) (quoted with approval in Russello v. United States, 464 U.S. 16, 23 (1983)). See also J. Ray McDermott & Co., Inc., v. Vessel Morning Star, 457 F.2d 815, 818 (5th Cir.), cert. denied, sub nom. Fish Meal Co. v. J. Ray McDermott & Co., Inc., 409 U.S. 948 (1972) ("Where Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded.").

Second, with respect to conspiracy offenses, the majority noted that "nothing prevents the Government from prosecuting [persons charged with conspiracy] as principals or as aiders and abettors, for substantive [drug-trafficking] offenses" under 21 U.S.C. § 841 and thereby subjecting them to the penalty provisions of that section. Id., at 400 n.16. <sup>28/</sup> Finally, the majority noted that members of particularly large-scale drug conspiracies may be subject to special provisions, including the continuing criminal enterprise statute (21 U.S.C. § 848) and dangerous special drug offender statutes (21 U.S.C. § 849(e)(2) and (3)), which impose especially severe sanctions. Id. The same reasons may be advanced as grounds for holding that the mandatory minimum terms of imprisonment under 21 U.S.C. §§ 841(b)(1) and 960(b) were not intended by Congress to carry over and apply to conspiracy and attempt offenses under 21 U.S.C. §§ 846 and 963.

Conclusion: The Department believes, based on the foregoing authorities, that most courts would conclude that the mandatory minimum terms of imprisonment under 21 U.S.C. §§ 841(b)(1) and 960(b) do not carry over and apply to "conspiracy" and "attempt" offenses under 21 U.S.C. §§ 846 and 963. While the issue is not entirely free of doubt, there appears to be no truly convincing argument to the contrary. Moreover, the Supreme Court has directed that any such doubts "be resolved in accord with the rule of lenity." Bifulco, 447 U.S. at 440. The Department is therefore considering recommending to Congress that it amend 21 U.S.C. §§ 846 and 963 so that those provisions expressly incorporate the mandatory minimum terms of imprisonment under 21 U.S.C. §§ 841(b)(1) and 960(b). Unless and until Congress acts, however, federal prosecutors should take the position that the mandatory minimum terms of imprisonment do not carry over and apply.

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The Department recommends that where the enhanced and mandatory minimum penalty provisions of 21 U.S.C. §§ 841(b)(1) and 960(b), as amended, are based upon the kind and quantity of drug involved in the particular offenses (e.g., 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 960(b)(1) and 960(b)(2), as well as 841(b)(1)(c) and 960(b)(3) for certain marihuana, hashish, and hashish oil offenses), both the kind and the quantity of the drug be specified in the indictment and proven at trial. See, e.g., United States v. McHugh, 769 F.2d 860, 867-68 (1st Cir. 1985)

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<sup>28/</sup> Conspirators convicted under 21 U.S.C. § 846 or § 963 might also be vicariously liable for substantive offenses committed by their co-conspirators in furtherance of the conspiracy. See Pinkerton v. United States, 328 U.S. 640 (1946).



(noting, in dictum, that "proving the amount of mari[h]uana is an essential element of the offense...under 21 U.S.C. § 841(b)(6)," which provided enhanced penalties for persons convicted of trafficking quantities of marihuana in excess of 1,000 pounds); United States v. Webster, 750 F.2d 307, 331-34 (11th Cir. 1984), cert. denied, \_\_\_ U.S. \_\_\_, 105 S.Ct. 2340 (1985); United States v. Alvarez, 735 F.2d 461, 466-68 (11th Cir. 1984). But see McMillan v. Pennsylvania, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2411 (1986) (upholding state sentencing statute imposing mandatory minimum jail terms for visible possession of a firearm during commission of enumerated offenses and specifically providing that visible possession of firearm was not an element of the offense and was to be established at sentencing by a preponderance of the evidence). However, it is not necessary to plead or prove that the defendant knew the quantity (or, presumably, the kind) of drug involved in the offense. See United States v. Normandeau, 800 F.2d 953, 956 (9th Cir. 1986). The same recommendation applies to those enhanced and mandatory minimum penalties which apply where death or serious bodily injury has resulted from use of the substance in question. See Jordan v. United States District Court, 233 F.2d 362, 367 (D.C. Cir.), vacated and remanded on other grounds, 352 U.S. 904 (1956) ("facts in aggravation [of sentence] must be charged in the indictment and found to be true by the jury"). Accord United States v. Moore, 540 F.2d 1088, 1089-91 (D.C. Cir. 1976) (construing penalty enhancement provisions of 21 U.S.C. § 845(a)). Imposition of those enhanced or mandatory minimum penalty provisions applicable to persons with prior drug-related convictions will continue to be governed by the notice provisions of 21 U.S.C. § 851.

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The provisions of 21 U.S.C. §§ 841(b) and 960(b), as amended, are silent as to whether the terms of imprisonment provided thereunder, including any mandatory minimum terms of imprisonment, are to run concurrently or consecutively where a defendant is convicted of more than one federal drug-trafficking offense. Thus, it must be presumed that terms of imprisonment imposed for such multiple offenses will run concurrently unless the sentencing court specifically directs that they are to run consecutively. See, e.g., Causey v. Civiletti, 621 F.2d 691, 693 n.2 (5th Cir. 1980). Accord United States v. Naas, 755 F.2d 1133, 1136 (5th Cir. 1985) (citing cases). 29/ Counsel should

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29/ However, this rule of presumptive concurrence does not apply and is, in fact, reversed, where one sentence is imposed by a federal court and the other by a state court. See, e.g., Causey, 621 F.2d at 693 n.2; Gomori v. Arnold 533 F.2d 871, 875-76 (3rd

(Footnote Continued)

note in this regard that when the Sentencing Reform Act of 1984 takes effect (currently scheduled for November 1, 1987), 18 U.S.C. § 3584 will provide that, where the judge does not specify whether sentences are consecutive or concurrent, sentences imposed at the same time will run concurrently and sentences imposed at different times will run consecutively. This rule will apply irrespective of whether a sentence already being served at the time of sentencing on a new federal offense is a state or federal sentence. See S. Rep. No. 225, 98th Cong., 1st Sess. 125-128 (1983). 18 U.S.C. § 3584 will also provide that the courts are free to specify whether the sentences are to run consecutively or concurrently.

F. Fine Provisions Under 21 U.S.C. §§ 841(b)(1)(A), (B), and (C) and 960(b)(1), (2), and (3).

The fine provisions applicable to "repeat drug offenders" under 21 U.S.C. §§ 841(b)(1)(A) and (B) and 960(b)(1) and (2) - unlike the provisions applicable to "first-time drug offenders" - use the phrase "shall be sentenced" in two clauses separated by the word "and." This seemingly innocuous language could lead to a defense argument that "first-time drug offenders" under Subsections 841(b)(1)(A) or (B) and 960(b)(1) or (2) are clearly subject to jail terms and fines in all cases whereas "repeat drug offenders" under those subsections arguably are subject to fines (in addition to the prescribed term of imprisonment) only in cases where death or serious bodily injury has resulted from use of the substance in question. To illustrate this point, the penalty provisions applicable to "repeat drug offenders" under Subsections 841(b)(1)(A) and 960(b)(1) might be set forth as follows:

"If any person commits such a violation after one or more prior convictions..., such person:

(i) shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and

(ii) if death or serious bodily injury results from the use of such substance shall be sentenced to life

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(Footnote Continued)

Cir.), cert. denied, 429 U.S. 851 (1976) (where federal district judge does not request and Attorney General does not designate that federal sentence run concurrently with sentence imposed by state court, federal sentence does not begin to run until person is received into federal custody).

imprisonment, a fine..., or both."  
[Emphasis and subsection numbers supplied.]

This result defies common sense and there is no evidence in the legislative history to suggest that Congress intended that "first-time drug offenders" be subject to fines in all cases but that "repeat drug offenders" be subject to fines only where death or serious bodily injury has resulted from use of the substance in question. The Department may be requesting that Congress enact technical amendments to correct this problem. In the interim, Government counsel must be prepared to argue that the fine provisions applicable to "repeat drug offenders" under Subsections 841(b)(1)(A) and (B) and 960(b)(1) and (2) apply to all offenses thereunder irrespective of whether death or serious bodily injury has resulted from use of the substance in question.

Although it is an elementary rule of statutory construction that effect must be given - if possible - to every word, clause, or sentence of a statute, it has been said that "words and clauses which are present in a statute only through inadvertence can be disregarded if they are repugnant to what is found, on the basis of other indicia, to be the legislative intent."

2A Sutherland Statutory Construction § 46.06, at 104 (4th ed. 1984). Indeed, a majority of cases permit the elimination or disregarding of words in a statute in order to carry out the legislative intent and hold that words may be disregarded or eliminated where, inter alia, "the word[s] [are] found in the statute due to the inadvertence of the legislature,...where [it is] apparent from the context of the act that the word[s] [were] a mere inaccuracy, or clearly apparent mishap, or [they were] obviously erroneously inserted,...[or] where it is necessary to avoid inconsistencies and to make the provisions of the act harmonize...." Id., § 47.37, at 258 (footnotes omitted). As mentioned earlier, the second phrase "shall be sentenced" in the fine provisions applicable to "repeat drug offenders" under Subsections 841(b)(1)(A) and (B) and 960(b)(1) and (2) does not appear in the companion fine provisions applicable to "first-time drug offenders" under those subsections, giving rise to the incongruous result that "first-time drug offenses" under those subsections clearly face fines in all cases whereas "repeat drug offenders" under those subsections arguably face fines only in cases where death or serious bodily injury has resulted from use of the substance in question. There is no indication in the legislative history that Congress intended this result. Thus, when responding to a defense challenge on this point, Government counsel should argue that the second phrase "shall be sentenced" in the fine provisions applicable to "repeat drug offenders" under Subsections 841(b)(1)(A) and (B) and 960(b)(1) and (2) was inadvertently inserted and constitutes mere surplusage that courts should, therefore, disregard in order to harmonize those provisions with the fine provisions applicable to "first-time

drug offenders" under those subsections. The absence of any form of punctuation (comma, semi-colon, or period) before the phrase "and if death or serious bodily injury results..." lends weight to this argument. *Id.*, § 47.15 at 157 ("[W]hen...intent is uncertain, punctuation may be looked to as an aid if it affords some indication of the true intention.").

A similar problem is presented by new Subsections 841(b)(1)(C) and 960(b)(3) where the problematic second phrase "shall be sentenced" appears in both the penalty provisions relating to "first-time drug offenders" and those relating to "repeat drug offenders." As a result, it is arguable that the fine provisions of those subsections apply only in cases where death or serious bodily injury has resulted from use of the substance in question. However, the absence of any form of punctuation (e.g., comma, semi-colon, or period) before the phrase "and if death or serious bodily injury results" indicates that Congress intended the fine provisions to apply in all cases. Moreover, the fine provisions of these subsections should be interpreted consistently with their companion provisions in Subsections 841(b)(1)(A) and (B) and 960(b)(1) and (2). *Id.*, § 46.05 at 90-92. As shown above, it appears that Congress intended the fine provisions of the latter subsections to apply in all cases.

#### G. Other Amendments Affecting Penalties

Former Subsections 841(b)(1)(C) [now codified as Subsection 841(b)(1)(D)] and 960(b)(3) [now codified as Subsection 960(b)(4)] of Title 21, United States Code - which apply to drug-trafficking offenses involving less than 50 kilograms of marihuana, 10 kilograms of hashish, or 1 kilogram of hashish oil, or any Schedule III substance (and Schedule IV and V substances for importation or exportation offenses) - are now amended to raise the fine applicable to persons who have no prior final drug-related felony convictions from a maximum of \$50,000 to an amount not to exceed the greater of that authorized under Title 18, United States Code, 30/ or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual. The fine applicable to persons who have such prior, final drug-related felony convictions has been raised from a maximum of \$100,000 to an amount not to exceed the greater of twice that authorized under Title 18, United States Code, 31/ or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual. The terms of imprisonment under this subsection remain unchanged. It should be noted that

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30/ See note 3, *supra*.

31/ *Id.*

an exception is made where the marihuana weighs less than 50 kilograms for offenses that involves 100 or more marihuana plants; such offenses are punishable under the more severe provisions of new Subsection 841(b)(1)(C) and 960(b)(3), which are discussed supra in Section C. The purpose of this exception is to deter the cultivation of marihuana.

Subsection 841(b)(2) of Title 21, United States Code - which applies to drug-trafficking offenses involving Schedule IV substances - is amended so that the fine applicable to persons with no prior, final drug-related felony conviction is raised from a maximum of \$25,000 to an amount not to exceed the greater of that authorized under Title 18, United States Code, 32/ or \$250,000 if the defendant is an individual, or \$1,000,000 if the defendant is other than an individual. The fine applicable to persons who have prior, final drug-related felony convictions is now raised from a maximum of \$50,000 to an amount not to exceed the greater of twice that authorized under Title 18, United States Code, 33/ or \$500,000 if the defendant is an individual, or \$2,000,000 if the defendant is other than an individual. The terms of imprisonment under this subsection remain unchanged.

Subsection 841(b)(3) of Title 21, United States Code - which applies to drug-trafficking offenses involving Schedule V substances - has been amended to raise the fine applicable to persons who have no prior, final drug-related felony convictions from a maximum of \$10,000 to an amount not to exceed the greater of that authorized under Title 18, United States Code, 34/ or \$100,000 if the defendant is an individual or \$250,000 if the defendant is other than an individual. The fine applicable to persons who have prior, final drug-related felony convictions has been raised from a maximum of \$20,000 to an amount not to exceed the greater of twice that authorized under Title 18, United States Code, 35/ or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual. The terms of imprisonment under this subsection remain unchanged.

Subsection 841(b)(5) of Title 21, United States Code - which applies to offenses involving cultivation of controlled substances on federal property - has been amended to specifically provide that offenders "shall be imprisoned as provided in this

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32/ Id.

33/ Id.

34/ Id.

35/ Id.

subsection" and shall be fined any amount not to exceed: (1) the amount authorized in accordance with Section 841; (2) the amount authorized under Title 18, United States Code, 36/ (3) \$500,000 if the defendant is an individual; or (4) \$1,000,000 if the defendant is other than an individual. Thus, if an offense involves the cultivation on federal property of 100 or more marihuana plants even if they weigh less than 100 kilograms 37/ and the defendant has no prior drug-related convictions, he/she may be fined up to \$1,000,000 because that is the amount specified in Subsection 841(b)(1)(C) for individual defendants.

Subsection 841(d) of Title 21, United States Code - which applies to possessory offenses involving piperidine - is amended to raise the fine from a maximum of \$15,000 to an amount not to exceed the greater of that authorized under Title 18, United States Code, 38/ or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual. The term of imprisonment under that subsection remains unchanged.

H. Deletion of "Special Parole Terms" and Substitution of "Terms of Supervised Release"

Subtitle A of Title I of the new Act also provides that the words "special parole term" will be deleted wherever they appear in the Controlled Substances Act and the Controlled Substances Import and Export Act and will be replaced by the words "term of supervised release" when 18 U.S.C. § 3583 becomes effective. The latter statute, which defines and implements the new "terms of supervised release," currently is scheduled to take effect on November 1, 1987. 39/

A somewhat difficult problem is presented by the fact that new Subsections 841(b)(1)(A), (B), and (C) and 960(b)(1), (2), and (3) - which became effective as of October 27, 1986 - require that a "term of supervised release" be imposed in every case in which a term of imprisonment is imposed. No mention is made of

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36/ Id.

37/ See note 1, supra.

38/ See note 3, supra.

39/ It should be noted, however, that the effective date of 18 U.S.C. § 3583 previously has been, and may again be, postponed. See Pub. L. 99-217, at Section 4 (effective September 26, 1985).

"special parole terms." 40/ Thus, federal courts currently must impose a "term of supervised release" in all such cases even though the provisions of Title 18 implementing the enforcement provisions applicable thereto will not become effective until November 1, 1987. This will not present a problem in cases in which the defendant's term of imprisonment is sufficiently long that he/she will not be released until 18 U.S.C. § 3583 becomes effective. The legislation is, however, silent as to what enforcement action may be taken against a defendant sentenced under the new provisions of Subsections 841(b)(1) or 960(b) who is released from prison and violates the terms or conditions of his/her "term of supervised release" prior to November 1, 1987. Corrective legislation may be sought in this area.

There will be no such problem, however, with respect to sentences imposed under Subsections 841(b)(1)(D) [formerly Subsection 841(b)(1)(C)] and 960(b)(4) [formerly Subsection 960(b)(3)]. Those subsections, as amended under the new Act, continue to provide for imposition of "special parole terms" in all cases in which a term of imprisonment is also imposed. Thus, courts should continue to impose "special parole terms" under those subsections until the amending language takes effect on November 1, 1987, after which time courts should impose "terms of supervised release."

#### Policy Considerations

In addition to the comments previously made regarding specific provisions of Subtitles A and G of Title I of the new Act, counsel should be aware of the ex post facto ramifications of the new Act. The Supreme Court repeatedly has held that "the ex post facto prohibition [of U.S. Const. art. IX, § 1, cl. 3]... forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." Weaver v. Graham, 450 U.S. 24, 30 (1981) (citing and discussing cases) (emphasis deleted). Thus, courts may only impose the penalties in effect on the date the offense in question was completed, not those in effect on the date of sentencing to the

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40/ At least one federal court has ruled that "special parole terms" may no longer be imposed under 21 U.S.C. § 841(b)(1)(B), as amended by the Anti-Drug Abuse Act of 1986. See United States v. Phungphiphadhana, 640 F. Supp. 88 (D. Nev. 1986). As stated in the text, the Department agrees with this decision. The Department believes that "terms of supervised release" - not "special parole terms" - should now be imposed under 21 U.S.C. §§ 841(b)(1)(A), (B), and (C) and 960(b)(1), (2), and (3), as amended, whenever a term of imprisonment is imposed.

extent the latter are more severe. See United States ex rel. Forman v. McCall, 709 F.2d 852, 856 (3rd Cir. 1983) (citing cases). Because conspiracies are deemed to be continuing offenses, conspiracies which began before but continue after the date that the more severe penalties became effective are subject to the more severe penalties. See, e.g., United States v. Baresh, 790 F.2d 392, 404 (5th Cir. 1986); United States v. Campanale, 518 F.2d 352, 365 (9th Cir. 1975) (citing cases). Similarly, a defendant who planned a distribution offense under 21 U.S.C. § 841(a) prior to the effective date of the new Act but distributed the drugs and received payment after the effective date, would be subject to the new, more severe, penalties. The new Act became effective on October 27, 1986, at 2:42 p.m. EST. Thus, new enhanced penalties described above should not be imposed for any offense that was completed before that date and time.

#### Criminal Division Contact

Questions concerning the provisions of Subtitles A and G of Title I of the new Act should be directed to Harry Harbin or Gary Schneider (786-4700) in the Narcotic and Dangerous Drug Section. In addition, copies of significant pleadings or decisions regarding the new penalty provisions should be sent to the Narcotic and Dangerous Drug Section, Criminal Division, Department of Justice, 1400 New York Avenue, N.W., Washington, D.C. 20005.



## Title I, Subtitle B - Drug Possession Penalty Act of 1986

### Summary

Subtitle B of Title I of the new Act amends Section 404 of the Controlled Substances Act (21 U.S.C. § 844) to impose mandatory minimum penalties for offenses involving the simple possession of controlled substances.

### Analysis and Discussion

Persons convicted of simple possession offenses under amended 21 U.S.C. § 844(a) who have no prior, final drug-related convictions must now be fined not less than \$1,000 nor more than \$5,000 <sup>41/</sup> and may also be sentenced to not more than one year in prison. <sup>42/</sup> Persons who have one prior, final federal or

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<sup>41/</sup> The Department is taking the position that the alternative fine provisions of 18 U.S.C. § 3623, as enacted by Section 6(a) of Pub. L. 98-596, which are currently in effect, do not apply to offenses under 21 U.S.C. § 844. The basis for this position is that where Congress intended for such fines to apply under the various provisions of the Anti-Drug Abuse Act of 1986 it expressly provided for imposition of such fines. However, in amending 21 U.S.C. § 844, Congress made no mention of the fines available under Title 18. Application of the maxim of statutory construction "expressio unius es exclusio alterius" leads to the conclusion that Congress, by including references to the fines available under Title 18 in certain provisions of the Act but omitting them from others (including 21 U.S.C. § 844), acted intentionally in the disparate inclusion and exclusion, and, therefore, that the alternative fine provisions of Title 18 do not apply unless expressly mentioned in the statutory provision. See, e.g., United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972) (quoted with approval in Russello v. United States, 464 U.S. 16, 23 (1983)). See also Appendix B.

<sup>42/</sup> The new Act also provides that courts may place such "first-time drug offenders" on probation without entering a judgment of guilty. Upon successful completion of the term of probation (or earlier if the court believes such action is warranted), the court may discharge the offender and dismiss the proceedings against him/her. Such discharge and dismissal may only be granted once to each individual offender. The Department is required to make and maintain a non-public record of persons whose convictions were deferred and discharged to insure that no one person gets the benefit of this treatment more than once.

state 43/ drug-related conviction must be sentenced to a mandatory minimum term of imprisonment of 15 days (up to a maximum of two years) and must be fined not less than \$2,500 or more than \$10,000. 44/ Persons who have two or more prior, final drug-related convictions must be sentenced to a minimum of 90 days in prison (up to a maximum of three years) and must be fined not less than \$5,000 nor more than \$25,000. 45/ A mandatory minimum term of imprisonment imposed under this section may not be suspended or deferred. A person convicted of simple possession must also pay the costs of investigation and prosecution of the offense. 46/

### Policy Considerations

The enactment of this provision is not intended to extend federal jurisdiction into an area traditionally reserved for local authorities. It is expected that this crime will continue to be charged only when other authorities lack jurisdiction over this offense.

The same ex post facto concerns mentioned earlier with respect to Subtitles A and G of Title I of the new Act apply to offenses under this Subtitle as well. Thus, counsel should not seek imposition of the new enhanced and "mandatory minimum" penalties for possessory offenses which occurred before 2:42 p.m. EST on October 27, 1986.

Proof of prior drug-related convictions will continue to be governed by 21 U.S.C. § 851.

### Criminal Division Contact

Questions concerning the provisions of Title I, Subtitle B, of the new Act should be directed to Harry Harbin or

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43/ Note that the "repeat drug offender" penalties under this section, unlike those under 21 U.S.C. § 841(b), do not apply to persons with prior, final foreign drug-related convictions.

44/ See note 41, supra.

45/ Id.

46/ Refer to Section 9-123.000 of the United States Attorneys' Manual concerning "costs of prosecution." There currently are no guidelines concerning recovery of "costs of investigation." Counsel are urged to be conservative in calculating recoverable costs under this provision, to seek only costs which are clearly justifiable, and to document hours and other forms of "cost" whenever possible.

Gary Schneider (786-4700) in the Narcotic and Dangerous Drug Section. In addition, copies of significant pleadings or decisions regarding the new penalty provisions should be sent to the Narcotic and Dangerous Drug Section, Criminal Division, Department of Justice, 1400 New York Avenue, N.W., Washington, D.C. 20005.

## Title I, Subtitle C - Juvenile Drug Trafficking Act of 1986

### Summary

Subtitle C of Title I - the "Juvenile Drug Trafficking Act of 1986" - creates new offenses with penalties substantially enhanced over those provided in 21 U.S.C. §§ 841(b) and 960(b). The new penalties are applicable to (1) persons who employ or use juveniles to commit offenses under Title 21 or to avoid detection or apprehension by law enforcement officials for such offenses and (2) persons who distribute drugs to pregnant women. Subtitle C also substantially amends the penalty provisions of 21 U.S.C. § 845 (distributions to persons under age 21) and the offense and penalty provisions of 21 U.S.C. § 845a (distribution in or near schools).

### Analysis and Discussion

#### A. Juvenile Drug Trafficking and Distribution to Pregnant Women [21 U.S.C. § 845b]

Subtitle C of Title I of the new Act creates a new offense (which is to be codified at 21 U.S.C. § 845b) with penalties substantially enhanced over those provided under 21 U.S.C. § 841(b) or § 960(b) for any person at least 18 years of age who knowingly and intentionally employs, hires, uses, persuades, induces, entices, or coerces any person under 18 years of age to either (1) violate any provision of the Controlled Substances Act or the Controlled Substances Import and Export Act or (2) assist in avoiding detection or apprehension by any federal, state, or local law enforcement official for any offense under those Acts. The same enhanced penalties will apply to any person who knowingly and intentionally provides or distributes any controlled substance to a pregnant woman in violation of the Controlled Substances Act. <sup>47/</sup> Any person convicted under these provisions who has no prior, final convictions under this section is punishable by up to twice the otherwise applicable term of imprisonment (including any applicable mandatory minimum term of imprisonment) and/or fine, and at least twice the otherwise applicable term of supervised release, as provided for in the underlying provision of the Controlled Substances Act or the

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<sup>47/</sup> 21 U.S.C. § 845b(f). Counsel should note that the subsection relating to distribution to pregnant women, unlike the subsection relating to employment of juveniles, applies only to those who "provide or distribute" controlled substances to pregnant women. It does not expressly refer to non-distribution offenses under Title III (the Controlled Substances Import and Export Act) and therefore does not encompass such offenses.

Controlled Substances Import and Export Act, as amended. In no case, however, may such a person be sentenced to less than a one-year term of imprisonment. Offenders who have any prior, final convictions under this new section are punishable by up to three times the otherwise applicable term of imprisonment (including any applicable mandatory minimum term of imprisonment) and/or fine, and at least three times the applicable term of supervised release. In no case, however, may such a person be sentenced to less than a one-year term of imprisonment.

This section of the new Act also provides for supplementary penalties if (1) the person over eighteen who knowingly and intentionally employs, hires, uses, persuades, induces, entices, or coerces a person under eighteen for either of the aforementioned purposes also knowingly provides or distributes a controlled substance or controlled substance analogue to a person under eighteen, or (2) the person employed, hired, or used is fourteen years of age or younger. In all such cases, a term of imprisonment of not more than five years and/or a fine of not more than \$50,000 may be imposed in addition to the enhanced penalties described above.

Any sentence imposed under this new section may not be suspended and probation may not be granted. See 21 U.S.C. § 845b(e). That subsection also provides that a person convicted thereunder "of an offense for which a mandatory minimum term of imprisonment is applicable shall not be eligible for parole... until the individual has served the mandatory term of imprisonment required by section 401(b) [21 U.S.C. § 841(b)] 48/ as enhanced by this section." As set forth below, this language creates considerable ambiguity concerning the imposition of any applicable mandatory minimum terms of imprisonment for offenses under this section.

Note that the penalty provisions of this section - 21 U.S.C. § 845b(b) and (c) - each provide that a person convicted of an offense shall be "punishable by a term of imprisonment up to twice [or "three times"] that otherwise authorized, or up to twice [or "three times"] the fine otherwise authorized, or both, and at least twice [or "three times"] any term of supervised release otherwise authorized for a first offense." The Department interprets this language as incorporating and multiplying the maximum penalties applicable to the underlying offense. The penalty provisions go on to provide that "[e]xcept

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48/ Apparently as a result of oversight, Congress omitted any reference to the mandatory minimum terms of imprisonment required by Section 1010(b) of the Controlled Substances Import and Export Act [21 U.S.C. § 960(b)] even though such penalties might apply to violations of 21 U.S.C. § 845b(a)(1) and (2).

to the extent a greater minimum term is otherwise provided, a term of imprisonment under this subsection shall not be less than one year." The Department interprets this part of the penalty provisions as incorporating, but not multiplying, any mandatory minimum terms of imprisonment which apply to the underlying offense. The term would be non-parolable until after the mandatory minimum portion of the sentence was served.

The aforementioned ambiguity is presented by the fact that the parole provision codified at 21 U.S.C. § 845b(e) specifically provides that "[a]n individual convicted under this section of an offense for which a mandatory minimum term of imprisonment is applicable shall not be eligible for parole...until the individual has served the mandatory term of imprisonment required by section 401(b) [21 U.S.C. § 841(b)] as enhanced by this section." The underscored language arguably contemplates that any applicable mandatory minimum term of imprisonment under 21 U.S.C. § 841(b) is to be doubled [or tripled under 21 U.S.C. § 845b(c)] and that no person subject to such a "multiplied" mandatory minimum term of imprisonment may become eligible for parole until the "multiplied" minimum term has been served. It would be illogical, however, for Congress to provide for enhancement of mandatory minimum terms of imprisonment in a provision relating to parole but not in the provisions relating to penalties. (Note, again, that the penalty provisions state that offenders are punishable by "a term of imprisonment up to twice [or "three times"] that otherwise authorized.") The Department believes that the "rule of lenity" requires that this ambiguity be resolved against the Government and in favor of criminal defendants. 49/ Thus, the Department recommends that Government counsel interpret the penalty provisions under 21 U.S.C. § 845b(b) and (c) as requiring a court to impose any applicable mandatory minimum term of imprisonment, during which a defendant shall not be eligible for parole, and permitting the court to impose up to twice (or three times) the maximum term of imprisonment applicable to the underlying offense.

The Department does not interpret the parole provision as meaning that a defendant shall be eligible for parole once the applicable mandatory minimum term of imprisonment is served. Indeed, the statute provides only that a defendant "shall not become eligible for parole" until that time. The date on which a defendant actually becomes eligible for parole is to be

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49/ See discussion in Subpart "vi," supra, in the analysis of Title I, Subtitles A and G, of the Act.

determined through reference to the parole guidelines and the forthcoming sentencing guidelines. The parole provision of 21 U.S.C. § 845b(e) is implicated only where application of those guidelines would result in a defendant becoming eligible for parole prior to completion of the applicable mandatory minimum term of imprisonment. In such cases, the terms of the statute control over the guidelines. In all other cases, the guidelines control when the defendant becomes eligible for parole.

For example, a defendant convicted of violating 21 U.S.C. § 845b and sentenced to a term of imprisonment of 40 years would not become eligible for parole until after serving at least 10 years if the "term of imprisonment...otherwise authorized" were that provided by 21 U.S.C. § 841(b)(1)(A) or § 960(b)(1), or at least 5 years if the "term of imprisonment...otherwise authorized" were that provided by 21 U.S.C. § 841(b)(1)(B) or § 960(b)(2). If the "term of imprisonment...otherwise authorized" were that provided by 21 U.S.C. § 841(b)(1)(C), 846, 960(b)(3), or 963, none of which carries a mandatory minimum term of imprisonment, then 21 U.S.C. § 845b(c) provides that the defendant shall receive a mandatory minimum sentence of one year in prison, and the defendant would not become eligible for parole until he/she served at least the mandatory minimum sentence of one year. The parole guidelines and forthcoming sentencing guidelines would determine the date of the defendant's parole eligibility after the applicable mandatory minimum term of imprisonment had been served. It should also be noted that, in most cases, the sentence imposed under 21 U.S.C. § 845b will be in addition to a sentence imposed for the underlying offense under some other provision of the Controlled Substances Act or the Controlled Substances Import and Export Act. Under many of those provisions, parole is not available, and any term of imprisonment imposed must be served in its entirety. See, e.g., 21 U.S.C. §§ 841(b)(1)(A) and (B) and 960(b)(1) and (2). Thus, a defendant convicted of a distribution offense under 21 U.S.C. § 841(b)(1)(A) and of an offense under 21 U.S.C. § 845b for employing a juvenile to assist in the distribution would not become eligible for parole until the entire term of imprisonment imposed for the Subsection 841(b)(1)(A) offense had been served, notwithstanding the language of 21 U.S.C. § 845b(e).

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The age(s) of the juvenile(s) involved in the offense or the fact that the distributee was pregnant are elements of the offense under Section 845b which must be alleged in the indictment and proven at trial. See United States v. Moore, 540 F.2d 1088, 1089-91 (D.C. Cir. 1976) (construing 21 U.S.C. § 845); United States v. Cunningham, 615 F. Supp. 519, 521 (S.D.N.Y. 1985). However, it is not necessary to prove that the defendant knew the age of the person employed, hired, used, etc.,

or in cases involving distributions to pregnant women, that the defendant knew that the recipient of the controlled substances was pregnant. See United States v. Pruitt, 763 F.2d 1256, 1261-62 (11th Cir. 1985), cert. denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 856 (1986) (interpreting 21 U.S.C. § 845). It is only the act of employment, use, or distribution which must be knowing or intentional. Id.

B. Amendments to the "Schoolyard Statute"

Subtitle C of the Act also amends Subsection 405A(a) of the Controlled Substances Act (21 U.S.C. § 845a(a)) by making it illegal to manufacture as well as distribute controlled substances within 1,000 feet of "a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university." It further amends the "schoolyard statute," at 21 U.S.C. § 845a(b), to provide that second or subsequent offenders thereunder are punishable "(1) by the greater of (A) a term of imprisonment of not less than three years and not more than life imprisonment or (B) a term of imprisonment of up to three times that authorized by [21 U.S.C. § 841(b)] for a first offense, or a fine up to three times that authorized by [21 U.S.C. § 841(b)] for a first offense, or both, and (2) at least three times any term of supervised release authorized by [21 U.S.C. § 841(b)] for a first offense."

C. Other Amendments to Subsections 405(a), 405(b), and 405A(a) of the Controlled Substances Act (21 U.S.C. §§ 845(a), 845(b), and 845a(a))

Subtitle C of the Act amends Subsections 405(a) and 405(b) of the Controlled Substances Act (21 U.S.C. § 845(a) and (b)) to provide that "[e]xcept to the extent a greater minimum sentence is otherwise provided by section 401(b) [21 U.S.C. § 841(b)], a term of imprisonment under [either Subsection 845(a) or (b)] shall be not less than one year." Thus, a term of imprisonment of at least one year must now be imposed for any offense under these provisions. Moreover, it appears that the new mandatory minimum penalties under 21 U.S.C. § 841(b) carry over and apply, where relevant, to offenses under 21 U.S.C. § 845. The mandatory-minimum nature of these penalties, however, does not appear to be subject to enhancement under 21 U.S.C. § 845(a) and (b). Subtitle C further amends 21 U.S.C. § 845(b), relating to "repeat offenders," to provide that the mandatory minimum penalties authorized thereunder shall not apply to offenses involving 5 grams or less of marihuana. Probably as a result of congressional oversight, there is no comparable provision in Subsection 845(a), which relates to "first-time offenders." The certainly unintended result of this omission is that "first-time offenders" under 21 U.S.C. § 845 are subject to the mandatory minimum penalties thereunder in all cases whereas "repeat offenders" under that section may avoid the applicable mandatory minimum penalties if the offense involves 5 grams or



less of marihuana. The Department may be requesting that Congress enact corrective legislation in this area.

Subtitle C similarly amends Subsection 405A(a) of the Controlled Substances Act (21 U.S.C. § 845a(a)) to provide that "[e]xcept to the extent a greater minimum sentence is otherwise provided by [21 U.S.C. § 841(b)], a term of imprisonment under [Subsection 845a(a)] shall be not less than one year." It also amends 21 U.S.C. 845a(a) to provide that the mandatory minimum sentencing provisions thereunder shall not apply to offenses involving five grams or less of marihuana. Because this latter provision applies only to first-time offenders under 21 U.S.C. § 845a, there is not the potential problem under this section comparable to that under Section 845. As discussed below, it appears that the mandatory minimum sentencing provisions of 21 U.S.C. § 841(b)(1) carry over and apply, where relevant, to offenses under Section 845a, but the mandatory-minimum nature of such sentence would not be subject to further enhancement.

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It appears that Congress intended for the mandatory minimum terms of imprisonment under revised 21 U.S.C. § 841(b)(1) to carry over and apply, where otherwise applicable, to persons convicted under Sections 845, 845a, and 845b. Each of those sections, as amended, specifically provides that persons convicted thereunder (without a prior conviction under that specific section) shall be subject to up to twice the term of imprisonment otherwise authorized under the applicable provision of Title 21, and that "except to the extent a greater minimum term of imprisonment is otherwise provided [under the applicable provision of Title 21], a term of imprisonment...shall not be less than one year." Thus, there should be no Bifulco issue with respect to these sections as there is with respect to the conspiracy and attempt provisions of 21 U.S.C. §§ 846 and 963. (See discussion regarding Bifulco and the "rule of levity" in the analysis of Subparts A and G of Title I, supra.)

#### Policy Considerations

The Department recommends that the provisions of 21 U.S.C. §§ 845, 845a, and 845b be used whenever appropriate but notes that these statutes are particularly useful in combatting the "street dealing" of drugs in large urban areas. For example, the "schoolyard" provisions of 21 U.S.C. § 845a have been used with considerable success against "street dealers" of cocaine and other drugs in cities such as New York, Philadelphia, and Tampa/St. Petersburg. It is anticipated that the provisions of new Section 845b will prove similarly useful against "street dealers" because the employment of juveniles to actually perform "street" drug transactions is becoming increasingly widespread.

Criminal Division Contact

Questions concerning the enhancement provisions of 21 U.S.C. §§ 845, 845a, and 845b should be directed to Harry Harbin or Gary Schneider (786-4700) in the Narcotic and Dangerous Drug Section. In addition, copies of significant pleadings or decisions regarding these enhancement provisions should be sent to the Narcotic and Dangerous Drug Section, Criminal Division, Department of Justice, 1400 New York Avenue, N.W., Washington, D.C. 20005.

Title I, Subtitle D - Assets Forfeiture Amendments Act of 1986  
(including Money Laundering Forfeiture  
Amendments)

Title I, Subtitle Q - Controlled Substances Technical Amendments

Summary

The Anti-Drug Abuse Act of 1986 contains several amendments and additions to civil and criminal forfeiture law and procedure. In addition, the Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. 99-646 (enacted November 10, 1986), made certain minor changes to forfeiture law. The RICO criminal forfeiture provisions of 18 U.S.C. § 1963 have been amended to provide for the forfeiture of substitute assets. An identical amendment has been made to 21 U.S.C. § 853. The civil forfeiture provisions of 21 U.S.C. § 881 have been amended in five ways: (1) under Subsection 881(b), the Government may now request the issuance of a warrant authorizing the seizure of property subject to forfeiture in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure; (2) all references to criminal forfeiture have been deleted from Subsection 881(b); (3) Subsection 881(e) now authorizes the Attorney General to pay awards to anyone who provides information leading to the arrest and conviction of a person who kills or kidnaps a federal drug enforcement agent; (4) Subsection 881(f) authorizes the seizure, summary forfeiture, and destruction of both Schedule I and Schedule II controlled substances; and (5) Subsection 881(i) now authorizes stays of civil forfeiture proceedings based on certain state court proceedings. The legislation governing the Department of Justice Assets Forfeiture Fund has been significantly amended to include authorization to pay from the fund certain program-related expenses of forfeiture. New Sections 981 and 982 of Title 18 authorize civil and criminal forfeitures relating to violations of the new Money Laundering Control Act. The new Mail Order Drug Paraphernalia Control Act authorizes the forfeiture of certain drug paraphernalia. Various amendments were made to Title 19, including an increase in the maximum limit of the claim and cost bond to \$5,000. Subsection 5317(c) of Title 31 has been amended to allow the forfeiture of any monetary instrument or property traceable to such an instrument transported in violation of the reporting requirements of 31 U.S.C. § 5316. There has been an amendment to 49 U.S.C. § 1972(q) providing for the civil forfeiture of property involved in certain violations of the Transportation Safety laws.

Analysis and Discussion

A. 18 U.S.C. § 1963 - RICO forfeiture amendments

1. Section 23 of the recently enacted Technical Amendments Act (which was enacted separately from the Anti-Drug Abuse Act)

amends 18 U.S.C. § 1963 by redesignating Subsections (e) through (m) as Subsections (d) through (l).

2. Section 1153 of the Anti-Drug Abuse Act amends 18 U.S.C. § 1963 by adding a new subsection (n). (An identical amendment has been made to 21 U.S.C. § 853.) The amendments provide that under certain conditions the court shall order the defendant to forfeit substitute assets up to a value equivalent to assets the defendant derived through drug-related activity which are unavailable for forfeiture. The amendments address a serious impediment to criminal forfeitures. Previously, a defendant could attempt to avoid the forfeiture sanction simply by transferring his/her assets to another, placing them beyond the jurisdiction of the court, or taking other actions to render his/her forfeitable property unavailable at the time of conviction.

Forfeiture of substitute assets is authorized if, as a result of any act or omission of the defendant, the property forfeitable under Subsection 1963(a): "(1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value; or (5) has been commingled with other property which cannot be divided without difficulty." The provision substantially broadens the Government's ability to forfeit property under the section.

Virtually identical provisions were originally included in an early version of what was enacted as the Comprehensive Crime Control Act of 1984, but these were deleted prior to enactment. In the legislative history to that Act, the provisions were interpreted as providing "that where property found to be subject to forfeiture is no longer available at the time of conviction, the court is authorized to order the defendant to forfeit substitute assets of equivalent value." S. Rep. 225, 98th Cong., 1st Sess. 201 (1983). The provisions and legislative history are silent as to the procedures for forfeiting substitute assets.

B. 21 U.S.C. § 853 - Criminal forfeiture amendments

Section 1153 of the Act amends 21 U.S.C. § 853 by adding a new Subsection (p) providing for the forfeiture of substitute assets which is identical to the amendment made to 18 U.S.C. § 1963, discussed supra.

C. 21 U.S.C. § 881 - Civil forfeiture amendments

1. Section 1865 of the Act amends 21 U.S.C. § 881(b) to provide that the Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture in the same manner as provided for a search warrant

under the Federal Rules of Criminal Procedure. This makes it clear that Rule 41 seizure warrants are authorized under the section. The provision has also been included in the civil forfeiture section of the Money Laundering Control Act (18 U.S.C. § 981(b)). Subsection 881(b) of Title 21 has also been amended by deleting references to criminal forfeiture.

2. Section 1992 of the Act amends Subsection 881(e) by redesignating paragraph "(e)" as "(e)(1)", by redesignating paragraphs (1) through (4) as subparagraphs (A) through (D), and by revising the paragraph following new subparagraph (D). The revision has eliminated all references to equitable sharing. However, redesignated subparagraph (A) still authorizes the Attorney General to transfer the custody or ownership of any forfeited property to any other federal agency, or to any state or local law enforcement agency that participated directly in the seizure or forfeiture of the property, pursuant to the customs laws. The revised paragraph has retained the other language of the paragraph but now specifically authorizes the Attorney General to pay awards up to \$100,000 to anyone who provides information leading to the arrest and conviction of a person who kills or kidnaps a federal drug enforcement agent.

3. Section 1006 of the Act amends Subsection 881(f) to authorize the seizure, summary forfeiture, and destruction of both Schedule I and Schedule II controlled substances.

4. Section 1865 of the Act amends Subsection 881(i) to authorize a stay of civil forfeiture proceedings based on the filing of a state or local indictment or information for violations that could have been charged under the federal drug laws. Absent such a stay, the Government might be compelled in the context of the civil forfeiture action to disclose prematurely certain matters relating to a state criminal case.

D. 28 U.S.C. § 524(c) - Assets Forfeiture Fund amendments

Section 1152 of the Act and section 27 of the Technical Amendments Act made significant amendments to 28 U.S.C. § 524(c), the law governing the Department of Justice Assets Forfeiture Fund ("the fund"). Section 27 of the Technical Amendments Act has a later effective date than the Act, creating a technical problem which will most likely be cured either by a note in the United States Code or by a technical amendment.

1. A new clause has been added to Subsection 524(c)(1)(A) providing that payments from the fund may include those, made pursuant to regulations promulgated by the Attorney General, that are necessary and direct program-related expenses for the purchase or lease of automatic data processing equipment (not less than 90 percent of which use will be program-related), training, printing, contracting for services directly related to the processing of and accounting for forfeitures, and the

storage, protection, and destruction of controlled substances. This language greatly expands the permissible uses of the fund. Now, not only case-related expenses are payable from the fund, but a wide range of program-related expenses as well.

2. A new Subsection 524(c)(1)(B) has been added that authorizes the payment of awards for information or assistance directly relating to violations of the criminal drug laws of the United States. Formerly, only payments of awards for information or assistance leading to forfeiture were permitted. It is hoped that this new provision will enhance the Government's ability to obtain information from informants in all drug-related cases, whether leading to forfeiture or not.

3. Subsection 524(c)(1)(F), formerly (c)(1)(E), has been amended in three ways. First, payments from the fund can be used to retrofit only conveyances used for "drug law enforcement functions." Second, the Federal Bureau of Investigation and the United States Marshals Service have been added to the list of agencies that can seek retrofitting expenses from the fund. And third, the fund can now be used for equipping any government-owned or leased conveyance, not just those acquired by forfeiture.

4. Congress, in amending Subsection 524(c)(1), redesignated paragraphs (B) through (F) as paragraphs (C) through (G). This has resulted in an oversight concerning the cap on awards under the section. Subsection 524(c)(2) specifies that an award paid from the fund for information concerning a forfeiture cannot exceed the lesser of \$150,000 or one-fourth of the amount realized by the United States from the property forfeited. Furthermore, the subsection provides that amounts awarded over \$10,000 are not delegable except as provided. The subsection was not amended to comport with new paragraph (B). In effect, Congress has provided no limits to awards under new paragraph (B), nor has it limited delegation of the grants of these awards.

5. Similarly, Subsection 524(c)(3) has not been amended to comport with the redesignation of paragraphs (B) through (F). Subsection 524(c)(3) should be read as applying to redesignated paragraph (G) rather than to redesignated paragraph (F).

6. Subsection 524(c)(4) has been amended to make it clear that expenses for forfeiture and sale authorized by law are payable from the fund. This provision is now consistent with the first clause of Subsection 524(c)(1)(A). The subsection has also been amended to make it clear that proceeds of forfeiture under the Endangered Species Act (16 U.S.C. § 1540(d)) and the Lacey Act Amendments of 1981 (16 U.S.C. § 3375(d)) are not to be deposited in the fund.

7. Subsection 524(c)(8) has been deleted from the section. This former subsection authorized appropriations for payments

from the fund from 1984 through 1987. It also provided that any amounts in the fund in excess of \$5,000,000, or any lesser appropriated amount, would be deposited in the general fund of the Treasury at the end of the fiscal year. This amendment has extended the life of the fund indefinitely and removed the automatic year-end rollover provisions of the section. Former paragraph (9) has been renumbered as paragraph (8).

E. Forfeiture Provisions of the Money Laundering Control Act of 1986.

Section 1366 of the Act adds a new Chapter 46 to Title 18 of the Code. The chapter authorizes both civil and criminal forfeitures relating to, but not necessarily involving, money laundering. It consists of Sections 981 and 982, which prescribe civil and criminal forfeitures, respectively.

1. 18 U.S.C. § 981(a)(1) - Civil forfeiture.

a. Section 981(a)(1) describes three types of property forfeitable to the United States. Subsection 981(a)(1)(A) makes forfeitable any real or personal property that represents the gross receipts a person obtained - directly or indirectly - as a result of a violation of 18 U.S.C. § 1956 or § 1957 (the new money laundering offenses) or which is traceable thereto. By use of the word "receipts," the Senate Judiciary Committee intended that only the commission earned by the money launderer is subject to forfeiture, and not the corpus laundered itself. 50/ See S. Rep. No. 433, 99th Cong., 2d Sess. 23 (1986).

b. Subsection 981(a)(1)(B) provides that the United States may civilly forfeit property in the United States that represents the proceeds of a violation of a foreign drug law. The offense must also be one that would be a felony drug violation under United States law had the offense occurred within the jurisdiction of the United States. The provision will allow the Government to forfeit the proceeds of a foreign drug violation and any property derived therefrom (although this is not explicitly stated, as in 21 U.S.C. § 853). The provision does not authorize the United States to forfeit property that was used or intended to be used in the violation of the drug offense, as is the case in many of our current forfeiture statutes. (See, e.g., 21 U.S.C. § 881.)

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50/ This would argue in favor of adding an additional substantive criminal offense for which the corpus could be forfeited. For example, if the money launderer is laundering narcotics money and it can be argued that he/she was an aider and abettor to the underlying offense, a substantive narcotics charge could be added to the money laundering indictment.

c. Subsection 981(a)(1)(C) makes forfeitable any coin or currency (or other monetary instrument prescribed by the Secretary of the Treasury), or property traceable thereto, involved in a transaction or attempted transaction in violation of 31 U.S.C. § 5313(a) (currency transaction reporting requirement) or new 31 U.S.C. § 5324 (prohibiting the structuring of financial transactions), provided the violation giving rise to forfeiture is not by certain regulated banks or brokerage firms.

2. Subsection 981(a)(2) sets forth an "innocent owner" exception to property forfeitable under Subsection 981(a)(1), which is already contained in several civil forfeiture statutes. See, e.g., 21 U.S.C. § 881(a)(6) and (7). The subsection explicitly includes lienholders under its protections.

3. Subsections 981(b) through 981(h) set forth, with a few minor modifications, the familiar civil forfeiture provisions contained in 21 U.S.C. § 881. Subsection 981(b) provides that property subject to forfeiture under Subsections 981(a)(1)(A) and 981(a)(1)(B) may be seized by the Attorney General and, in the case of property involved in a violation of Sections 1956 and 1957 of Title 18 investigated by the Secretary of the Treasury, may be seized by the Secretary of the Treasury. Any property subject to forfeiture under Subsection 981(a)(1)(C) may be seized by the Secretary of the Treasury. Subsection 981(b) also sets out when property is subject to forfeiture with or without process, and the appropriate measures which must be taken. It also mirrors the recent amendments to 21 U.S.C. § 881(b) which allows the Government to request the issuance of a warrant authorizing the seizure of property subject to forfeiture pursuant to the Federal Rules of Criminal Procedure.

4. Subsections 981(c) and 981(d) relate to the custody and disposition of forfeited property, respectively. Subsection 981(d) clarifies that the customs laws are specifically incorporated by the section. Subsection 981(e) authorizes the Attorney General or Secretary of the Treasury to transfer forfeited property to any other federal agency, or to any state or local law enforcement agency that participated directly in the seizure and forfeiture of the property. The subsection also authorizes the Attorney General or the Secretary of the Treasury to discontinue forfeiture proceedings in favor of state or local proceedings. Subsection 981(f) codifies the familiar "relation back" doctrine to forfeitures under the section. Subsections 981(g) and 981(h) relate to stays of forfeiture proceedings and venue, respectively.

5. Subsection 981(i) sets forth additional provisions applicable only to property subject to forfeiture under Subsection 981(a)(1)(B). Under the first sentence of Subsection 981(i)(1), property that is subject to forfeiture under Subsection 981(a)(1)(B) and has been forfeited under the Controlled Substances Act may be equitably shared with a foreign



country by the Attorney General with the concurrence of the Secretary of State, to the extent provided by treaty and to a degree reflecting the contribution of the foreign country to the seizure or forfeiture. Such property consists of any conveyance, currency, and any other type of personal property which the Attorney General may designate by regulation for equitable transfer. Furthermore, any amounts realized by the United States from the sale of any forfeited real or personal property may also be equitably shared under this clause.

6. Subsection 981(i)(2) is included to foreclose any argument that any of the provisions of Subsection 981(i) are intended to supersede or limit any other authority or procedure whereby the United States can provide assistance to a foreign country in obtaining property relating to crimes committed in the foreign country.

7. Subsections 981(i)(3) and 981(i)(4) create rebuttable presumptions when an order or judgment of forfeiture or conviction by a foreign court concerning the property or the violation giving rise to forfeiture is admitted into evidence. Such certified orders or judgments and any recordings or transcripts or testimony taken in a foreign judicial proceeding concerning such orders of judgments are expressly made admissible concerning forfeiture of property of the type described in Subsection 981(a)(1)(B). Subsection 981(i)(5) makes it clear that these provisions are not intended to limit the admissibility of any other evidence otherwise admissible in forfeiture proceedings.

8. Subsection 982(a) sets forth criminal forfeiture provisions by providing that a court, in imposing sentence on a person convicted of an offense under 18 U.S.C. §§ 1956 or 1957, shall order that the person forfeit to the United States any real or personal property that represents the gross receipts the person obtained, directly or indirectly, as a result of such offense, or which is traceable to such gross receipts. This section is the criminal counterpart to civil forfeiture under Subsection 981(a)(1)(A).

Subsection 982(b) incorporates the familiar criminal forfeiture provisions contained at 21 U.S.C. § 853, to the extent they are not inconsistent with the section. However, Subsection 982(b) does not incorporate the new substitute assets provisions of 21 U.S.C. § 853(p).

F. Forfeiture Provisions of the Mail Order Drug  
Paraphernalia Control Act

The new paraphernalia provisions, contained at Section 1821 et seq. of the Act, reportedly are to be codified at 21 U.S.C. § 857. The forfeiture provisions are included at Subsection (c) to that section. This subsection provides that any drug paraphernalia involved in a violation of the section is subject

to seizure and forfeiture upon the conviction of a person for such violation. Conviction of a violator is therefore a prerequisite to seizure and forfeiture. Any such paraphernalia must be delivered to the General Services Administration for destruction, law enforcement uses, or educational purposes. The section is silent as to what forfeiture law and procedure apply.

#### G. Special Forfeiture of Collateral Profits of Crime

Section 41 of the Technical Amendments Act has redesignated Sections 3671 and 3672 of Title 18, relating to the special forfeiture of collateral profits of crime, as Sections 3681 and 3682.

#### H. Title 19 - Customs laws amendments

1. 19 U.S.C. § 1436 - Penalties for violation of the arrival reporting and entry requirements

Section 3113 of the Act amends 19 U.S.C. § 1436 to make any conveyance used in connection with a violation of Sections 1433, 1434, 1435, or 1644 of Title 19, 49 U.S.C. § 1509, or any regulations promulgated thereunder, subject to seizure and forfeiture. These sections all relate to the reporting requirements concerning the entry of conveyances into the United States. The section also makes forfeitable any merchandise in or on board a conveyance which was not properly reported or which entered in violation of the sections.

2. 19 U.S.C. § 1497 - Penalties for failure to declare  
Section 3116 of the Act amends 19 U.S.C. § 1497 with no change to its existing forfeiture provisions.

3. 19 U.S.C. § 1590 - Aviation smuggling

Section 3120 of the Act adds a new Section 1590 to Title 19. Subsection (e) authorizes the seizure and forfeiture of any vessel or aircraft used in connection with or in aiding or facilitating any violation of the section. The section prohibits the pilot of any aircraft to transport, or for any person on board the aircraft to possess, merchandise knowing or intending that the merchandise will be introduced into the United States contrary to law. It also prohibits certain unauthorized transfers of merchandise between an aircraft and a vessel on the high seas or within customs waters. The section has a common carrier exception.

4. 19 U.S.C. § 1594 - Seizures of conveyances

Section 3121 of the Act amends 19 U.S.C. § 1594 to eliminate the requirement that conveyances seized to secure payment of penalties (not for forfeiture) be proceeded against

in an admiralty proceeding and permits administrative forfeiture in many instances. In addition, the exemptions concerning common carriers have been revised. Under prior law, a common carrier could not be seized or forfeited for violations of the customs laws unless the owner or master or other person in charge consented to or was privy to the violation. This protection was given to shield the common carrier from seizures where dishonest passengers concealed contraband in baggage or otherwise violated the customs laws or where a dishonest shipper misdescribed the contents of cargo on a bill of lading. However, in recent years, common carriers in increasing and alarming numbers have escaped seizure where large quantities of drugs were concealed on board the vessel or aircraft by crew members or other personnel employed by common carriers.

The amendment will continue protection for common carriers where contraband is contained in the baggage of a passenger being lawfully transported or in manifested cargo with external marks and quantities which match the bill of lading, unless the owner, operator, or person in charge participated in or had knowledge of the violation or was grossly negligent in preventing or discovering the violation. However, in the case of prohibited merchandise or controlled substances, common carriers will be subject to seizures for transporting such items in unmanifested cargo or for articles concealed on the conveyance, but outside the cargo area. After investigation, the common carrier would be subject to forfeiture unless the owner or operator, master, or officers can show that they did not know, and through the exercise of the highest degree of care and diligence could not have known, that the contraband was on board. This standard is identical to the standard contained in 19 U.S.C. § 1584.

5. 19 U.S.C. § 1595 - Search and seizure amendment

Section 3122 of the Act amends 19 U.S.C. § 1595 to expand the customs civil search and seizure warrant to cover any article subject to seizure rather than just imported merchandise. This amendment permits a civil warrant to be issued to seize conveyances, monetary instruments, and evidence of violations of the customs laws which are subject to forfeiture under laws enforced by the Customs Service. Evidence relating to violations of 19 U.S.C. § 1592 will only be subject to seizure under this section if fraud is involved. The standard for obtaining a warrant is now "probable cause" in accordance with constitutional requirements.

6. 19 U.S.C. § 1595a - Forfeiture and other penalties

Section 3123 of the Act amends 19 U.S.C. § 1595a to permit the civil seizure and forfeiture of merchandise introduced or attempted to be introduced contrary to law. While it is true that most laws which restrict or prohibit merchandise provide

for forfeiture, some, such as the motor vehicle laws and coffee laws, merely deem the goods to be a "prohibited importation" but do not provide for a separate forfeiture. This amendment will close that gap. In order to protect commercial importations, the provision excludes merchandise which is only in violation of 19 U.S.C. § 1952, because that section has its own forfeiture procedures.

7. 19 U.S.C. § 1608 - Claim and cost bond amendment

Section 1862 of the Act amends 19 U.S.C. § 1608 to extend the claim and cost bond maximum limit to \$5,000. A duplicative 19 U.S.C. § 1608, as enacted by Public Law 98-473, has been repealed.

8. 19 U.S.C. § 1613 - Disposition of proceeds of forfeited property amendments

Section 3124 of the Act amends 19 U.S.C. § 1613 to treat amounts tendered in lieu of merchandise subject to forfeiture in the same manner as the proceeds of sale of a forfeited item. Such amounts may be used to pay expenses of seizure and forfeiture and may be deposited in the Customs Forfeiture Fund.

The section has also been amended to treat agency seizure expenses in the same manner as court costs and marshals' expenses. A recent court decision held that only seizure expenses incurred in custodia legis after a complaint is filed are priority claims. Under this interpretation, agency expenses incurred prior to referral for judicial forfeiture proceedings would not be paid in some instances where the proceeds of sale are insufficient to cover preferred mortgage liens and all the expenses incurred by the seizing and custodial agencies. The amendment remedies this situation by putting agency expenditures on an equal footing with marshals' fees and court costs.

9. 19 U.S.C. §§ 1613a and 1613b - Customs Forfeiture Fund

In 1984, Congress inadvertently enacted two somewhat different provisions creating a Customs Forfeiture Fund. One was enacted by Pub. L. 98-473 and codified as 19 U.S.C. § 1613a. The other was enacted by Pub. L. 98-573 and codified as 19 U.S.C. § 1613b. Section 1613a was repealed by Section 1888 of the Tax Reform Act of 1986, Pub. L. 99-514, effective October 22, 1986. The legislation governing the fund has become even more confused by the passage of the Anti-Drug Abuse Act. Section 1142 of the Act amends 19 U.S.C. § 1613a, while Section 3142 of the Act amends 19 U.S.C. § 1613b. However, Section 1142 of the Act, by its terms, repeals Section 1613b. It is not clear, however, that Section 1613b has been repealed by the Act, because its original enactment and subsequent amendments represent a later expression of congressional will. See generally Sutherland, Statutory Construction § 23.17. As a

consequence, Section 1613b is arguably still in force, possibly along with Section 1613a. Clarifying legislation is being sought in this area. The amendments to both sections will be discussed on the assumption that both are still in force.

Section 1152 of the Act amends 19 U.S.C. § 1613a. Subsection (a)(3) has been amended to authorize the equipping for law enforcement functions of any government-owned or leased conveyances available for official use by the Customs Service. Subsection (h) has been deleted from the section. This subsection authorized appropriations for payments from the fund from 1984 through 1987. It also provided that any amounts in the fund in excess of stated appropriations were required to be deposited in the general fund of the Treasury at the end of the fiscal year. This amendment has extended the life of the fund indefinitely and removed the automatic year-end rollover provisions of the section. Both of these amendments are analogous to amendments of the Department of Justice Assets Forfeiture Fund, discussed supra.

Section 3142 of the Act amends 19 U.S.C. § 1613b (as enacted by Pub. L. 98-573). The amendments extend the life of the fund through Fiscal Year 1991, change the year-end rollover amounts from ten to twenty million dollars, and supplement the permissible uses of the fund for the payment of certain expenses.

10. 19 U.S.C. § 1616a - Transfer of forfeited property

Section 1863 of the Act amends 19 U.S.C. § 1616a so that forfeited property may be transferred to "any other Federal agency" as well as to any state or local law enforcement agency which participated directly in the seizure of the forfeited property. The amendment also repeals Section 1616 (as enacted by Pub. L. 98-473) so that there is now only one Section 1616.

11. 19 U.S.C. § 1619 - Award of compensation to informers

Section 3125 of the Act amends 19 U.S.C. § 1619 to allow customs officers to exercise some discretion in determining the percentage of an informant's award, subject to stated limitations.

I. 31 U.S.C. § 5317 - Monetary instrument forfeitures

Section 1355 of the Act amends 31 U.S.C. § 5317(c) to allow forfeiture of any monetary instrument transported in violation of the reporting requirements of 31 U.S.C. § 5316 to include forfeiture of the monetary instrument "and any interest in the property, including a deposit in a financial institution traceable to such instrument." The Government will thus be able to seize not only unreported or misreported instruments, but any property traceable to such instruments.

J. 49 U.S.C. App. § 1472(q) - Transportation Safety amendments

Section 3401 of the Act amends 49 U.S.C. App. § 1472(q) to provide for the civil forfeiture of any fuel tanks, fuel systems, and aircraft involved in a violation of 49 U.S.C. App. § 1472(q)(1)(F). That provision prohibits the operation of an aircraft with a fuel tank or fuel system that has been installed or modified without complying with all applicable rules, regulations, and requirements of the Administrator of the Federal Aviation Administration. The forfeiture provisions specifically incorporate customs law and procedure.

Policy Considerations

A. Policy Regarding Forfeiture of Substitute Assets

The United States Attorneys' Offices are required to consult with the Asset Forfeiture Office prior to moving for the forfeiture of any substitute assets under 18 U.S.C. § 1963(n) or 21 U.S.C. § 853(p). As discussed in Part A.2, *supra*, these provisions are silent as to the procedures for forfeiting substitute assets. The Asset Forfeiture Office will work to develop consistent policies and procedures relating to the seizure and forfeiture of substitute assets.

B. Policy Regarding Forfeiture Pursuant to 18 U.S.C. § 981(a)(1)(B)

The United States Attorneys' Offices are required to consult with the Asset Forfeiture Office prior to seeking forfeiture of property representing the proceeds of foreign controlled substance violations pursuant to 18 U.S.C. § 981(a)(1)(B) or prior to enforcing or implementing any of the provisions of 18 U.S.C. § 981(i).

C. Policy Regarding Discontinuance of Federal Forfeiture Actions

18 U.S.C. § 981(e) provides for the discontinuance of federal forfeiture actions in favor of proceedings under state or local law. The policy outlined in the Department of Justice's Handbook on the Comprehensive Crime Control Act of 1984 (December, 1984), Paragraph III.C., at page 56, and Part V, Section A, of the Attorney General's Guidelines on Seized and Forfeited Property are specifically incorporated with respect to discontinuance of federal forfeiture actions under this section.

D. Policy Regarding Forfeitures Under the Mail Order Drug Paraphernalia Control Act

The forfeiture provisions of the new Mail Order Drug Paraphernalia Control Act are silent as to what forfeiture law

and procedure apply. The section provides that any drug paraphernalia involved in a violation of the section is subject to seizure and forfeiture upon the conviction of a person for such violation. Conviction of a violator is therefore a prerequisite to seizure and forfeiture. The section incorporates neither the customs laws, supplemental rules, nor any criminal forfeiture procedures.

Based on the lack of legislative guidance in this matter, the United States Attorneys' Offices are required to consult with the Asset Forfeiture Office prior to seeking seizure or forfeiture of property under the Mail Order Drug Paraphernalia Control Act. The Asset Forfeiture Office will work with the seizing agencies to develop consistent policies and procedures relating to the seizure and forfeiture of drug paraphernalia.

#### Criminal Division Contact

Questions concerning the provisions outlined in this discussion of Subtitles D and Q of Title I should be directed to Brad Cates, Director, Asset Forfeiture Office (272-6420) or members of his staff.

## Title I, Subtitle E - Controlled Substance Analogue Enforcement Act of 1986

### Summary

Subtitle E of Title I of the Anti-Drug Abuse Act of 1986, at Section 1202, amends the Controlled Substances Act by creating a new section proscribing certain conduct with regard to controlled substance analogues - popularly referred to as "designer drugs" (although this term is to be discouraged because of its supposed allure to youths and young adults). This subtitle - also known as the "Controlled Substance Analogue Enforcement Act of 1986" - accomplishes this effect by creating a new section 203 of the Controlled Substances Act ("Treatment of Controlled Substance Analogues"), which should be codified at 21 U.S.C. 813.

### Analysis and Discussion

#### A. Background

As the proscriptions of the Controlled Substances Act had, prior to this law, been tied exclusively to the precise chemical description of the substances under control, professional and amateur chemists were able to create substances which were just slightly different from the chemical structures of controlled substances and which, therefore, were legal to manufacture, distribute, etc. under the terms of the Controlled Substances Act. As noted in a Senate report concerning this provision:

The problem is heightened because current law provides such a powerful incentive for profiteers to experiment with conventional chemical structures. Seeking to produce narcotics that do not fall within the exact definitions of the CSA schedules, marginal chemists may manufacture novel compounds of unknown pharmacological properties. The resulting products, whether marketed as counterfeits of the drugs they imitate or as new "synthetic drugs," can have unintended effects: witness the 1982 outbreak of Parkinson's disease in California users of the analog[ue]s.

S. Rep. No. 196, 99th Cong., 1st Sess. 3 (1985). 51/

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51/ The House of Representatives report, which includes a discussion of the bill in a form closer to that which was finally enacted, is the report relating to the then-"Designer Drug Enforcement Act of 1986," H.R. Rep. 848, 99th Cong., 2d Sess. (1986).



Amendments to the Controlled Substances Act in the Comprehensive Crime Control Act of 1984 provided for the emergency scheduling of such substances, but this process still allowed a significant period of time to elapse between the initial discovery of the new substance, the determination of the substance's dangers, and the emergency scheduling action (which required at least 30 days prior notice). Under the new law, newly produced substances which meet the definition of a "controlled substance analogue" are proscribed as of their creation without any further requirement with regard to notice or otherwise. The early-stage research of legitimate chemists into controlled substance analogues would be protected because of the limitation on the proscription of such conduct "to the extent intended for human consumption," as well as the ability of the legitimate chemist to apply for a new drug application.

B. Treatment of Controlled Substance Analogues  
(21 U.S.C. § 813)

The new 21 U.S.C. § 813 provides that a "controlled substance analogue," to the extent intended for human consumption, shall be treated as a controlled substance in Schedule I pursuant to the provisions of both the Controlled Substances Act and the Controlled Substances Import and Export Act. Thus, a prosecution for the unlawful manufacture, distribution, or possession (with intent to manufacture or distribute) of a controlled substance analogue would be pursuant to 21 U.S.C. § 841(a)(1) and defendants convicted of such offenses would be punished in accordance with the penalties set forth in 21 U.S.C. § 841(b). Importation offenses involving analogues would be prosecuted pursuant to the applicable provisions of the Controlled Substances Import and Export Act (e.g., 21 U.S.C. §§ 952, 963), and defendants convicted of these offenses would be punished in accordance with the penalties set forth in 21 U.S.C. § 960. Because new 21 U.S.C. § 813 applies only for the purposes of the Controlled Substances Act and the Controlled Substances Import and Export Act, it might not be applicable to the provisions of the Act of September 15, 1980 (which, prior to the ADAA's amendment was contained at 21 U.S.C. § 955a et seq., but which will now be moved out of Title 21 and, reportedly, into Title 46 Appendix, at Sections 1901 et seq.). This does not appear to be a significant problem.

By operation of this subtitle, many of the enhancement provisions of the Controlled Substances Act have been automatically made applicable to analogue offenses, such as offenses involving distribution to persons under the age of 21 [21 U.S.C. § 845], distribution or manufacture of controlled substances within 1,000 feet of a school [21 U.S.C. § 845a], use or employment of a minor in drug activity [21 U.S.C. § 845b], and second or subsequent offenses [21 U.S.C. § 841(b)]. This is also true with regard to many of the enhancement provisions in the Controlled Substances Import and Export Act. However, because the

enhancements relating to offenses involving large quantities of certain controlled substances [21 U.S.C. §§ 841(b)(1)(A) and (B) and 960(b)(1) and (2)], only provide such enhanced penalties for analogues of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, i.e., fentanyl, only the non-enhanced penalties of 21 U.S.C. § 841(b)(1)(C) and 960(b)(3) are applicable to non-fentanyl analogues. It is because non-fentanyl analogues are not included in the list of substances which receive enhanced penalties in 21 U.S.C. § 841(b)(1)(B) that they are not also proper predicates for the new "principal administrator..." provision of 21 U.S.C. § 848(b).

C. Definition of "analogue" (21 U.S.C. § 802(32))

Section 1203 of the Anti-Drug Abuse Act defines "controlled substance analogue" in new subsection (A) of 21 U.S.C. § 802(32) to mean any substance: "(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II; (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II."

Subsection (B) of 21 U.S.C. § 802(32) explicitly indicates that the term "controlled substance analogue" does not include: "(i) a [currently scheduled] controlled substance; (ii) any substance for which there is an approved new drug application; (iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. § 355] to the extent conduct with respect to such substance is pursuant to such exemption; or (iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance."

Policy Considerations

PROSECUTION FOR ANY ANALOGUE OFFENSE REQUIRES PRIOR CONSULTATION WITH THE NARCOTIC AND DANGEROUS DRUG SECTION OF THE CRIMINAL DIVISION.

In interpreting the provisions of this bill, it is important to make note of one of the major compromises effected during the debate between members of the House and Senate on the coverage of the bill. As finally resolved, in defining the term "analogue," any one of the three definitional elements will suffice. The

original House version would have required the first element (viz., substantially similar chemical structure) to always be present, with any of the other two conditions (viz., effect of the drug or representations concerning the drug) also being required to trigger the bill's proscriptions.

As noted above, because of the structure of the Controlled Substance Analogue Enforcement Act of 1986, no conforming amendments to other provisions of the Controlled Substances Act or the Controlled Substances Import and Export Act were believed necessary. Likewise, no amendments were believed necessary to other titles of the United States Code to allow for analogue offenses to be permissible predicate offenses, such as for the wiretap provisions [18 U.S.C. § 2510, et seq.], Interstate Transportation in Aid of Racketeering [18 U.S.C. § 1952], Racketeer Influenced and Corrupt Organizations [18 U.S.C. § 1961, et seq.], and the new money laundering offenses [18 U.S.C. §§ 1956 and 1957], as well as the air-drop provisions [new Section 590 of part V or title IV of the Tariff Act of 1930].

This should hold true notwithstanding the language in 21 U.S.C. § 813 (viz., "for the purposes of this title and Title III") that appears to limit the applicability of this provision to the Controlled Substances Act and the Controlled Substances Import and Export Act. Section 813 should be applicable to the Title 18 offenses listed above and other provisions which would use analogue offenses as predicates because they refer to the CSA and CSIEA. Section 813 was intended to ensure applicability of the analogue provision to both the CSA and the CSIEA, rather than to restrict the applicability of this provision to any non-Title 21 offenses (e.g., Title 18 offenses). The Department may be seeking an amendment to clarify this matter.

We anticipate that most prosecutions for violation of this statute will be undertaken pursuant to the definition of analogue contained at 21 U.S.C. § 802(32)(A)(i), based upon the substantial similarity between the chemical structure of the suspect substance and a schedule I or II controlled substance. In such cases, the proof presented will most likely be expert testimony concerning the chemical structure of the suspect substance. The Forensic Sciences Section of the Drug Enforcement Administration's Office of Science and Technology, in conjunction with DEA's Office of Diversion Control, is prepared to provide witnesses who will present such testimony.

In cases in which the prosecution is premised on the definition contained at 21 U.S.C. § 802(32)(A)(iii), we anticipate that the Government would seek to introduce evidence from undercover agents, informants, or cooperating codefendants that the defendant held the substance out as having an effect on users similar to or greater than the effect of a schedule I or II substance.

The third definitional basis for a prosecution - that the substance has an actual effect like or greater than that of schedule I or II substances (21 U.S.C. § 802(32)(A)(ii)) - will be used when that information is available. In the case of newly synthesized substances, this will infrequently or never be used because very lengthy animal studies are required to prove the actual effect of a suspect substance. In these latter cases, one of the other two definitional elements should be available to establish the violation.

Criminal Division Contact

Questions concerning the provisions of the Controlled Substance Analogue Enforcement Act should be directed to Gary Schneider (786-4700) in the Narcotic and Dangerous Drug Section.

## Title I, Subtitle F - Continuing Drug Enterprise Act of 1986

### Summary

Subtitle F of Title I of the Anti-Drug Abuse Act of 1986 amends the Continuing Criminal Enterprise (CCE) statute, 21 U.S.C. § 848, to (1) increase the maximum fine levels for CCE offenses, and (2) provide for mandatory life imprisonment for the "principal administrator, organizer, or leader" of a CCE in certain instances.

### Analysis and Discussion

As revised by the new Act, 21 U.S.C. § 848(a) provides substantial maximum penalties for a first CCE conviction. While the maximum term of imprisonment remains life imprisonment without the possibility of parole (with a mandatory-minimum term of 10 years in prison), the fine has been modified to allow a fine of not more than the greater of that authorized in 18 U.S.C. § 3623 (which allows for a fine of twice the gross gain derived through the CCE) or \$2 million if the defendant is an individual (or \$5 million if the defendant is other than an individual, such as a corporation or other business entity). The forfeiture provided in 21 U.S.C. § 853 is still mandated. In the case of a second or subsequent conviction under the CCE statute, these penalties are doubled, with the mandatory-minimum term of imprisonment also doubled to 20 years in prison.

Under the Anti-Drug Abuse Act, former 21 U.S.C. § 848(b) ("Continuing criminal enterprise defined") and (c) ("Suspension of sentence and probation prohibited") have been redesignated as new 21 U.S.C. § 848(d) and (e), respectively.

A new Subsection (b) has been created by the Act in 21 U.S.C. § 848 to provide a mandatory term of life imprisonment for the "principal administrator, organizer, or leader" of a CCE in either of two instances: (1) [Subsection 848(b)(2)(A)] - where the violation referred to in 21 U.S.C. § 848(d) "involved at least 300 times the [minimum] quantity" of a controlled substance allowing for an enhanced penalty in 21 U.S.C. § 841(b)(1)(B) [the five-year mandatory-minimum provision also created by this Act], or (2) [Subsection 848(b)(2)(B)] - where "the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received \$10 million...in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in [21 U.S.C. § 841(b)(1)(B)]." Because of the requirement in both subsections of 21 U.S.C. § 848(b) that the controlled substances involved in the predicate offenses for the CCE must be contained in the penalty provision of 21 U.S.C. § 841(b)(1)(B), the enhancement in Subsection (b) will not be applicable where the CCE violation

involves non-included schedule I or II controlled substances, such as methamphetamine and non-fentanyl analogues, as well as all schedule III, IV, and V controlled substances.

Prosecutors should note that there is no 21 U.S.C. § 848(c) under this new statutory hierarchy. As this was obviously an oversight which occurred in the drafting process, it may be addressed in a note - "21 U.S.C. § 848(c) -- Reserved" when 21 U.S.C. § 848 is reprinted.

"Principal administrator, organizer, or leader" is not defined in the Act. Therefore, these terms should be given their common-sense meaning: a person in "a position of organizer, a supervisory position, or any other position of management," as previously (and currently) used in defining a CCE candidate, but limited to the most major person or persons. "Gross receipts" should be given a broad interpretation.

### Policy Considerations

In general, prosecution for a CCE offense requires that a violation of 21 U.S.C. § 848 be specifically pleaded and proved (except where it is being used to demonstrate a prior CCE to establish the double penalty for a second or subsequent CCE). Although it may not be required under the statute, it is recommended that the facts establishing the applicability of the enhanced penalty contained in 21 U.S.C. § 848(b) also be pleaded and proved.

Because of the severe nature of the penalties provided in new 21 U.S.C. § 848(b), there has been imposed a requirement (consistent with Sections 9-2.120 and 9-2.131 of the United States Attorneys' Manual) that, prior to any information, indictment, or grand jury proceedings relating to this provision, as well as any disposition of such charge other than by trial, a United States Attorney must obtain approval for such action from the Assistant Attorney General of the Criminal Division, with requests for such authorization being directed to the Narcotic and Dangerous Drug Section.

### Criminal Division Contact

Questions concerning 21 U.S.C. § 848 should be directed to Jeffrey Russell (786-4708), John Kuray (786-4721), or Gary Schneider (786-4700) in the Narcotic and Dangerous Drug Section.

## Title I, Subtitle H - Money Laundering Control Act of 1986

### Summary

The Money Laundering Control Act creates a federal money laundering offense; authorizes forfeiture of assets earned by launderers; creates a Title 31 offense which prohibits the structuring of currency transactions; enhances the civil and criminal penalty provisions of Title 31; and amends the Right to Financial Privacy Act. All of these topics are discussed in this section with the exception of the forfeiture provisions, which are discussed in Subtitle D, supra.

18 U.S.C. §§ 1956 and 1957 create new offenses which have been generically designated as "money laundering." These new crimes differ greatly from the Title 31 offenses which have traditionally been thought of as money laundering. Thus, even a prosecutor experienced in the Title 31 area should carefully evaluate the elements of the new Title 18 offenses before utilizing them. Sections 1956 and 1957 became effective on October 27, 1986.

### Analysis and Discussion

#### 1. Introduction

Section 1956 criminalizes virtually any dealings with the proceeds of a wide range of "specified unlawful activities" when those dealings are aimed at furthering the same "specified unlawful activities" or at concealing or disguising the source, ownership, location or nature of the proceeds. Subsections 1956(a)(1) and 1956(a)(2) lay out the core of this provision. Subsection (a)(1) deals with violations in a domestic context. Subsection (a)(2) involves violations which occur when monetary instruments or funds are transported between the United States and a foreign country. Both sections have three alternative grounds for liability.

Section 1957 effectively criminalizes any knowing "monetary transaction" or attempted monetary transaction in criminally derived property when three factors exist: (1) over \$10,000 is involved, (2) a financial institution is utilized, and (3) the property is derived from specified unlawful activity. The statute does not require that the property be used for any additional criminal purpose.

Newly created 31 U.S.C. § 5324 adds a new crime to the Bank Secrecy Act entitled "structuring to evade reporting requirements." This section is specifically intended to overrule the line of cases initiated by United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985). Under the terms of this statute, it is unlawful to cause or attempt to cause a domestic financial

institution to fail to file a CTR or file a CTR with material omissions or misstatements. Further, and most significantly, it is now unlawful to "structure," "assist in structuring," or attempt to do either of the above with one or more domestic financial institutions. This provision became effective January 28, 1987.

The Money Laundering Control Act also contains numerous miscellaneous provisions affecting the Right to Financial Privacy Act and civil and criminal aspects of Title 31. The most significant of these changes are discussed in the last section of this chapter. 52/

## 2. Section 1956 - Laundering of monetary instruments

Section 1956, "laundering of monetary instruments," is divided into Subsections 1956(a) and (b). Subsection 1956(a) is further divided into Subsection (a)(1) (domestic financial transactions) and Subsection (a)(2) (the international transportation of monetary instruments or funds). Subsection 1956(b) provides a civil penalty for violations of the above subsections. Subsection 1956(c) defines several of the terms used in Section 1956 (as well as in Section 1957). Subsections 1956(d), (e), and (f) address, respectively, the effects of other statutes, agency investigative responsibilities, and extraterritorial jurisdiction.

### A. Subsection 1956(a) - Involving domestic transactions or international transportation

The three alternative violations of Subsection 1956(a)(1) are contained within Subsections (a)(1)(A) and (a)(1)(B), the latter of which has two subsections of its own, (i) and (ii). All Subsection 1956(a)(1) prosecutions have two elements in common: (1) the prospective defendant must "knowingly" "conduct or attempt to conduct" a "financial transaction" "knowing that the property involved in the financial transaction represents the proceeds of some form of unlawful activity" and (2) the property involved in the financial transaction must in fact actually be derived from "specified unlawful activity."

#### (1) Subsection 1956(a)(1) - Domestic financial transactions

Section 1956(a)(1) provides:

Whoever, knowing that the property  
involved in a financial transaction represents

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52/ The Forfeiture provisions of this Act are discussed supra in Subtitle D - Assets Forfeiture Amendments Act of 1986.



the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity....

An analysis of Subsection 1956(a)(1) requires reference to the definition section of the Act, contained at Section 1956(c). As explained in a Senate report, these definitions form the heart of the Act. The report provides as follows:

Section 1956(c)(1) sets out the definition of the phrase "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" as used in section (a)(1). The significance of this phrase is that the defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law. This will eviscerate the defense that a defendant knew the funds came from a crime, but thought the crime involved was a crime not on the list of "specified" crimes in Section (c)(7).

Section 1956(c)(2) defines the term "conducts" to include initiating, concluding or participating in a transaction. This ensures that section (a) applies not only to a person who deposits cash in a bank knowing that the cash represents the proceeds of crime, but also to a bank employee who accepts the cash if the employee knows that the money represents the proceeds of crime.

Section 1956(c)(3) defines the term "transaction" to include various activities involving financial institutions such as a deposit, an exchange of funds, a transfer between accounts, and the purchase of stock or certificates of deposit. The term also includes activities not involving banks, such as the purchase, sale, or other disposition of property of all kinds. It should be noted that each transaction involving "dirty money" is intended to be a separate offense. For example, a drug dealer who takes

\$1 million in cash from a drug sale and divides the money into smaller lots and deposits it in 10 different banks (or in 10 different branches of the same bank) on the same day has committed 10 distinct violations of the new statute. If he then withdraws some of the money and uses it to purchase a boat or condominium, he will have committed two more violations, one for the withdrawal and one for the purchase. 53/

Section 1956(c)(4) defines the term "financial transaction" very broadly. Because of the broad definition of the term "transaction" in section (c)(3), the term "financial transaction" is not limited to transactions involving financial institutions. It includes all forms of commercial activity. The only requirement is that the transaction must "affect interstate or foreign commerce" or be conducted through or by a financial institution which is engaged in or the activities of which affect interstate or foreign commerce, "in any way or degree." 54/ The term "affect commerce in any way or degree" is derived from the Hobbs Act, 18 U.S.C. 1951, and is intended to reflect the full exercise of Congress' powers under the Commerce Clause of the U.S. Constitution. Thus, for example, the use of the proceeds of unlawful activity to purchase a residence

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53/ It would appear from this definitional comment that individuals who engage in multiple \$6,000 transactions are chargeable with each \$6,000 transaction in separate counts and that multiple transactions need not be aggregated in excess of the \$10,000 threshold in order to charge one count. See also United States v. Kattan-Kassin, 696 F.2d 893 (11th Cir. 1983). It is also true that an individual who transfers money to another, whether or not that money ever finds its way into a financial institution, has engaged in a "transaction" within the meaning of this Act.

54/ 18 U.S.C. § 10 defines interstate and foreign commerce for Title 18 purposes. A detailed analysis of this phrase can be found at Section 9-131.190 of the United States Attorneys' Manual.

would be covered if any of the materials could be shown to have come from out of State. 55/

Section 1956(c)(6) defines the term "financial institution" as that term is defined in 31 U.S.C. section 5312(a)(2)

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55/ The term "financial transaction" is drafted in rather confused prose. It is suggested that this definition be read as if written in the following way: The term "financial transaction" means a "transaction" involving: (1) the movement of funds by wire or other means, which in any way or degree affects interstate or foreign commerce; (2) one or more monetary instruments which in any way or degree affects interstate or foreign commerce; or, (3) the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

When read this way, the term "financial transaction" is set forth with three alternative definitions. Each of these three alternative definitions refers to the term "transaction." This is broadly defined in Subsection 1956(c)(3) and is defined to mean any transfer or exchange whether or not a financial institution is involved.

The first sub-definition involves the use of "movement of funds by wire or other means." The term "funds" is not defined in the Act. It is assumed, though it is not stated in the legislative history, that this subpart was intended to cover all forms of wire or other electronic transfers. The phrase "or other means" would, therefore, refer to the movement of funds only.

The second sub-definition is the broadest definition and the easiest to apply. It refers to any "transaction" involving one or more monetary instruments which in any way affects interstate or foreign commerce. Thus, the simple transfer of cash from one person to another is a financial transaction within the meaning of this sub-definition if it affects interstate or foreign commerce. It is this sub-definition which will, in all probability, form the basis of liability for most 1956(a)(1) prosecutions.

The third sub-definition is the standard Title 31 type of financial transaction involving a financial institution.

While prosecutors need not set forth in the indictment the particular sub-definition upon which they have relied, an election may be appropriate if a Bill of Particulars is filed.

and the regulations promulgated thereunder as they may be amended from time to time.

Section 1956(c)(7) sets out the list of crimes encompassed in the term "specified unlawful activity." The term does not include every State or Federal crime, but rather those crimes most commonly associated with organized crime, drug trafficking, and financial misconduct. This last category includes crimes such as embezzlement, bank bribery, and illegal arms sales. The prior categories include continuing criminal enterprise offenses covered under 21 U.S.C. section 848 and the RICO predicate offenses listed in 18 U.S.C. section 1961(e), with the notable exception of Bank Secrecy Act offenses. The reason for this exception is that there were not identifiable "proceeds" of a Bank Secrecy Act violation as there are for other RICO predicates. In the view of the Senate Judiciary Committee, violations of the reporting requirements of the Bank Secrecy Act were more appropriately covered by inclusion directly in the operative language of subsection (a), where they now appear. 56/

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56/ In the context of prosecutions predicated upon narcotic trafficking, it is important to remember that the term "specified unlawful activity" is based upon RICO predicate offenses. (With the exception of CCE offenses, and offenses against foreign nations.) RICO offenses are based in Title 18 and use the phrase "felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States." Thus, it would seem that the drug must be a "narcotic or dangerous drug" to form the basis of a Section 1956 or Section 1957(A) or (B)(i) violation. It would likewise seem prudent to track this language in drafting indictments as opposed to the Controlled Substances Act phraseology. For prosecutions predicated upon marihuana trafficking it is important to remember that not all circuits have held that marihuana trafficking is a RICO predicate. Those which have are: United States v. Ryland, 806 F.2d 941 (9th Cir. 1986); United States v. Bascaro, 742 F.2d 1335, 1343 (11th Cir. 1984), cert. denied, 105 S.Ct. 3476 (1985); and United States v. Phillips, 664 F.2d 971, 1039 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982).

(Footnote Continued)

In order to prevent international jurisdictional conflicts, this section also clarifies that a specified offense must occur in whole or in part within the United States or be directed at the U.S. Government. The one exception is foreign drug offenses, defined as offenses against the law of a foreign nation involving the manufacture, sale, or distribution of a controlled substance. Such offenses are the subject of an international crackdown and thus are appropriately covered here.

S. Rep. No. 433, 99th Cong., 2d Sess. 12-14 (1986).

In order to prove the first common element in all Subsection 1956(a)(1) prosecutions ("knowing that the property...represents the proceeds of some form of unlawful activity"), it must be established that the defendant knew, by direct or circumstantial proof, that the property involved in the financial transaction was the proceeds of some state or federal felonious activity. It need not be proven that the defendant knew the specific unlawful activity from which the proceeds were derived.

While Justice Department efforts to build a "reckless disregard" standard into the statute failed, the Senate Judiciary Committee Report makes it clear that in the committee's view, the knowledge requirement would embody a standard of "willful blindness":

The "knowing" scienter requirements are intended to be construed, like existing "knowing" scienter requirements, to include instances of "willful blindness." See United States v. Jewel, 532 F.2d 697 (9th Cir.), cert. denied, 426 U.S. 951 (1976). Thus, a currency exchanger who participates in a transaction with a known drug dealer involving hundreds of thousands of dollars in cash and accepts a commission far above the market rate, could not escape conviction, from the first tier of the offense, simply by claiming that he did not know for sure that the currency involved in the transaction was derived from crime. On the other hand, an automobile car dealer who sells a

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(Footnote Continued)

Sample indictments may be obtained by contacting Michael Zeldin in the Narcotic and Dangerous Drug Section.

car at market rates to a person whom he merely suspects of involvement with crime, cannot be convicted of this offense in the absence of a showing that he knew something more about the transaction or the circumstances surrounding it. Similarly, the "intent to facilitate" language of the section is intended to encompass situations like those prosecuted under the aiding and abetting statute in which a defendant knowingly furnishes substantial assistance to a person whom he or she is aware will use that assistance to commit a crime. See e.g., Backun v. United States, 112 F.2d 635 (4th Cir. 1940).

Id., at 9-10.

The knowledge standard also received considerable attention by the House Judiciary Committee. While it was agreed that the term "knowledge" did not encompass "should have known," "might have known," or "a reasonable person would have known," it was agreed that the Committee was particularly concerned about merchants and other businessmen who willingly receive and invest drug proceeds. The transcript of the markup by the Subcommittee considering the Money Laundering Control Act contained the following comment:

A person who engages in a financial transaction using the proceeds of a designated offense would violate this section if such person knew that the subject of the transaction were the proceeds of any crime. The Subcommittee is aware that every person who does business with a drug trafficker, or any other criminal, does so at some substantial risk if that person knows that they are being paid with the proceeds of a crime and then use that money in a financial transaction. As argued by Mr. Shaw, "I am concerned about a broker who might take a quarter million dollars of cash down to Fort Lauderdale taking that as payment. I am concerned about the realtor who is going to make a \$50,000 or \$100,000 commission on a deal by knowingly doing it. I am sick and tired of watching people sit back and say, "I am not part of the problem, I am not committing the crime, and, therefore, my hands are clean even though I know the money is dirty I am handling. The only way we will get at this problem is to let the whole community, the whole population,

know they are part of the problem and they could very well be convicted of it if they knowingly take these funds. If we can make the drug dealers' money worthless, then we have really struck a chord, and we have hit him where he bruises, and that is right in the pocketbook.... You have outstanding business people who are otherwise totally moral who are accepting these funds and profiting greatly from drug trafficking that is going on throughout this country, and this will put a stop to it."

H.R. Rep. No. 855, 99th Cong., 2d Sess. 13 (1986).

Determinations as to whether sufficient facts and circumstances exist to properly indict an individual for violating this Act will have to be made on a case-by-case basis. The Narcotic and Dangerous Drug Section should be consulted prior to indictment. Prosecutors must carefully scrutinize their evidence with respect to this aspect of the statute when merchants and businessman not known to have dealings in unlawfully generated currency are involved. In the case of attorneys, the greatest degree of caution is urged because of the delicate balance that must be drawn to protect the attorney-client privilege and defendant's Sixth Amendment rights. Prosecutors should refer to Section 9-111.000 of the United States Attorneys' Manual for guidance in this area. 57/

Finally, where a defendant is alleged to be acting solely as a conduit for illegal money, prosecutors should anticipate a defense strategy that argues that the defendant did not know whether the money was the product of illegal activity or private business activity or, if criminal, from felonies or misdemeanors. While this defense raises a question of fact that will be decided by the jury, prosecutors should carefully evaluate their evidence with an eye toward establishing the degree to which the property involved has indicia of illegitimate origins and the manner in which the defendant dealt with the property. The fact that prosecutors need not prove that a defendant knew the particular origin of the property will, however, effectively eliminate defenses the gist of which are "I thought it was gambling proceeds, not drug money."

Proof of the second common element in all Subsection

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57/ Approval by the Assistant Attorney General of the Criminal Division is required if the defendant is an attorney and the property represents bona fide attorney's fees. A forthcoming bluesheet will discuss this issue in further detail.

1956(a)(1) prosecutions is a more difficult proposition. This element requires proof that the proceeds of the unlawful activity were in fact "proceeds of specified unlawful activity." (as defined in 18 U.S.C. § 1956(c)(7)). Thus, while the Government must only establish that a defendant knew that the property was derived from some form of felonious activity under state or federal law, the Government must, nonetheless, prove that the proceeds were in fact derived from specified unlawful activity.

It is well documented in money laundering prosecutions that while money laundering organizations are intimately connected to the criminal organizations they are servicing, they tend to run parallel to these organizations with few, if any, direct bridges running between the two. Accordingly, only individuals within or intelligence concerning the criminal organizations actually generating the illegal proceeds will be able to provide proof of the generation of these proceeds through "specified unlawful activity." Indeed, it is often true that the highest-level money launderer paid to launder illegal proceeds may not "know" the specific unlawful origin of the money. Thus, even with cooperation from individuals within the laundering organizations or from undercover agents planted within the laundering organization, prosecutors may lack sufficient facts to supply the proof necessary to establish the "specific unlawful activity" nexus which is an element of Section 1956. Consequently, it is suggested that substantive Section 1956 charges be considered as a means to prosecute money generating corrupt organizations or individuals. The money laundering groups conspiring with these organizations can be charged as co-conspirators under 18 U.S.C. § 371 and Pinkerton liability will attach for the underlying substantive offenses. Absent conspiracy proof, however, the new structuring prohibition in Section 5324 of Title 31 should be looked to as the primary statute with which to charge traditional money laundering outfits where the specified unlawful activity nexus can not be established.

A second problem presented by this element of proof arises in the area of Government sting operations. Sting operations involving Government money would not appear to be viable substantive counts because the money to be laundered is not proceeds of some form of unlawful activity. <sup>58/</sup> Therefore, if a sting operation is the only investigative device available, Section 5324 will prove to be the most useful substantive

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<sup>58/</sup> The same is true for prosecution under Subsections 1956(a)(1) (B)(i) and (ii) and Section 1957. As will be discussed infra, sting operations would appear to be viable under 18 U.S.C. § 1956(a)(2)(A).



statute. However, prosecutors should, under appropriate facts, be able to prosecute sting operation targets using a charge of conspiracy or attempt to violate either Section 1956 or Section 1957. Cf. United States v. Ospina, 798 F.2d 1570 (11th Cir. 1986); United States v. Goldberg, 756 F.2d 949, 953 (2nd Cir. 1985); United States v. Richter, 610 F. Supp. 480 (D.C. Ill., 1985); United States v. Puerto, 730 F.2d 627 (11th Cir. 1984), cert. denied, \_\_\_ U.S. \_\_\_, 105 S.Ct. 162 (1985); and United States v. Elledge, 723 F.2d 864, 866 (11th Cir. 1984).

An example of the interaction of these first two elements is a prosecution of codefendants A and B, where A is a cocaine dealer and B has served as an investor of A's drug profits. The proof at trial that A was dealing cocaine and obtained the funds involved from those sales proves the first element, knowledge of an illegal source, as to A. For B, the evidence at trial may show actual knowledge that the money being invested was from the drug activity, or, alternately, that the circumstances of B's dealings with the funds, while not demonstrating knowledge that the money was specifically derived from cocaine sales, are such that B knew that the source of the funds was some form of illegal activity. Evidence of either type will prove the first element as to B. Independent proof that the money was cocaine profits is adequate to prove the second element (viz., that the proceeds were in fact derived from specified unlawful activity) as to both A and B, whether B was actually aware of the source of the funds or not.

Each of the three subparagraphs of Subsection 1956(a)(1) - (A), (B)(i), and (B)(ii) - add distinct alternative third elements of proof to a Section 1956 offense.

(a) Subsection (a)(1)(A) - with intent to promote the carrying on of specified unlawful activity

Subsection 1956(a)(1)(A) provides:

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A) with the intent to promote the carrying on of specified unlawful activity.

The element added by this subsection is that the defendant conducted or attempted to conduct a financial transaction "with the intent to promote the carrying on of specified unlawful

activity." The "intent to promote" language is quite similar to that used in 18 U.S.C. § 1952(a)(3) (ITAR). Under case law interpreting Subsection 1952(a)(3), it has been held that the Government is not required to prove that an accused intended to violate a specific statute but only that he/she intended to promote or facilitate a general activity which he/she knew to be illegal. See United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1121 (1975). Reference is, thereafter, made to state and federal laws to identify the types of activities which are unlawful. See United States v. Nardello, 393 U.S. 286 (1969). Further, ITAR case law does not require that the underlying crime have been actually committed or fully completed because Section 1952 only proscribes the use of interstate/foreign travel/facilities in furtherance of unlawful activity, not actual violations of law. See United States v. Briggs, 700 F.2d 408, 717 (7th Cir. 1982), cert. denied, 103 S.Ct. 2129 (1983); McIntosh v. United States, 385 F.2d 274, 277 (8th Cir. 1967) (attempt to extort sufficient for Travel Act conviction); United States v. Loucas, 629 F.2d 989 (4th Cir. 1980) (intent to violate, not actual violation of gambling laws, was sufficient for conviction). See also United States v. Davanzo, 699 F.2d 1097 (11th Cir. 1983), and United States v. Griffin, 699 F.2d 1102 (11th Cir. 1983).

It is suggested that the same theories used to prosecute ITAR violations be employed in prosecutions under Subsection 1956(a)(1)(A). Thus, if a prospective defendant can be shown to have promoted unlawful activity which in fact is shown to be specified unlawful activity, a viable Subsection 1956(a)(1)(A) prosecution would exist. This prosecution, in turn, would remain viable whether the defendant or, if pertinent, his/her co-conspirators, actually committed or fully completed the underlying crime. (It is noteworthy to remember that Section 1956 also contains an attempt provision which could be used to form the basis of a charge for an aborted Section 1956 violation.)

To continue the example used above, if the prosecution can show that cocaine dealer A was using profits from his/her drug dealings to buy additional cocaine, or to purchase a cigarette boat to be used in transporting that cocaine, a violation of this subsection as to A may be established. As to codefendant B, one who is acting as a conduit for the money A's cocaine business is generating, if B had no knowledge whatever of what the boat was for, he/she could not be convicted of intending to promote unlawful activity by buying the boat for A. However, if B intended to promote A's illegal activity by buying a boat with money he/she knew was proceeds of illegal activity for use in violating the law, it would be unnecessary to show whether B knew, for example, that the boat was to be used for unlawfully smuggling legal goods to avoid paying duty or for importing drugs.

(b) Subsection (a)(1)(B)(i) - to conceal or disguise the nature, source, etc. of proceeds of specified unlawful activity

Section 1956(a)(1)(B)(i) provides:

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -

(B) knowing that the transaction designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

The element added by this subsection is that the defendant conducted or attempted to conduct a financial transaction "knowing that the transaction was designed in whole or in part...to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." Again, as in Subsection (a)(1)(A), the statute does not require knowledge that the concealment was of the proceeds of specified unlawful activity. Rather, it must only be proven that the defendant knew that the transaction was designed to conceal the nature, location, source, or ownership/control of proceeds of some form of unlawful activity and that in fact the proceeds were from a specified unlawful activity.

Turning again to the example, in the prosecution of A, the cocaine dealer, there would be no difficulty in showing that he/she was aware that the funds were derived from a specified unlawful activity, drug dealing. As to codefendant B, if he/she did not know that the purpose in buying the boat was to launder proceeds of crime, he/she could not be convicted, but if he/she knew the purpose for purchasing the boat was to disguise the nature of the proceeds of unlawful activity but did not know the specific unlawful activity giving rise to the proceeds, he/she could still be convicted under Subsection 1956(a)(1)(B)(i).

(c) Subsection (a)(1)(B)(ii) - to avoid a reporting requirement

Section 1956(a)(1)(B)(ii) provides:

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(B) knowing that the transaction is designed in whole or in part-

(ii) to avoid a transaction reporting requirement under State or Federal law.

The element added by this subsection is that the defendant conducted or attempted to conduct a financial transaction "knowing that the transaction is designed in whole or in part...to avoid a transaction reporting requirement under State or Federal law." The additional element added by this subsection is that the financial transaction be designed in whole or in part to avoid the filing of CTRs or any other transaction reporting requirement under state or federal law, such as 26 U.S.C. § 6050I (relating to cash transactions over \$10,000 in a trade or business). There is no requirement that the defendant know that the money involved was in any way connected or destined for a "specified unlawful activity." Thus, if A was taking his/her cocaine profits and giving them to B, who was directing a network of "smurfs" (splitting up the proceeds before depositing them in banks to avoid the filing of CTRs), B would be guilty of a violation of the statute even if he/she was unaware that the funds involved were actually derived from one of the specified criminal activities; provided, however, that it could be shown that B knew that the money was derived from some form of unlawful activity.

(2) Subsection 1956(a)(2) - international transportation

Subsection 1956(a)(2) provides:

Whoever, transports or attempts to transport a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or  
(B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part-- (i) to

conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law

This subsection is designed to proscribe international money laundering transactions. It covers situations in which a person transports or attempts to transport "monetary instruments" (as defined in Subsection 1956(c)(5)) or funds <sup>59/</sup> into or out of the United States for certain illicit purposes. As in Subsection 1956(a)(1), there are three separate bases upon which a violation can occur. All permutations have a common first element: There must be a transportation or attempted transportation of a monetary instrument or funds into or out of the United States.

The Senate Judiciary Committee explained the definition of monetary instrument as follows:

Section 1956(c)(5) defines the term "monetary instruments" to include coin or currency of the United States or of any other country, traveler's checks, personal checks, bank checks, money orders, investment securities in such form that title thereto passes upon delivery, and negotiable instruments in bearer form or otherwise in such form that title there- to passes upon delivery. The definition would include cashier's checks. The phrase "coin or currency" is also intended to include gold or other precious metal coins, which are the legal tender of a country but which do not normally circulate as such, or whose value is determined by the worth of their metallic content rather than by the operation or normal currency exchange markets. "Monetary instruments" are a subset of the term "property" as used in section (a), a term that is intended to be construed liberally to encompass any form of tangible or intangible assets.

S. Rep. No. 433, 99th Cong., 2d Sess. 13 (1986).

Once it has been established that there was a transportation or attempted transportation of a monetary instrument or funds into or out of the United States, one of the three following alternative elements of proof must be met:

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<sup>59/</sup> Again, "funds" are not defined in the statute. However, in the context in which it is used it would appear to apply to wire transfers or any other electronic funds transfers.

(a) Subsection (a)(2)(A) - with intent to promote the carrying on of specified unlawful activity

Section 1956(a)(2)(A) provides:

Whoever transports or attempts to transport a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carry on of specified unlawful activity.

This element requires that the transportation or attempted transportation be carried out "with the intent to promote the carrying on of specified unlawful activity." Unlike Subsection 1956(a)(1)(A), there is no requirement in this subsection that the monetary instrument or funds be the product of unlawful activity. Prosecutors must only establish that the defendant transported or attempted to transport the monetary instrument or funds with the "intent to promote the carrying on of specified unlawful activity." Again, this phrase is analogous to that used in the ITAR statute. Case law interpreting ITAR would appear to apply to Subsection 1956(a)(2)(A) prosecutions.

The absence of a requirement that the monetary instruments or funds be the proceeds of unlawful activity would allow for the use of Government funds in "sting" operations. Thus, if an individual or domestic money laundering organization was willing to launder its money through outbound currency transportation then the use of Government funds would not preclude a viable Subsection 1956(a)(2)(A) prosecution if it could be established that the purpose of the transportation was to promote the carrying on of specified unlawful activity (§1956 (c)(7)).

(b) Subsection (a)(2)(B)(i) - to conceal or disguise the nature, source, etc. of the proceeds of specified unlawful activity

Subsection 1956(a)(2)(B)(i) provides:

Whoever transports or attempts to transport a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(B) knowing that the monetary instrument or funds involved in the transportation

represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity....

This subsection adds two distinct elements of proof to a Subsection 1956(a)(2) prosecution. First, it mirrors the language of Subsection 1956(a)(1) in requiring that the monetary instrument or funds involved in the transportation or attempted transportation represent the proceeds of some form of unlawful activity. The analysis under Subsection 1956(a)(1) would apply with equal force to Subsection 1956(a)(2)(B)(i) prosecutions. Second, like Subsection 1956(a)(1)(B)(i), it must be proven that the transportation was designed in whole or part "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." The knowledge and proof requirements under this subsection are identical to the Subsection 1956(a)(1)(B)(i) counterparts. As the Senate Judiciary Committee comments:

As with the prior section, the knowledge requirement of this section should be construed to encompass instances of "willful blindness"; and the "intent to facilitate" language should also be construed in accord with Backun v. United States, supra.

Id., at 11.

Finally, as to the requirement that the transportation be undertaken to conceal or disguise, etc., it would seem that the easiest hook on which to hang this element of proof, in the event a CMIR is filed, would be the "conceal the...proceeds" phrase. For, when an individual fails to file a CMIR he/she has, a fortiori, concealed the location of the monetary instrument.

(c) Subsection (a)(2)(B)(ii) - to avoid a reporting requirement

Section 1956(a)(2)(B)(ii) provides:

Whoever transports or attempts to transport a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States --

(ii) to avoid a transaction reporting requirement under State or Federal law....

This element, like Subparagraph (B)(i) above, requires proof that the monetary instruments or funds involved in the transportation or attempted transportation represent the proceeds of some form of unlawful activity. In addition, Subsection (a)(2)(B)(ii) adds the element of proof that such transportation be designed in whole or part "to avoid a transportation reporting requirement under State or Federal law." Although this subsection requires knowledge that the funds involved are the product of some unlawful activity, there is no requirement that the funds be the proceeds of specified unlawful activity. Thus, all that has to be proven in addition to the transportation or attempt to transport is that: (1) the funds are known to be the product of some kind of unlawful activity; and (2) that the movement in or out of the country was to avoid a reporting requirement.

In essence, Subsection (a)(1)(B)(ii) is a CMIR count (31 U.S.C. § 5316) with the added burden of proving that the defendant knew that the proceeds represented some form of unlawful activity.

Finally, under the terms of Subsection (d) of Section 1956, 18 U.S.C. § 1956 does not supersede any provision of federal or state law imposing criminal or civil penalties in addition to those provided in Subsection 1956(d). Thus, a person could be charged with both a violation of Section 1956 and a violation of the Bank Secrecy Act for causing a financial institution to fail to file a CTR or CMIR or for filing a false CTR or CMIR.

#### B. Penalties

The criminal penalty for a violation of either Subsection (a)(1) or (a)(2) of Section 1956 is a maximum sentence of twenty years' incarceration for each offense and a maximum fine of \$500,000, or twice the value of the monetary instruments or funds involved, whichever is greater.

Under the terms of Subsection 1956(b), violators of Subsections 1956(a)(1) and (a)(2) are also liable to the United States for a civil penalty of not more than the greater of the value of the property, funds, or monetary instruments involved in the transaction or \$10,000. (Although "or transportation" does not follow "transaction" as it does earlier, fines should be imposeable relating to the property, etc. involved in the Subsection 1956(a)(2) transportation offense and should not be limited to the minimum \$10,000 fine.) "Such civil penalty is intended to be imposed in addition to any fine imposed for the criminal offense." S. Rep. No. 433, 99th Cong., 2d Sess. 12 (1986). Consequently, typical pleas for mitigation of fine at the time of sentencing to the effect "IRS will punish the



defendant enough in this respect via civil fines or a jeopardy assessment" should be to no avail in light of the clear intent of Congress to provide for double monetary penalties. Moreover, it should also be noted that the forfeiture provisions of this act may be applied in addition to civil and criminal penalties.

As stated in the Senate Judiciary Committee Report:

Thus, a person who violates section 1956 by laundering \$250,000 might have the funds civilly forfeited, be subject to a fine of another \$250,000 if convicted of the criminal offense, and pay a civil penalty of another \$250,000. For payment of the criminal fine and civil penalty, the Government may look to other assets of the defendant not involved in the offense.

Id., at 12.

### C. Extraterritorial Jurisdiction

Subsection 1956(f) defines the jurisdiction of United States courts over extraterritorial acts which fall within the scope of Section 1956. The two preconditions for extraterritorial jurisdiction are: (1) The conduct was committed by a United States citizen or, in the case of a non-United States citizen, the conduct occurred in part in the United States, and (2) the transaction or series of transactions involved funds or monetary instruments of a value exceeding \$10,000.

The legislative history contained in Senate Report 99-433 describes the intended reach of this section:

Section 1956(f) is intended to clarify the jurisdiction of U.S. courts over extraterritorial acts that could be construed to fall within the scope of Section 1956. It is not the Committee's intention to impose a duty on foreign citizens operating wholly outside of the United States to become aware of U.S. laws. Section (f) avoids this by limiting extraterritorial jurisdiction over the offense to situations in which the interests of the United States are involved, either because the defendant is a U.S. citizen or because the transaction occurred in whole or in part in the United States. An example of the latter is a situation in which a person transfers by wire the proceeds of a drug transaction from a bank in the United States to a bank in a foreign country; another example is a situation in which a

person telephones instructions from the United States to one foreign bank to transfer such proceeds to another foreign bank. The section also specifies that there will only be extraterritorial jurisdiction over a transaction or series of related transactions involving more than \$10,000, thus ensuring that Federal extraterritorial jurisdiction is confined to significant cases.

S. Rep. No. 433, 99th Cong., 2d Sess. 14 (1986) (emphasis added).

It is clear from the foregoing that an individual, whether or not a U.S. citizen, who conducts business in the United States is subject to the jurisdiction of the United States. A more difficult problem arises with respect to the foreign institutions through which the proscribed conduct was transacted. While it is apparent that the Senate did not endeavor to impose an obligation on these institutions to become aware of United States currency laws, the broad language of this section would, nonetheless, appear to subject foreign institutions to United States jurisdiction provided they have legally sufficient contact with the United States. Accordingly, the Department reads this section to confer jurisdiction over foreign institutions which participate in conduct occurring in whole or part in the United States. Decisions whether to exercise the jurisdictional prerogative granted by this section, however, will be made on a case-by-case basis taking into consideration the nature of the underlying contact, participation by the defendant in the underlying criminal scheme, and the possibility of prosecution in the foreign country, as well as practical problems of proof.

The Criminal Division may be providing additional guidance as to this matter in the future.

Remember that approval of the Assistant Attorney General in charge of the Criminal Division is necessary before any grand jury investigation may be commenced, an indictment returned, or a complaint filed whenever extraterritorial jurisdiction under Subsection 1956(f) is asserted against any defendant.

3. Section 1957 - Engaging in monetary transactions in property derived from specified unlawful activity

Section 1957 creates a new offense entitled "engaging in monetary transactions in property derived from specified unlawful activity." The actual proscription is contained in Subsection 1957(a), whose elements are: (1) an individual must "knowingly" engage or attempt to engage in a "monetary transaction" in "criminally derived property"; (2) the value of the property must be "greater than \$10,000"; and (3) the property must in fact be derived from "specified unlawful activity."

An analysis of Section 1957 requires reference to the definitions contained in Subsection 1957(f).

Subsection 1957(f)(1) defines the term "monetary transaction" to include the deposit, withdrawal, transfer, or exchange of "funds" or a "monetary instrument" by, through, or to a "financial institution" (defined in 31 U.S.C. § 5312(a)(2)) which affects "interstate or foreign commerce" (see case law interpreting 18 U.S.C. § 1952 ("ITAR")).

Subsection 1957(f)(2) defines criminally derived property to mean any property constituting, or derived from, proceeds of a criminal offense.

Subsection 1957(f)(3) defines "specified unlawful activity" in accordance with the definition contained at Subsection 1956(c)(7). See discussion, supra.

The knowledge requirement contained in Section 1957 is only that the individual know that the monies involved are derived from some kind of criminal activity. There is no requirement of knowledge that the funds are derived from any particular kind of crime or, indeed, that the funds were derived from a felony rather than a misdemeanor. While there is a proof requirement of the actual origins of the money or funds involved in the transaction, this is not a knowledge requirement on the part of the defendant. See 18 U.S.C. § 1957(c).

The penalty for violation of this section is ten years' imprisonment and/or a fine as provided for in Title 18 (viz., \$250,000 pursuant to 18 U.S.C. § 3623) or a fine of not more than twice the amount of the criminally derived property involved in the transaction. Jurisdiction for a Section 1957 offense is based upon the offense taking place in the United States or the special maritime and territorial jurisdiction of the United States. Additionally, jurisdiction for offenses occurring outside the United States is available if the defendant is a United States person (18 U.S.C. § 3077) except those persons who are employees or contractors of the United States, regardless of nationality, who are the victim or intended victim of an act of terrorism by virtue of that employment. 18 U.S.C. § 3077(2)(D). (Note: It is not clear why 18 U.S.C. § 1957 has a broader extraterritorial reach than 18 U.S.C. § 1956, which is limited by Subsection 1956(f).) See Section C of the discussion concerning Section 1956, supra, for a discussion of the policy concerning the use of extraterritorial jurisdiction.

In essence, Subsection 1957(a) effectively proscribes any knowing receipt of criminally derived funds when over \$10,000 is involved and a financial institution is utilized at some point. The statute does not require that these funds be used for any additional criminal purpose. For example, the deposit in a bank of the proceeds of a house sale by a seller who knows that these

proceeds were funds derived from drug dealing would constitute a violation of this statute.

In a related discussion, the House Committee offered guidance as to the types of offenses and offenders they were contemplating by passing statutes like the presently enacted Sections 1956 and 1957:

The following example, discussed at the markup, illustrates the potential problem that an expansive reading of the state of mind would have in extending the reach of the offense beyond that intended by the Committee. The corner grocer in a small community is aware of the reputation of a person who is the local drug trafficker. That person comes to the store and buys five pounds of hamburger. The grocer takes the cash and deposits it in his/her bank account with his/her other receipts. The financial transaction is the act of the grocer depositing his day's receipts in his/her bank account. The question is whether the grocer is guilty of violating this branch of the offense.

As Mr. McCollum observed, "You [the grocer] have to know what he is coming in to buy groceries with is indeed the money derived from the particular designated crimes; and to get to that point, you would have to prove to a jury [that the grocer knew that] the fellow had no other source of income or that [if] he had -- the grocer had some more direct knowledge this fellow was just standing outside on that street corner before he came in peddling drugs, like if [the grocer] saw him doing it. [Under those circumstances] I don't have any problem whatsoever holding the grocer accountable if he sees the guy [the trafficker] outside dealing in drugs and takes cash and walk into his store.

Mr. Lungren stated his understanding of the Committee's use of the term "knowingly", "It is a 'knowing' standard. I think it is repetitive of what he [Mr. McCollum] said, but I think that is extremely important. It is not 'should have known, might have known, a reasonable person would have known,' it is 'this person knew the source of the income'." Mr. Lungren, in reiterating the importance of this branch of the offense said, "It is time for us to tell the local trafficker and everyone else, 'If you know that person is a trafficker and has this income derived from the offense, you better beware of dealing with that person.'"

H.R. Rep. No. 855, 99th Cong., 2d Sess 13-14 (1986).

These remarks, as well as those referenced in the discussion on the knowledge requirements of Section 1956, emphasize that it was the intent of Congress to ensure that all classes of individuals who knowingly deal with drug traffickers were subject to prosecution. <sup>60/</sup> Obviously, the key aspect in assessing the viability of a Section 1957 prosecution is that knowledge. If substantial evidence exists to prove that an individual knowingly violated the terms of this statute, then prosecution is warranted. A forthcoming bluesheet for the United States Attorneys' Manual will discuss this issue in greater detail. This bluesheet may also address whether the monetary transaction required by Section 1957 is an event which should reasonably be foreseen by the defendant (see 18 U.S.C. § 1341 et seq. ("mail fraud")), and thus need not have been directly done or caused by the defendant, as well as the need, vel non, to establish the identity of the funds used in the monetary transaction.

Prosecutors are again directed to Section 9-111.000 of the United States Attorneys' Manual for guidance in exercising the discretion vested them by this section. Remember, however, that no prosecution may be brought under Section 1957 without first obtaining the concurrence of the Narcotic and Dangerous Drug Section. In addition, remember that approval by the Assistant Attorney General of the Criminal Division is required before a prosecution may be initiated where the defendant is an attorney and the property represents bona fide attorneys' fees.

#### 4. Section 5324 of Title 31 - Structuring transactions to evade reporting requirements

Section 1354 of the Anti-Drug Abuse Act has created 31 U.S.C. § 5324, a new offense entitled "structuring transactions to evade reporting requirements prohibited." This provision supplements 31 U.S.C. § 5313(a) by authorizing the imposition of civil and criminal penalties on a person who, "for the purpose of evading the reporting requirements," commits any of the three alternative acts: (1) causes or attempts to cause a domestic financial institution (31 U.S.C. § 5312; 31 C.F.R.

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<sup>60/</sup> It should be noted that the House Committee adopted a resolution limiting the reach of Section 1956 (and presumably Section 1957 in its current form) to exclude financial transactions involving bona fide attorneys fees accepted by an attorney for representing a client in a criminal investigation. This resolution was not followed by the Senate and is not part of this statute.

103.11) 61/ to fail to file a currency transaction report; (2) causes or attempts to cause a domestic financial institution to file a CTR that contains a material omission or misstatement of fact; or (3) "structures" or assists in structuring, or attempts to structure or attempts to assist in structuring, any transaction with one or more domestic financial institutions.

As a threshold matter, prosecutors must establish that an individual conducted or attempted to conduct any of the types of transactions alternatively set forth "for the purpose of evading the reporting requirements of [31 U.S.C. §] 5313(a)." This element of proof is essentially the same as that which now exists for traditional Section 5313 prosecutions. That is, prosecutors must establish that an individual knew of the reporting requirements and set out thereafter to evade such requirements. Factors typically giving rise to a finding of intent to evade are: use of false payee or remitter names on checks or money orders; false information on account opening documents; artificially structuring single deposits; numerous artificial withdrawals or exchanges of currency in order to create a false appearance that multiple unrelated transactions were made; employment of runners to surreptitiously make deposits, withdrawals, or exchanges; payment or receipt of a percentage for conducting deposits, withdrawals, or exchanges for which a bank would have charged no fee; and, maintenance of multiple accounts for moving money among several banks or within one bank.

Once it has been proven that the transaction was conducted for the purpose of evading the reporting requirements, one of the three alternative provisions of 31 U.S.C. § 5324 must be met. Subsections 5324(1) and (2), are, essentially, restatements of Section 5313 and 18 U.S.C. § 1001 prohibitions with a much needed attempt provision. Under current law, a financial institution is not required to report a currency transaction until 15 days after the transaction has taken place; therefore, a reporting violation does not occur until 15 days have passed from the time of the transaction and the financial institution has failed to file a report. This situation creates two problems for prosecutions of persons who have structured their transactions to avoid the reporting requirements of the Bank Secrecy Act. First, after 15 days the money launderers may have fled and the investigative trail may be cold. Second, an individual who has attempted to

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61/ Section 5324 contains no definitions section. Reference must be made, therefore, to Title 31 and 31 C.F.R. 103.11 for the appropriate definitions of terms.

avoid the reporting requirements may escape liability if the financial institution, despite the efforts of the money launderer, files a timely, correct report. The attempt provision authorizes an earlier seizure of individuals and funds and subjects individuals who attempt to frustrate the reporting requirements of the Bank Secrecy Act to potential criminal liability at the time of their attempt and not 15 days later.

In essence, Subsection 5324(1) makes it clear that a person who engages in a financial transaction in excess of \$10,000 in a single day with a single financial institution whether at the same or different branches of that financial institution, in a manner that causes the financial institution to fail to file a CTR, is guilty of a Subsection 5324(1) offense. Similarly, that subsection also encompasses conduct such as a single defendant engaging in multiple transactions each less than \$10,000 with different tellers or in different branches of the same bank or more than one defendant each taking a total of more than \$10,000 to different tellers at the same time or at least on the same day, with less than \$10,000 being taken by any one defendant to any one teller.

Subsection 5324(2) is essentially a false statement provision that authorizes the prosecution of a individual for causing or attempting to cause a financial institution to file a false CTR. Reference should be made to 18 U.S.C. § 1001 case law for analysis of materiality. See, e.g., United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983); United States v. Puerto, 730 F.2d 627 (11th Cir. 1984); United States v. London, 550 F.2d 206 (5th Cir. 1977); and United States v. Fitzgibbon, 619 F.2d 874 (10th Cir. 1980).

Subsections 5324(1) and (2) can also be effectively utilized in circumstances in which an individual is charged as a financial institution and his/her co-conspirator customers are paying a percentage to either not file reports or file or cause to be filed false reports. The act of giving the individual money launderer (charged as a financial institution) currency for the purpose of depositing or exchanging it at secondary financial institutions (e.g., banks) in such a way as to cause the bank not to file or to falsely file triggers the liability of the co-conspirator customer. See United States v. Cure, 804 F.2d 625 (11th Cir. 1986).

Subsection 5324(3) creates a new offense of structuring or attempting to structure or assisting in structuring a financial transaction with one or more financial institutions with the intent to evade the CTR reporting requirements. This subsection is the only one of the three that presents any significant problems of interpretation because the statute does not define "structuring." This definitional problem is hardly insurmountable if care is taken in bringing cases that Congress

clearly intended to be covered by this section. As the Senate Judiciary Committee points out:

Under present law, money launderers are successfully prosecuted in some judicial circuits for causing financial institutions not to file reports on multiple currency transactions totaling more than \$10,000 or causing financial institutions to file incorrect reports. In such cases, the actual money launderers are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001 (concealing from the Government a material fact by a trick, scheme, or device). For example, in United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 where the defendants had engaged in a money laundering scheme in which they had structured a series of currency transactions, each one less than \$10,000 but totaling more than \$10,000, to evade the reporting requirements. See also United States v. Massa, 740 F.2d 629, 645 (8th Cir. 1984), cert. denied, sub nom Skinner v. United States, \_\_\_ U.S. \_\_\_, 105 S.Ct. 2357 (1985); United States v. Sanchez Vazquez, 585 F. Supp. 990, 993 (N.D. Ga. 1984); United States v. Konefal, 566 F. Supp. 698 (N.D.N.Y. 1983) (prosecution for structuring upheld under Title 31). In contrast, the First Circuit Court of Appeals, in United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court of Appeals in United States v. Denemark, 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in United States v. Varbel, 780 F.2d 758 (9th Cir. 1986) have held that structuring currency transactions to avoid the reporting requirements did not violate 18 U.S.C. Section 1001.

[Subsection 3] would codify Tobon-Builes and like cases and would negate the effect of Anzalone, Varbel and Denemark. It would expressly subject to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements



of facts. In addition, the proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act. For example, a person who converts \$18,000 in currency to cashier's checks by purchasing two \$9,000 cashier's checks at two different banks or on two different days with the specific intent that the participating bank or banks not be required to file Currency Transaction Reports for those transactions, would be subject to potential civil and criminal liability. A person conducting the same transactions for any other reasons or a person splitting up an amount of currency that would not be reportable, if the full amount were involved in a single transaction (for example, splitting \$2,000 in currency into four transactions of \$500 each), would not be subject to liability under the proposed amendment.

Id. at 21-22

The House Committee on Banking, Finance and Urban Affairs, in reporting a virtually identical version of the money laundering provisions, clearly intended the same results. It reported:

In some judicial circuits, money launderers have been successfully prosecuted for causing financial institutions not to file reports on such multiple currency transactions. In such cases, defendants are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001 (concealing from the Government a material fact by a trick, scheme, or device) [citing Tobon-Builes, supra].

In contrast, other cases have held that the Act and its regulations impose no duty on the customer to inform the financial institution of the structured nature of the transactions, that the reporting duties are placed solely upon the financial institution, and therefore, only a financial institution can directly violate the reporting requirements [citing, inter alia, Anzalone, supra, and Varbel, supra].

The Committee believes that Section 2 of H.R. 5176 would resolve the legal issues raised by the various circuit courts by expressly subjecting to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986)

The House floor debate on H.R. 5484, which contains the same language as in 31 U.S.C. § 5324 as was finally passed, see Cong. Rec. H6620 (daily ed. Sept. 11, 1986), contains extensive legislative history regarding the money laundering provisions. See Cong. Rec. H6556-H6563, H6599 (daily ed. Sept. 10, 1986). Included in the discussion are extensive remarks by Congressman St. Germain, Chairman of the House Committee on Banking, Finance and Urban Affairs, the Committee that reported the money laundering provisions. As to the "structuring" provisions, Congressman St. Germain said, "it creates an offense of struct[ur]ing a transaction to evade the reporting requirements without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act." Id. at H6558. Similarly, Congressman J.J. Pickle, sponsor of an earlier money laundering bill, H.R. 4573, twice described the provision as enabling successful prosecution not only of "smurfs" but also of "those who mastermind money laundering" schemes. Id., at H6599.

Thus, as the legislative history makes certain, Congress clearly intended to cover the splitting up of more than \$10,000 in cash into multiple transactions, each totalling less than \$10,000, at the same or different banks or branches of the same bank and on the same or different days, with the intent of avoiding the filing of CTRs. Where the sum of money in excess of \$10,000 is "structured" on the same day or in a fairly short period of time, there is no doubt under the legislative history that Congress intended to cover the conduct. A problem of proof will arise where the structuring occurs over a period of time, although even there the problem will be one of insufficient evidence to prove the offense rather than the kind of problem that might result in bad precedent for other cases.

#### 5. Penalties

Section 5324 does not provide for penalties separate from

those contained in 31 U.S.C. § 5322. Thus, each transaction or attempted transaction carries a five-year maximum. Note, however, that Subsection 1357(g) of the Anti-Drug Abuse Act amends Section 5322 to provide for a ten-year penalty if a pattern of illegal activity involving more than \$100,000 in a 12-month period is found to exist.

If prosecutors cannot prove the specific unlawful origin of the proceeds, thereby rendering prosecutions under 18 U.S.C. § 1956 or § 1957 difficult, Section 5324 should provide rather straightforward cases. With a ten-year penalty - as most money laundering cases will involve in excess of \$100,000 within 12 months - the risk of bringing a marginal Title 18 case will weigh in favor of bringing a Section 5324 prosecution.

Finally, with respect to all Section 5322 sentences, newly created Subsection 5321(d) provides that a civil money penalty may be imposed under Subsection 5321(a) with respect to any violation of Title 31 notwithstanding the fact that a criminal penalty is imposed with respect to the same violation. Again, as indicated in the penalty section of Section 1956, prosecutors are now well-equipped to argue for substantial fines in criminal cases and against arguments that civil fines or jeopardy assessments sufficiently cover any need for the imposition of a fine in the related criminal matter.

#### 6. Right to Financial Privacy Act Amendments

Section 1353 of the Money Laundering Control Act amends the Right to Financial Privacy Act of 1978 (Privacy Act), (12 U.S.C. § 3401) in two respects. Each change is designed to remedy problems that have arisen in past money laundering investigations.

Subsection (a) amends Subsection 1103(c) (12 U.S.C. § 3403(c)) of the Privacy Act. Currently, Section 1103(c) provides that nothing in the Privacy Act shall preclude a financial institution from notifying proper Government authorities that it has information which may be relevant to a possible violation of statute or regulation affecting a financial institution. Questions have arisen among financial institutions pertaining to the quantum of information which may be properly released without simultaneous notice to the affected customer. This amendment, while not authorizing complete disclosure of a customer's financial records, authorizes the financial institution to give to the appropriate governmental authority sufficient information concerning the nature of the suspected violation and the parties involved to allow that authority to obtain a summons, subpoena, or search warrant for additional information.

Subsection (a) makes it clear that a financial institution may disclose three specific pieces of information: (1) the name

or names of the individual(s) conducting the suspected transaction and other identifying information pertaining to these individuals; (2) the account number or other identifying information about the account; and (3) the nature of the suspected illegal activity.

The Senate Judiciary Committee, in addressing this amendment, offered the following elaboration on the type of information which may be disclosed under amended Subsection 3403(c):

The name or names that may be disclosed under this Section includes the name of any corporate entity, partnership, or other organization in which an account is listed, as well as the names, if known of any individuals involved in a suspected transaction. Other identifying information that may be disclosed about individuals includes the individual's home or business addresses or social security number, if known.

Other identifying information that may be disclosed about accounts includes, in addition to account number, the type of account (checking, savings, securities) or the interest rate paid on the account. It also includes the location of the branch or office at which the account is maintained.

The nature of suspected illegal activity that may be disclosed includes a specification of the offense that the financial institution believes is being violated, if known, or a description of the activities giving rise to the bank's suspicions. Thus, for instance, if a customer of a bank comes into the bank with regularity, every Monday, Wednesday, and Friday, to obtain a cashier's check with \$5,000 in small denomination bills, the bank could describe this pattern in the information it submits to law enforcement officials, even if the bank does not know precisely what law might be violated.

S. Rep. No. 433, 99th Cong., 2d Sess. 15 (1986).

(It should be pointed out that any disclosure under this section is entirely voluntary on the part of the disclosing bank. However, under certain circumstances a financial institution or an employee thereof who ignores obvious patterns of criminal activity may be subject to liability under Section 5324).

Section 3(a) also establishes a limited "good faith" defense for financial institutions that provide such voluntary disclosure. Under existing Section 1117(c) of the Right to Financial Privacy Act (12 U.S.C. § 3417(c)), if a financial institution provides information to a Government authority in good-faith reliance on a certification by that authority that it has complied with the applicable procedures of the Right to Financial Privacy Act, the institution may not be held liable for such disclosure in a civil suit by the customer whose records have been disclosed. Section 3(a) provides parallel protection for a financial institution that voluntarily provides the information listed above.

The section also specifies that this limited good-faith defense applies to suits against any officers of an institution that is involved in a voluntary disclosure, as well as against the institution itself. Suits affected by this defense include suits brought under any theory of federal, state, or local law. This includes suits brought under common law as well as statutory or regulatory provisions. It also includes suits brought under constitutional provisions, to the extent it may constitutionally affect such suits.

The Senate Judiciary Committee offers the following caution to those institutions which prosecutors are trying to encourage to cooperate:

However, because there is no Government certificate that changes hands in a voluntary disclosure by a financial institution, the only way an institution can assure itself of protection from civil suit under this Section is if it limits its disclosures to the above information.

Id., at 16.

Finally, the section effects a limited preemption of state and local privacy laws. It preempts such laws to the extent they prohibit voluntary disclosure of the information specified above. It does not preempt state or local privacy laws in any other respect. As in the case of the good-faith defense, this preemption applies to common law as well as state constitutional, statutory, and regulatory law, as provided for in the Supremacy Clause of the U.S. Constitution, Article 6. This change should be helpful to prosecutors in states such as California which have privacy rights specifically provided for in their state constitutions.

Subsection (b) modifies Section 1113(i) of the Privacy Act (12 U.S.C. § 3413(i)). Subsection 3414(i) presently exempts grand jury subpoenas and related court orders from Privacy Act disclosure. Yet, while the exemption embodied in Subsection

3413(i) was designed to free the grand jury investigative process from the customer notice and other protections of the Act, several courts have construed the provision in a manner that ensures more notice to customers. These courts have refused Government requests to order a financial institution that receives a grand jury subpoena to produce customer records to delay notifying its customer of the receipt of the subpoena. See, e.g., In re Grand Jury Subpoena Duces Tecum, 628 F. Supp. 580 (W.D. Ark. 1986); In re Grand Jury Subpoena Duces Tecum, 575 F. Supp. 1219 (E.D. Pa. 1983). The effect of these decisions has been to jeopardize many significant organized crime investigations because financial institutions that have received record subpoenas have proceeded to notify their customers of the pendency of investigations against them.

Subsection (b), in an effort to redress this problem, amends Subsection 3413(i) to authorize delayed notification for grand jury subpoenas issued to financial institutions to obtain customer records.

The Senate Judiciary Committee clarified the effect of this amendment by observing:

A court may order such delayed notification under the circumstances specified and pursuant to the procedures already provided in Section 1109, 12 U.S.C. 3409, for judicial and administrative subpoenas. That Section clarifies, for instance, that there must be reason to believe that there will be serious jeopardy to an investigation before a court will order delayed notification and that such an order is to be periodically reviewed by the issuing court. It also ensures, however, that delayed notification can be ordered in appropriate circumstances.

Id., at 17.

#### 7. Amendments to the Bank Secrecy Act

(1) Section 1355 of the Anti-Drug Abuse Act amends 31 U.S.C. § 5317(b). In its present form, Subsection 5317(b) requires a customs officer seeking to conduct a warrantless border stop and search to have "reasonable cause to believe" that a monetary instrument is being transported in violation of 31 U.S.C. § 5316. Understandably, questions have arisen as to the meaning of this phrase. Some courts ruled that it actually implied probable cause while others maintained it meant reasonable suspicion.

The amendment embodied in Subsection 1355(a) of the Anti-Drug Abuse Act eliminates this phrase altogether. As amended, Subsection 5317(b) now reads:

"(b) SEARCHES AT BORDER. -- For purposes of ensuring compliance with the requirements of section 5316, a customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States."

Under its terms, customs officers may now, without warrant search any entering or departing passenger for the purpose of ensuring compliance with the requirements of Section 5316. The border exception to the warrant requirement serves as the justification for the intrusion. This subsection was effective as of the signature of the President on October 27, 1986.

(2) Section 1355 of the Anti-Drug Abuse Act also amends 31 U.S.C. § 5317(c). Previously Subsection 5317(c) provided for the seizure and forfeiture of a monetary instrument when a CMIR pertaining to that monetary instrument had not been filed or contained a material omission or misstatement. Under the terms of amended Subsection 5317(c), the Government may seize and forfeit the monetary instrument for which no CMIR or a false CMIR has been filed but also "any interest in property, including a deposit in a financial institution, traceable to such instrument." Thus, amended Subsection 5317(c) allows agents to trace the proceeds of the seized monetary instruments. Agents would, for example, be able to seize currency in a bank account which represents the corpus of a bearer instrument seized at the border as a consequence of a failure to file or falsely filed CMIR. (Note, under Subsection 981(a)(1)(C) of the forfeiture provisions of this Act, agents are also empowered to seize, forfeit and trace any interest in property pertaining to a violation or attempted violation of 31 U.S.C. §§ 5313(a) and 5324.) This new seizure/forfeiture authority applies to violations committed on or after January 28, 1987.

(3) Section 1356 amends 31 U.S.C. § 5318 in such a way as to entrust to the Secretary of Treasury new authority to summon both testimonial and documentary evidence in connection with civil enforcement violations of Title 31.

Newly added Subsection 5318(a)(3) authorizes the Secretary of the Treasury to "examine any books, papers, records or other data of domestic financial institutions relevant to the record keeping or reporting requirements of this subchapter."

Newly added Subsection 5318(a)(4) authorizes the Secretary of the Treasury to "summon a financial institution, <sup>62/</sup> an officer or employee of a financial institution (including a former officer or employee), or any person having possession, custody, or care of the reports and records required under this subchapter, to appear before the Secretary of the Treasury or his

delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give testimony, under oath, as may be relevant or material to an investigation described in Subsection (b)." (Subsection (b) limits the powers under Subsections (a)(3) and (a)(4) to civil enforcement violations of this subchapter.)

The reasons for passage of these new sections were carefully explained by the Senate Judiciary Committee:

This Section amends 31 U.S.C. 5318 to give the Secretary of the Treasury new authority to summon both testimonial and documentary evidence. It is imperative to the effectiveness of the Bank Secrecy Act that the Secretary have the ability to summon witnesses and documents both to investigate violations of the act and to assess the appropriate level of civil penalties for violations of the Act. This authority is especially critical with respect to the estimated 3,000 miscellaneous financial institutions such as casinos and foreign currency brokers, whose compliance with the Bank Secrecy Act is monitored by the Internal Revenue Service. Currently, IRS must rely on the voluntary cooperation of these institutions to insure compliance, since the IRS summons authority does not extend beyond tax matters under Title 26.

Under the new Section 5318(a)(4) this summons authority may be used against any financial institution, whether foreign or domestic, regulated by the Treasury Department. Concerns have been raised about the application of this authority to obtain records of foreign financial activity through the issuance of a subpoena to a U.S. branch of a predominantly offshore financial institution. The primary concern is that compliance with such a subpoena may force the institution to violate the strict financial privacy laws of other nations, such as the Bahamas or the Cayman Islands, from which records may be sought. It is the Committee's intention that efforts should be made, at least in the first instance, to resolve any conflicts that may arise between U.S. law enforcement interests and foreign secrecy laws

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62/ As defined in Subsection 5312(a)(2)(D), this includes "an agency or branch of a foreign bank in the United States."



through diplomatic efforts. If diplomatic efforts prove to be unsuccessful, however, the Committee expects such conflicts to be resolved by a careful balancing of the competing interests, in accordance with the decision of the U.S. Court of Appeals for the Eleventh Circuit in United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), and United States v. Bank of Nova Scotia, 740 F.2d 817 (11th Cir. 1984). See also United States v. First National Bank of Chicago, 699 F.2d 341 (7th Cir. 1983).

While these sections only empower the Secretary of the Treasury to obtain such information in connection with civil enforcement actions, there is nothing in the Act which can be read to restrict the use of information developed from a civil summons from being used in a subsequent or collateral criminal investigation or proceeding relating to the Bank Secrecy Act or any other matter. Indeed, the Senate Judiciary Committee stated: "The Committee intends that procedures that Treasury currently uses to convey information with respect to corresponding civil and criminal Bank Secrecy Act cases will not be affected." Id., at 18.

(4) Section 5318 is further amended by the addition of new Subsection (f). This subsection provides that no person shall qualify for an exemption from the reporting requirements of Title 31 unless the relevant financial institution prepares and maintains a statement which describes in detail the reasons why such person qualifies for the exemption and containing the signature of such person. On December 17, 1986, the Department of the Treasury promulgated a regulation implementing this provision. See 51 Fed. Reg. 45108 (December 17, 1986).

This amendment is a further effort to tighten control over improper use of exempt lists by financial institutions. These added elements of signature and bank employee statement may allow for false statement (18 U.S.C. § 1001) and false bank entry (18 U.S.C. § 1005) prosecutions in the event that material information provided to or by the financial institution to gain or attempt to gain exempt list status is proven to be false.

(5) Subsection 5322(b) is amended by Subsection 1357(g) of the Anti-Drug Abuse Act to provide for enhancement of the criminal penalty for violations of the Bank Secrecy Act that occur in conjunction with violations of other laws of the United States or with other illegal activities involving more than \$100,000 in a 12-month period. Section 5322(b) is amended so as to raise the maximum term of imprisonment under this enhancement from five to ten years. It also changes the language of Section 5322 to correct the problem of interpretation that arose in the case of United States v. Dickinson, 706 F.2d 88 (2d Cir.

1983). In that case, the court held that the requirement of other illegal activities in excess of \$100,000 referred only to reporting violations under the Bank Secrecy Act. This section now makes explicit that illegal activities involving more than \$100,000 are not restricted to violations under the Bank Secrecy Act itself, but to any illegal activity involving the requisite amount.

And, as the Senate Judiciary Committee points out:

Illegal activities mean activities constituting an offense whether or not the person has been charged with or was convicted of the offense.

Id., at 20.

(6) Under the terms of Subsection 5316(a)(1), an individual is obligated to file a CMIR when he/she knowingly "transports or attempts to transport or has transported monetary instruments of more than \$10,000 at one time." Section 1358 of the Anti-Drug Abuse Act amends Section 5316 in two important respects: First, new Subsection 5316(d) authorizes the Secretary of the Treasury to prescribe regulations defining "at one time" for the purposes of Subsection 5316(a)(1). Such regulations may permit the cumulation of closely related events in order that such events may collectively be considered to occur at one time for the purposes of Subsection 5316(a). Obviously, these regulations will head off a "structuring" debate in the context of a failure to file or a false filing of CMIRs. Second, the phrase "or attempts to transport or have transported" has been stricken from Subsection 5316(a)(1). In its place, the phrase "is about to transport" is substituted. Thus, in its new form, Subsection 5316(a)(1) reads: an individual is obligated to file a CMIR when he/she knowingly "transports or is about to transport monetary instruments of more than \$10,000 at one time." This change appears to be a difference without distinction.

(7) Section 1365 sets forth the predicate offenses created by this Act. In sum, this section provides:

- (A) Violations of 18 U.S.C. §§ 1956 and 1957 qualify as predicate offenses for the issuance of a wiretap (18 U.S.C. § 2510 et seq.).
- (B) Violations of 18 U.S.C. §§ 1956 and 1957 are ITAR predicates (18 U.S.C. § 1952).
- (C) Violations of 18 U.S.C. §§ 1956 and 1957 are predicate offenses for RICO (18 U.S.C. § 1961 et seq.).

(8) 31 U.S.C. § 5312, which defines the term "financial institution" for Title 31 purposes, has been modified in Subpart (a)(2)(U) to include the United States Postal Service. Under the terms of this amendment, postal money order purchases will not be covered by Section 5313 reporting requirements until the Secretary of the Treasury promulgates regulations designating the Postal Service as a financial institution subject to the reporting requirements.

### Policy Considerations

Sections 1956 and 1957 of Title 18 and Section 5324 of Title 31 vastly expand the prosecutive options in money laundering cases. Yet, because these statutes have broad parameters which have the potential to implicate sensitive issues, consultation with the Narcotic and Dangerous Drug Section is advised for all prosecutions under any of these statutes. Therefore, written prosecution memoranda and, if possible, proposed indictments should be sent to the Narcotics Section for review in all cases arising under these statutes.

DUE TO THE POTENTIAL INTERNATIONAL SENSITIVITIES, AS WELL AS PROOF PROBLEMS, INVOLVED IN UTILIZATION OF THE EXTRATERRITORIAL PROVISIONS OF THESE SECTIONS, NO GRAND JURY INVESTIGATION MAY BE COMMENCED, INDICTMENT RETURNED, OR COMPLAINT FILED WITHOUT THE APPROVAL OF THE ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE CRIMINAL DIVISION WHEN JURISDICTION TO PROSECUTE THIS OFFENSE EXISTS AS TO ANY DEFENDANT BECAUSE OF THIS EXTRATERRITORIAL PROVISION. IF YOU ANTICIPATE A POSSIBLE "EXTRATERRITORIAL CASE," PLEASE CONSULT THE CRIMINAL DIVISION CONTACT LISTED BELOW IMMEDIATELY.

APPROVAL BY THE ASSISTANT ATTORNEY GENERAL OF THE CRIMINAL DIVISION IS REQUIRED IF THE DEFENDANT IS AN ATTORNEY AND THE PROPERTY REPRESENTS BONA FIDE ATTORNEY'S FEES.

### Criminal Division Contact

Questions concerning the Money Laundering Control Act should be directed to Charles S. Saphos, Chief, Narcotic and Dangerous Drug Section (786-4695) or Michael Zeldin, Deputy Chief (786-4700).

Copies of significant pleadings or decisions regarding the new money laundering provisions should be sent to the Narcotic and Dangerous Drug Section, Criminal Division, Department of Justice, 1400 New York Avenue, N.W., Washington, D.C. 20005.

## Title I, Subtitle I - Armed Career Criminals

### Summary

Subtitle I ("eye") of Title I ("one") of the Anti-Drug Abuse Act of 1986, the "Career Criminals Amendment Act of 1986," amends the Armed Career Criminal Act of 1984 to include the terms "serious drug offense" and "violent felony" in the category of offenses covered by the Armed Career Criminal Act.

### Analysis and Discussion

#### A. Background

In 1968, as Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, Congress banned the possession of firearms by persons previously convicted of a felony, as well as other groups of persons deemed unfit to carry firearms. See 18 U.S.C. App. § 1201 *et seq.* ("Unlawful possession or receipt of firearms"). In 1984, as part of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, these sections were amended to incorporate the Armed Career Criminal Act, which mandated at least a fifteen-year term of imprisonment for a new category of weapons offender - the "armed career criminal" - "a person who receives, possesses, or transports in commerce or affecting commerce any firearm and who has three previous convictions [in state or federal court] for robbery or burglary, or both."

This Act was designed to provide a means by which serious, repeat offenders could be effectively deterred from committing further crimes, or, if deterrence failed, to effectively incapacitate those persons for a substantial period of time. As part of the Firearm Owners' Protection Act, Pub. L. 99-308, the Armed Career Criminal Act was rewritten and moved, effective November 15, 1986, to 18 U.S.C. § 924(e).

#### B. Extension of 18 U.S.C. § 924(e) to serious drug offenses

As part of the Anti-Drug Abuse Act, Congress has now enlarged the Armed Career Criminal Act (18 U.S.C. § 924(e)) to include as part of the three predicate offenses leading to an enhanced federal weapons charge any convictions involving a "violent felony" or a "serious drug offense." (Specific reference to convictions for robbery or burglary has been deleted, although such convictions should still be included in the definition of "violent felony.")

#### C. Definition of "serious drug offense" and "violent felony"

"Serious drug offense" is defined as federal offenses under the Controlled Substances Act, the Controlled Substances Import

and Export Act, or the first or third sections of the Act of September 15, 1980, Pub. L. 96-350 (formerly at 21 U.S.C. § 955a and 955(c), but reportedly to be recodified at 46 U.S.C. App. § 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law. It also includes state offenses involving the manufacture or distribution of a controlled substance for which a maximum term of imprisonment of ten years or more is prescribed by law.

A "violent felony" is defined as "any crime punishable by imprisonment for a term exceeding one year that -- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) constitutes burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

### Policy Considerations

Prosecutors should note the recent Court of Appeals decision in United States v. Davis, 801 F.2d 754 (5th Cir. 1986), in which a panel of the Fifth Circuit ruled that the Armed Career Criminal Act (as previously contained at 18 U.S.C. App. § 1202(a)) is a totally new offense and is not just a sentence-enhancement provision. This opinion, in effect, disagreed with the Criminal Division's advice that 18 U.S.C. App. § 1202(a) was merely an enhancement provision which could be triggered by notice procedures similar to 18 U.S.C. § 3575 or 21 U.S.C. § 851. In United States v. Gregg, 803 F.2d 568 (10th Cir. 1986), however, the Tenth Circuit reached the same conclusion as the Criminal Division and ruled that 18 U.S.C. App. § 1202(a) was a penalty-enhancement provision and did not create a new federal crime. Moreover, because of the statutory format in which Congress has rewritten the Armed Career Criminal Act, it is even clearer that the new 18 U.S.C. § 924(e) is a sentence-enhancement provision. Therefore, the Fifth Circuit's ruling in Davis is not anticipated to be a significant problem in the future.

As noted in the Criminal Division's earlier Handbook on the Comprehensive Crime Control Act of 1984, because of the concerns with the proper role of the Federal Government in this area, the Armed Career Criminal Act should not be viewed as a substitute for local prosecution, but rather as a supplement to the options available to law enforcement officials in dealing with career criminals. A mechanism within the various Law Enforcement Coordinating Committees should have been set up following the 1984 Act to identify offenders subject to the application of this major federal proscription by which they could be referred, when appropriate, for federal prosecution. These, of course, should be modified to reflect the present coverage of the Act.

It should be noted that the Firearm Owners' Protection Act also amended the penalty provisions of 18 U.S.C. § 924(c) [not

part of the Armed Career Criminal Act] to extend the mandatory punishment for a person who used or carried a firearm during and in relation to a crime of violence. Because various courts had determined that "crime of violence" did not include drug offenses, Congress has amended this provision to include the term "drug trafficking crime" (viz., "any felony violation of federal law involving the distribution, manufacture, or importation of any controlled substance"). The mandatory penalty was also increased from five years in prison to ten years in prison. [A comprehensive discussion of the myriad provisions of the Firearm Owners' Protection Act has been prepared by the General Litigation and Legal Advice Section of the Criminal Division.]

#### Criminal Division Contact

Questions concerning this subtitle should be directed to Gary Schneider (786-4700) in the Narcotic and Dangerous Drug Section. Questions relating to the Firearm Owners' Protection Act and related firearms provisions should be directed to Ezra H. Friedman (724-6971) or Arthur Norton (724-7526) in the General Litigation and Legal Advice Section.

## Title I, Subtitle M - Narcotic Traffickers Deportation Act

### Summary

This Subtitle amends the Immigration and Nationality Act to enlarge the class of aliens who are ineligible to receive visas, who will be excluded from entry into the United States, and who may be deported. This Subtitle also provides a procedure for prompt determination by the Immigration and Naturalization Service as to whether to issue detainers on aliens arrested by federal, state, or local law enforcement officers for controlled substances violations.

### Analysis and Discussion

#### A. Entry into the United States

Subsection 1182(a)(23) of Title 8, United States Code, has been amended by Section 1751 of the Anti-Drug Abuse Act to increase the class of aliens who are ineligible to receive a visa and who will be excluded from entry into the United States. The former law listed those narcotics violations for which a prior conviction would cause a denial of entry. Under the revised law, any conviction of any state, federal, or foreign substantive or conspiracy offense relating to any controlled substance as defined by 21 U.S.C. § 802 will cause the offender to be denied entry. This provision applies to convictions occurring before or after the date of enactment of the statute.

#### B. Deportation

Section 1751 of the Act further enlarges the class of aliens who will be deported - as provided in 8 U.S.C. § 1251(a) - to include any alien who after entry into the United States is addicted to narcotic drugs or who has at any time before or after entry been convicted of any state, federal, or foreign substantive or conspiracy offense relating to any controlled substance as defined by 21 U.S.C. § 802. This provision applies to convictions occurring before or after enactment of this statute.

Incorporating the above modification, 8 U.S.C. § 1251(a)(11) presently reads that all controlled substance violations - not just those involving specifically listed controlled substances - are included within that provision of Subsection (b) of 8 U.S.C. § 1251 which removes the trial judge's ability to make a binding recommendation on the Government regarding deportation.

In Janvier v. United States, 793 F.2d 449 (2d Cir. 1986), the Second Circuit, after ruling that a trial judge's recommendation as to deportation was part of the sentencing process, remanded the case to the district court to determine whether the defendant could demonstrate ineffective assistance of

counsel because his counsel (1) failed to request such a recommendation against deportation or (2) failed to inform the defendant as to the effect the failure to request such a recommendation would have on the deportation of the defendant. The amendment to 8 U.S.C. § 1251(a)(11), by removing the judge's discretion in this matter, should effectively obviate the decision in Janvier.

### C. Expeditious Determination of Detainers

Section 1751 of the Act also provides for prompt determination by the Immigration and Naturalization Service of whether to issue a detainer on an alien arrested for controlled substance violations by federal, state, or local law enforcement officers when the arresting officer has reason to believe the alien is not legally in the United States and the officer expeditiously informs INS of the arrest and the facts concerning the status of the alien.

### Policy Considerations

A detainer may only be placed on an alien if a charge of deportability or excludability can be sustained at the time the detainer is placed. While mere arrest may be sufficient to sustain a charge of excludability, in many cases mere arrest is not sufficient to sustain a charge of deportability. Close coordination with INS enforcement personnel is recommended as to the issuance of detainers. Prosecutors should be aware of detainer limitations and not expect to use INS detainers in lieu of pre-trial detention.

### Criminal Division Contact

Questions concerning this subtitle should be directed to John Kuray (786-4721) in the Narcotic and Dangerous Drug Section or to William P. Joyce, Associate Chief Counsel, Immigration and Naturalization Service (633-2895).



## Title I, Subtitle N - Freedom of Information Act

### Summary

Section 1802 of the Anti-Drug Abuse Act amends the exemption sections of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b), so that criminal law enforcement agencies, under certain narrowly defined circumstances, are not required to acknowledge in response to a FOIA request the existence of records concerning ongoing and undisclosed criminal investigations, informant records maintained under an informant's name or personal identifier, or classified records of the FBI pertaining to foreign intelligence, counterintelligence, or international terrorism investigations.

Section 1803 of the Act modifies the fees which can be charged under FOIA by making fee waivers and fee reductions available to all requesters when the information released contributes to public understanding of the Government.

### Analysis and Discussion

#### A. Section 1802

The previous threshold language of the seventh exemption section of FOIA required that the information sought to be protected be an "investigatory record" whose disclosure "would" result in one of six specified harms. The amendment in Section 1802 has broadened the exemption to include "records or information" compiled for law enforcement purposes, thus protecting documents that, while not reports, contain law enforcement information. In addition, the amendment changes the "would" threshold to a "could reasonably be expected to" requirement. This is a reasonableness test rather than an objective test, thereby allowing more information to be protected.

This section also allows law enforcement agencies in certain defined situations to avoid confirming the investigatory status of specific individuals or incidents in responding to FOIA requests. This is a narrow exception to be used sparingly to protect informants and open investigations from being exposed to public scrutiny.

#### B. Section 1803

This section changes the availability of fee waivers and fee reductions to certain requesters of information.

The legislative history is clear that Congress intended to "remove the roadblocks and technicalities" which purportedly have been used by various federal agencies to deny fee waivers or fee

reductions under FOIA to news media or other public interest users of such information.

Policy Considerations

There are no major prosecutive policy considerations with regard to these new provisions.

Criminal Division Contact

Questions concerning Subtitle N of Title I may be directed to L. Jeffrey Ross, Jr., Chief, FOI/PA Unit, Office of Enforcement Operations (724-7026).

● Title I, Subtitle O. Prohibition on the Interstate Sale and  
Transportation of Drug Paraphernalia

Summary

Subtitle O of the Anti-Drug Abuse Act of 1986 creates the "Mail Order Drug Paraphernalia Control Act." This Act creates a new offense by which it is unlawful for persons "(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia; (2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or (3) to import or export drug paraphernalia."

Analysis and Discussion

A. Background

The origin of this legislation can be found in congressional hearings which were held in the late 1970s, when the drug paraphernalia problem - with its inherent encouragement of drug abuse - became obvious. In response to a call for some federal action, but to avoid the enactment of a federal law in this area (which the Justice Department felt would spread existing federal drug resources too thin), the Drug Enforcement Administration drafted a model drug paraphernalia statute to assist state and local governments in addressing the problem of so-called "head shops." These shops were sending a message to young persons - both through the availability of such devices and the advertisements and displays attached thereto - that drugs were okay. Those states and communities which enacted and enforced this type of law were able to decrease the availability of such products and thereby reduce the incorrect message of drug acceptability. Still, several states were unwilling to enact or enforce laws that would address this problem. The planned effect of Subtitle O - reportedly to be codified at 21 U.S.C. § 857 - is to ensure that the availability of drug paraphernalia in a state or community which has not chosen to proscribe such substances within its own borders does not "spill over" into a community or state which has so acted.

By proscribing use of the mails or any interstate attempt to spread drug paraphernalia, the mail-order drug paraphernalia industry should be substantially curtailed, with hard-core drug paraphernalia (bongs, cocaine freebase kits, carburetion masks, etc.) becoming increasingly harder to acquire.

B. Definition of "Drug Paraphernalia"

In defining the term "drug paraphernalia," Subsection (d) of the new statute provides a broad definition to the effect that "drug paraphernalia" means "any equipment, product, or material

of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substances Act.... It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing mari[h]uana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body...."

#### C. Examples of "Drug Paraphernalia"; Guidance

Subsection (d) continues with a lengthy list of examples of "drug paraphernalia": "(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; (2) water pipes; (3) carburetion tubes and devices; (4) smoking and carburetion masks; (5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand; (6) miniature spoons with level capacities of one-tenth cubic centimeter or less; (7) chamber pipes; (8) carburetor pipes; (9) electric pipes; (10) air-driven pipes; (11) chillums; (12) bongs; (13) ice pipes or chillers; (14) wired cigarette papers; or (15) cocaine freebase kits."

Subsection (e) of the new statute provides guidance for determining whether something should be considered "drug paraphernalia." Pursuant to that subsection, all logically relevant factors may be considered, including:

"(1) instructions, oral or written, provided with the item concerning its use; (2) descriptive materials accompanying the item which explain or depict its use; (3) national and local advertising concerning its use; (4) the manner in which the item is displayed for sale; (5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products; (6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise; (7) the existence and scope of legitimate uses of the item in the community; and (8) expert testimony concerning its use."

#### D. Exceptions from Coverage

Specifically excluded from coverage of this new statute are any persons authorized by local, state, or federal law to manufacture, possess, or distribute such items, as well as any item that, in the normal lawful course of business, is primarily intended for use with tobacco products, including any pipe, paper, or accessory.

## E. Penalties

Violations of this new provision carry a maximum penalty of three years in prison and a fine of not more than \$100,000. As the penalty provision does not make specific reference to the alternative fines provision of Title 18 (presently at 18 U.S.C. § 3623), the alternative fines in Title 18 are most likely not applicable to paraphernalia offenses. See Appendix B, infra.

## F. Seizure and Forfeiture

Subsection (c) of the new statute provides that drug paraphernalia involved in any violation of Subsection (a) shall be subject to seizure and forfeiture upon the conviction of a person for such violation, with any property so forfeited being delivered to the General Services Administration for destruction or use for law enforcement or educational purposes by federal, state, or local authorities. A further discussion of this topic may be found in the discussion of Subtitle D of Title I, supra, which pertains to the Assets Forfeiture Amendments Act of 1986.

## Policy Considerations

There are some questions as to the effectiveness of the language used in defining "drug paraphernalia," particularly the use of the qualifier "primarily intended." Therefore, prosecutors utilizing this statute should make particular note of the means by which an intentional violation will be proven.

All of the provisions of Subtitle O had a delayed effective date of 90 days after the date of enactment of the Anti-Drug Abuse Act of 1986. This time period was probably designed to give persons and companies involved in this formerly legitimate industry a chance to "retool" for some other activity.

## Criminal Division Contact

Questions concerning Subtitle O of Title I should be directed to Gary Schneider (786-4700) or John Kuray (786-4721) in the Narcotic and Dangerous Drug Section.

## Title I, Subtitle P - Manufacturing Operations

### Summary

Section 1841 of the Anti-Drug Abuse Act has created a new Section 416 of the Controlled Substances Act, to be codified as Section 856 of Title 21, United States Code, which proscribes the maintaining or making available of any place for the purpose of manufacturing, distributing, or using a controlled substance.

### Analysis and Discussion

Section 856 makes it a federal crime to knowingly open or maintain a place to manufacture, distribute, or use a controlled substance. In addition, Section 856 also prohibits a person or other legal entity which manages or otherwise controls a building, room, or enclosure from knowingly making the building, room, or enclosure available; with or without compensation, for manufacturing, storing, distributing, or using a controlled substance. A natural person convicted under this section is subject to twenty years' imprisonment and a fine of \$500,000. If a corporation or other legal entity is convicted under this section, the fine is quadrupled to \$2,000,000.

### Policy Considerations

Although there is no official legislative history behind Section 856, it appears to be aimed at "crack houses" and "shooting galleries." Section 856 is modeled after California Health and Safety Code Sections 11365 et seq., and, in particular, new Section 11366.5.

The word "place" should be broadly construed. It may designate a location or space other than that which is ordinarily referred to as a room in a building or structure and can include an automobile or other similar "place." People v. Lee, 260 Cal. App. 2d 836 (1968).

The term "open or maintain any place for the manufacturing, distributing, or using" a controlled substance describes a "purpose" which contemplates continuity in pursuit of such objectives. Thus, a single or isolated instance of drug use, distribution, or manufacture, while sufficient to criminally forfeit a property, is probably not sufficient to convict a person for a violation of this section. People v. Horn, 187 Cal. App. 2d 68, cert. denied, 368 U.S. 846 (1961).

Knowledge by the property manager of the illegal activity is an essential element of this offense. Providing notice to the potential defendant of the prohibited criminal activity taking place on the property in question should be sufficient to defeat a defense of lack of knowledge.

In addition, challenges to the constitutionality of the section may arise premised on the argument that the section impermissibly interferes with the right of an owner to rent or lease his/her property as he/she wishes. The requirement of proving knowledge of the illegal activity should be sufficient to defeat such a challenge. People v. Cressey, 2 Cal. 3d 836 (1970).

Vagueness challenges can be answered by pointing out that the plain language of the section shows that it is designed for the person who knowingly, willfully, and intentionally gets involved in certain illegal activity by making a place under his/her control available for such illegal uses. People v. Brim, 257 Cal. App. 2d 839 (1968).

#### Criminal Division Contact

Questions concerning this subtitle should be directed to John Kuray (786-4721) in the Narcotic and Dangerous Drug Section.

## Title I, Subtitle T - Common Carrier Operation Under the Influence of Alcohol or Drugs

### Summary

Subtitle T of the Anti-Drug Abuse Act creates a new offense, that of operating a common carrier under the influence of alcohol or drugs. The subtitle consists of three new sections to be added to Title 18, United States Code. Section 341 defines "common carrier" to include all major forms of public transportation. Section 342 establishes the offense and the penalty. Section 343 establishes certain conclusive presumptions to be used in prosecuting violations of Section 342.

### Analysis and Discussion

New Section 342 of Title 18, United States Code, makes it a federal crime to operate a common carrier while under the influence of alcohol and/or drugs. Prior to the enactment of Section 342, there was no federal criminal statute to deal with this problem.

The term "common carrier" is defined in Section 341. It includes rail carriers, sleeping car carriers, water common carriers, air common carriers, and buses transporting passengers in interstate commerce. It does not include trucks.

Section 343 creates two conclusive presumptions relating to proving the element of "under the influence." The first conclusive presumption is that a common carrier operator with a blood alcohol content of .10 or more is under the influence of alcohol. The second conclusive presumption is that a common carrier operator with enough drugs in his or her system to impair the average individual is under the influence of drugs.

The penalty for a violation of Section 342 is imprisonment for not more than five years, a fine of not more than \$10,000, or both.

### Policy Considerations

Section 342 does not provide exclusive federal jurisdiction for all common carrier operation under the influence of alcohol or drugs. For example, Section 341 limits applicability to buses which carry passengers in interstate commerce. Bus drivers on purely intra-state routes do not violate this statute if they perform their duties under the influence of drugs or alcohol. Federal prosecution of rail, air, or water common carrier operators on purely intra-state routes should be evaluated on a case-by-case basis to ensure that federal intervention is the most appropriate prosecutorial approach. Coordination with state



and local authorities through the Law Enforcement Coordinating Committees is strongly encouraged.

Section 343 creates two conclusive presumptions intended for use when prosecuting violations of Section 342. Statutes which create irrebuttable presumptions have been found to violate the Due Process Clauses of the Fifth and Fourteenth Amendments. See Vlandis v. Kline, 412 U.S. 441, 446 (1973); Heiner v. Donnan, 285 U.S. 312, 329 (1932). Similarly, jury instructions which create a mandatory, rebuttable presumption which shifts the burden of persuasion to the defendant as to an element of an offense are also unconstitutional. See Francis v. Franklin, U.S. \_\_\_, 105 S.Ct. 1965, 1973 (1985); Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Patterson v. New York, 432 U.S. 197, 215 (1977); Mullaney v. Wilbur, 421 U.S. 684, 698-701 (1975). Additionally, there is a technical flaw in the ".10" presumption contained in Section 343(1). The phrase "per cent" was inadvertently omitted after the ".10" figure. The commonly used standard for being under the influence of alcohol is a blood alcohol content of 0.10 per cent. A person having a blood alcohol content of .10 (ten per cent) would usually be dead. Furthermore, the conclusive presumption contained in 18 U.S.C. § 343(2) relating to being under the influence of drugs may be susceptible to legal challenge because it appears to be imprecise and not based upon any fixed empirically accepted standard. Corrective legislation for both presumptions may be sought in the 100th Congress. Consequently, when prosecuting violations of Section 342, prosecutors should not rely on either of the presumptions created by Section 343. In addition, prosecutors should specifically request instructions which explain how drawing an inference from facts in evidence does not shift the burdens of proof or persuasion.

#### Criminal Division Contact

Questions relating to this subtitle should be directed to Ezra H. Friedman (724-6971) of the General Litigation and Legal Advice Section.

## Title II - International Narcotics Control Act

### Summary

Prior to the Anti-Drug Abuse Act of 1986, the Mansfield Amendment, 22 U.S.C. § 2291(c), prohibited an employee of the United States from engaging or participating in any direct police action in any foreign country with respect to narcotics control efforts. Section 2009 of the Anti-Drug Abuse Act amends the Mansfield Amendment prohibition to the extent that U.S. employees may not directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts.

### Analysis and Discussion

#### A. Mansfield provision pre-1986 changes

Prior to the 1986 Anti-Drug Abuse Act, the Mansfield Amendment, 22 U.S.C. § 2291(c), stated in pertinent part:

(1)...no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotic control efforts.... (emphasis added)

22 U.S.C. § 2291 allowed the law enforcement officer to be present during direct police arrest actions if the Secretary of State and the foreign country had agreed and the agreement had been transmitted to Congress.

The Chief Counsel of the United States Coast Guard provided two opinions construing the above language. By memorandum 16210 of 1 February 1978, the Chief Counsel considered joint boardings and transportation of foreign boarding parties within Colombian waters to be participating in foreign police operations, and thereby proscribed by Mansfield. The opinion did find that providing "training, technical equipment, and intelligence in support of foreign governments' enforcement efforts" was not prohibited. The impact of this interpretation has been to limit Coast Guard joint operations, arrests on behalf of a coastal state, or detentions on behalf of coastal states when operating within the territorial sea of a foreign nation.

The second memorandum, of 16 January 1980, determined that Mansfield was intended to limit participation in foreign police actions, not independent actions by U.S. law enforcement officials. Therefore, it concluded that enforcement of U.S. law against U.S. vessels and foreign vessels in foreign territorial waters was not prohibited by Mansfield.

B. Changes to the Mansfield provision in 1986

Section 2009 of the Anti-Drug Abuse Act of 1986 amended 22 U.S.C. § 2291(c). The statute now reads:

(c)(1) No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law. This paragraph does not prohibit an officer or employee from assisting foreign officers who are effecting an arrest.

(2) Unless the Secretary of State, in consultation with the Attorney General, has determined that the application of this paragraph with respect to that foreign country would be harmful to the national interests of the United States, no officer or employee of the United States may engage or participate in any direct police arrest action in a foreign country with respect to narcotics control efforts, notwithstanding any other provision of law. Nothing in paragraph (1) shall be construed to allow United States officers or employees to engage or participate in activities prohibited by this paragraph in a country with respect to which this paragraph applies.

(3) Paragraphs (1) and (2) do not prohibit an officer or employee from taking direct action to protect life or safety if exigent circumstances arise which are unanticipated and which pose an immediate threat to United States officers or employees, officers or employees of a foreign government, or members of the public.

(4) With the agreement of a foreign country, paragraphs (1) and (2) shall not apply with respect to maritime law enforcement operations in the territorial sea of that country.

(5) No officer or employee of the United States may interrogate or be present during the interrogation of any United States person arrested in any foreign country with respect to narcotics control efforts without the written consent of such person.

(6) This subsection shall not apply to the activities of the United States Armed Forces in carrying out their responsibilities under applicable Status of Forces arrangements.

For most Coast Guard operations, the most important provision will be Paragraph (4). On its face, it removes any restrictions of Paragraphs (1) and (2) as long as the coastal state has consented to the activity. Although the legislative history on this amendment to 22 U.S.C. § 2291(c) is minimal, Senator Murkowski was quite clear in introducing the language which became Paragraph (4) that he had Coast Guard operations and restrictions against joint operations in mind. See Cong. Rec. S13991 (daily ed. September 27, 1986). The Senator expressed the view that the "PD-27 process" was adequate to keep Coast Guard operations "from becoming inappropriately involved in the internal affairs of foreign nations." The Chief Counsel's 1978 opinion that Mansfield limited Coast Guard joint operations was primarily based on the language of "participating in direct police arrest actions." The opinion appears to be no longer current to the extent of operations in the territorial seas. It may, however, still be applicable to operations conducted in internal waters.

Paragraph (4) does have a geographic reference to the territorial sea of a consenting foreign country. The term territorial sea has a meaning in international law. Both the 1958 Convention on the Territorial Sea and Contiguous Zone and the U.N. Convention on the Law of the Sea describe the territorial sea as a belt of sea measured from the baseline which extends the coastal state's sovereignty. Senator Murkowski, in explaining the amendment, used an undefined term of territorial waters. Therefore, there is room, albeit small, to press an argument that the application of Paragraph (4) should not distinguish between territorial seas and internal waters. However, the more likely interpretation will be that, absent any express intent to the contrary, the term territorial sea will have its usual meaning found in the conventions. Assuming this interpretation, Paragraphs (1) and (2) will be applicable to any law enforcement activity conducted in the internal waters of a foreign nation.

#### Policy Considerations

The Commandant of the United States Coast Guard, on December 15, 1986, issued a statement providing guidance to U.S. Coast Guard units in light of the statutory changes to the Mansfield provision in the Anti-Drug Abuse Act of 1986. The Commandant's statement is attached to this handbook as Appendix C.

Criminal Division Contact

Questions regarding the amendment to the Mansfield Amendment should be directed to William J. Corcoran (786-4704) of the Narcotic and Dangerous Drug Section. Also available for assistance is the Chief Counsel's office (267-1616) or Jon Waldron, Maritime and International Law Division (267-1527), United States Coast Guard.

**Title III: Interdiction - National Drug Interdiction Improvement Act of 1986 - Subtitle A:****Department of Defense Drug Interdiction Assistance - Defense Drug Interdiction Assistance Act -**

Requires the Secretary of Defense to use specified funds to acquire certain equipment and aircraft for drug interdiction assistance activities of the Department of Defense. Requires the Secretary of Defense to make such aircraft available to the U.S. Customs Service.

Directs the Secretary of Defense and the Secretary of Transportation to provide for the assignment of Coast Guard personnel to naval vessels for law enforcement purposes.

Authorizes appropriations for the installation of 360-degree radar on Coast Guard surveillance aircraft.

Requires the National Drug Enforcement Policy Board to submit a report to specified congressional committees on the manner and extent to which the Department of Defense should be involved narcotics law enforcement activities.

Requires the Secretary of Defense to submit a report to specified congressional committees containing a discussion of: (1) the extent to which students enrolled in schools operated by the Department of Defense are receiving drug and substance abuse education; and (2) the extent to which such education should include peer counseling classes.

Amends the Uniform Code of Military Justice to include driving under the influence of drugs as an offense.

Allows the Department of Defense to provide certain assistance to civilian law enforcement personnel. Provides for congressional approval of such assistance and for review by the General Accounting Office.

Increases by one the number of Marine Corps officers authorized to be on active duty in grades above major general during any period that a Marine Corps officer is serving as Director of the Department of Defense Task Force on Drug Enforcement.

Allows the Secretary of Defense to use authorized funds to acquire equipment for the **qCivil Air Patrol** **p** for drug interdiction surveillance and reporting missions. Requires the Secretary of the **qAirp** Force to report to specified congressional committees on the use of such funds.

## Title III, Subtitle B - Customs Enforcement Act of 1986

### Summary

Part 1 of the Customs Enforcement Act of 1986 amends the Tariff Act of 1930 to: (1) add the term "monetary instruments" to the definition of merchandise and also add "controlled substances," as the latter is defined in 21 U.S.C. § 802, to the category of merchandise, the importation of which into the United States is prohibited, to the definition of merchandise; (2) require that any vessel, aircraft, or vehicle arriving into the United States report such arrival to the nearest customs facility; (3) create penalties for arrival, reporting, and entry violations; (4) increase penalties for illegally unloading arriving passengers; (5) require that individuals arriving in the United States on conveyances other than aircraft, vessel, or vehicle (e.g., horseback) enter only at designated border crossings and to impose penalties for violations of such requirement; (6) provide increased penalties for failure to declare arriving merchandise; (7) prohibit aviation smuggling; (8) provide additional authority for the forfeiture of conveyances used or involved in the violation of the customs laws; (9) permit awards of compensation to informers in discretionary amounts; (10) to authorize the exchange of information with foreign law enforcement agencies; (11) authorize inspections and preclearance in foreign countries, with those countries' consent, of passengers bound for the United States.

Part 2 of the Customs Enforcement Act of 1986 authorizes the Secretary of the Treasury to utilize commercial "cover" corporations in undercover operations in much the same manner as DEA and FBI are presently authorized.

Part 3 of the Customs Enforcement Act of 1986 provides for funding of the U.S. Customs Service for Fiscal Year 1987 and for amendments to the Customs Forfeiture Fund, among other things, extending the expiration date of the latter to 1991.

Part 4 contains miscellaneous customs provisions regarding documentation of vessels and assistance to customs officers.

Part 5 amends the Controlled Substances Import and Export Act of 1970, specifically 21 U.S.C. § 959, to make it a crime to possess a controlled substance with the intent to distribute aboard an aircraft bound for the U.S. or to a place within 12 miles of the coast of the United States.

### Analysis and Discussion

The Customs Enforcement Act of 1986 strengthens in several ways the ability of the U.S. Customs Service to protect our borders from contraband smugglers, particularly drug smugglers.

Of particular importance are the anti-air smuggling provisions of the act which penalize the recent phenomenon of air drops of contraband to vessels in international waters.

## Part 1

### 1. 19 U.S.C. § 1401 - Definitions

Section 401 of the Tariff Act of 1930 (hereinafter, "the Act") (19 U.S.C. § 1401), which contains definitions of various terms, is amended. The term merchandise is amended to include "monetary instruments as defined in Title 31." Controlled substances are given the same definition as they have under the Controlled Substances Act and they are to be treated as merchandise, the importation of which is prohibited into the United States, except under license or if authorized by the Controlled Substances Import and Export Act of 1970. Subsection (k) of this section ("hovering vessel") is also amended to the effect that vessels receiving merchandise from aircraft or other vessels on the high seas or in Customs waters beyond the territorial sea will be treated in the same manner as vessels which visit hovering vessels or foreign countries. They will have to report their arrival and make formal entry. (See also explanation on Section 590 - new 19 U.S.C. § 1590.)

### 2. 19 U.S.C. § 1433 - Report of Arrival of Vessels, Vehicles, and Aircraft

Section 433 of the Act (19 U.S.C. § 1433) is amended. Subsection (a) is amended to require the master of a foreign vessel arriving from a foreign port or place, or of a foreign vessel arriving from a domestic port, or a vessel of the United States carrying bonded merchandise or foreign merchandise for which no entry has been made, to immediately report arrival of the vessel to the nearest customs facility or such other place as the Secretary of the Treasury may designate by regulation.

Subsection (b) replaces the existing vehicle reporting requirements of Section 459 (19 U.S.C. § 1459) to require crossing only at designated facilities and immediate reporting of vehicle arrivals.

Subsection (c) provides similar requirements for aircraft and thus subjects them to specific penalties provided under Section 436 (19 U.S.C. § 1436) rather than the more general (and lighter) penalties contained in 49 U.S.C. § 1474.

The amendment to Section 433 (19 U.S.C. § 1433) also authorizes the Secretary of the Treasury to require the master of a vessel, the person in charge of a vehicle, or an aircraft pilot to report immediately (in person or by radio or other means as prescribed in the regulations), and would also afford greater flexibility in designating the places where arrival may be



reported. The Customs Service would thus be in a position to concentrate enforcement activities on those conveyances failing to report immediately to the designated facility, on the assumption that they are likely to be involved in smuggling.

3. 19 U.S.C. § 1436 - Penalties for Violations of the Arrival, Reporting, and Entry Requirements

Section 436 of the Act (19 U.S.C. § 1436) is amended and establishes, in addition to increased criminal sanctions, civil penalties for violation of Sections 433, 434, and 435 of the Tariff Act (19 U.S.C. §§ 1433, 1434, and 1435), and provides for the seizure and forfeiture of any conveyances used in connection with these violations. These penalties are subject, in appropriate cases, to mitigation or remission under Section 618 of the Tariff Act (19 U.S.C. § 1618). The amount of the criminal fines which may be imposed has also been increased.

4. 19 U.S.C. § 1454 - Penalties for Unauthorized Unloading of Passengers

Section 454 of the Act (19 U.S.C. § 1454) is amended to increase the penalties for discharging a passenger without a permit, from \$500 to \$1,000 for the first passenger and \$500 for each other passenger.

5. 19 U.S.C. § 1459 - Reporting Requirements for Individuals

Section 459 of the Act (19 U.S.C. § 1459) is amended to require all persons arriving in the United States as pedestrians or by means other than vessel, vehicle, or aircraft (horseback, for example) to immediately report their arrival to a designated Customs facility. Persons on board conveyances are required to remain aboard until authorized by Customs to depart. Present law only requires the master to report his/her arrival but imposes no obligations on the passengers or crew members themselves. An incident at a New York airport involving a near riot after a delayed landing showed the weaknesses of existing law. In addition, passengers and crew members arriving aboard conveyances which did not report arrival in accordance with Section 433 are also required to notify Customs and report the circumstances of their arrival. The new law also repeals Section 460 of the Act and, in Subsections (e), (f), and (g) of Section 3115 of the Anti-Drug Abuse Act, incorporates the civil and criminal penalties of repealed Section 460 into 19 U.S.C. § 1459.

6. 19 U.S.C. § 1497 - Penalties for Failure to Declare

Section 497 of the Act (19 U.S.C. § 1497) is amended to make the person failing to declare liable for a penalty based on the value of the undeclared merchandise. In the case of controlled

substances, the penalty could reach as much as 200 times the "street price" of the substance. The price would be established by the Secretary of the Treasury in consultation with the Attorney General.

7. 19 U.S.C. § 1509 - Examination of Books and Witnesses

Section 509 of the Act (19 U.S.C. § 1509) is amended to expand the scope of Customs' administrative summons for documents to conform to the scope of the summons coverage for testimony. Prior to this amendment, Section 509 of the Act only allowed a summons to be used to ascertain the correctness of entries, determine liability for duties and taxes, fines, and penalties, and to ensure compliance with any law administered by the Customs Service. Although the summons could be used to take testimony under oath in connection with an investigation of any of these areas, it could only be used to obtain those documents which were "required to be kept" pursuant to Section 508 of the Act. It might not have been available to obtain documents which were prepared by third persons, by the importer subsequent to the import transaction, or which pertained to a law administered by Customs not directly related to imports, such as drawback shipping records, or currency transactions or export records. The amendment would facilitate the use of the summons in these other investigations.

8. 19 U.S.C. § 1584 - False Manifest; Lack of Manifest

Section 584 of the Act (19 U.S.C. § 1584) is amended to eliminate the pre-penalty procedures which were added in 1978 but which have proven to be of little benefit to the public or the Government. This section would also substantially increase penalties relating to unmanifested drugs and other merchandise.

The penalties for unmanifested opium of \$25 an ounce were first set in 1922 and the penalties for other controlled substances have been set at \$10-50 an ounce (depending on the drug) since 1935. In order to increase vigilance on the part of carriers, the bill would raise penalties to \$200-1,000 an ounce.

9. 19 U.S.C. § 1585 - Increase in Penalties for Departure Before Report or Entry

Section 585 of the Act (19 U.S.C. § 1985) is amended. This amendment increases the penalties that can be imposed to a master of a vessel or on a person in charge of a vehicle who departs after entering the limits of any collection district without making a report or entry. The new penalties are \$5,000 for the first violation and \$10,000 for each subsequent violation.

10. 19 U.S.C. § 1586 - Unlawful Unloading of Merchandise

Section 586 of the Act (19 U.S.C. § 1586) is amended. This section increases the civil and criminal penalties for unlawful unloading or transshipment. In addition, the geographical limits of the statute are changed from 12 miles to "customs waters," which term means "12 miles" or the distance permitted by treaty or special arrangement with a foreign country for the boarding of vessels flying its flag. The criminal penalties have increased from a maximum of two years' imprisonment to 15 years.

11. 19 U.S.C. § 1590 (New section) - Aviation Smuggling

Section 590 is a new section added to the Act (19 U.S.C. § 1590) which is intended to control aviation smuggling by adopting many of the provisions contained in 19 U.S.C. § 1586 and the Anti-Smuggling Act of 1935 (19 U.S.C. § 1700 et seq.) which apply to vessels. In addition, this section is intended to address a relatively new phenomenon, air drops of contraband to vessels in international waters.

The statute addresses these problems as follows:

Subsection (a) makes it unlawful for any person to possess restricted or prohibited merchandise knowing or intending that it be unlawfully introduced into the United States or its territories or possessions or within 12 miles of the coast. Subsection (b) makes it unlawful to transfer any merchandise between an aircraft and a vessel on the high seas or within customs waters if the plane or boat is of United States nationality or the circumstances indicate the purpose is to introduce the merchandise contrary to law unless the transfer has been authorized by the Secretary of the Treasury.

The section provides civil and criminal penalties and civil forfeiture. In addition, Subsection (g) contains certain rebuttable presumptions of an intent to unlawfully transship merchandise which are applicable for the imposition of civil penalties or forfeiture. These presumptions expand on the presumptions contained in the Anti-Smuggling Act of 1935. Customs and other law enforcement officers often discover suspicious aircraft or vessels without contraband on board, but under circumstances indicating that they were used or intended to be used for unlawful purposes, such as smuggling. The presumptions contained in Subsection (g) would have the effect of shifting the burden of proof to the claimant of seized property. Thus, the claimant, for example, would have to explain why his/her aircraft had illegally installed fuel tanks or false registration markings.

Any person who violates this new section is liable for a civil penalty equal to twice the value of the merchandise involved (including controlled substances) but not less than

\$10,000, and may also be liable, if the violation is intentional, for a criminal fine of not more than \$10,000 or imprisonment for not more than 5 years, or both, if the merchandise was not a controlled substance. If the violation involved a controlled substance, the person may be criminally liable for a fine of not more than \$250,000 or imprisonment for not more than 20 years or both. This provision creates an exposure of up to 20 years in prison regardless of the amount of controlled substance involved and should be kept in mind by prosecutors to be applied whenever appropriate in drug-smuggling cases.

12. 19 U.S.C. § 1594 - Seizure of Conveyances

Section 594 of the Act (19 U.S.C. § 1594) is amended to eliminate the expensive and time-consuming requirement that conveyances seized to secure payment of penalties (not for forfeiture) be proceeded against in an admiralty court action, and permits administrative forfeiture in many instances, but protects the rights of individuals by requiring court proceedings whenever a claim and cost bond are posted. In addition, the exemptions from common carriers being seized are revised. Under the law prior to this amendment, a common carrier could not be seized or forfeited for violations of the Customs laws unless the owner or master or other person in charge consented to or was privy to the violation. This protection was given to shield the common carrier from seizures where dishonest passengers concealed contraband in baggage or otherwise violated the Customs laws or where a dishonest shipper misdescribed the contents of cargo on a bill of lading. However, in recent years, common carriers in increasing and alarming numbers have escaped seizure where large quantities of drugs were concealed on board the vessel or aircraft, outside the cargo, by crew members or other personnel employed by common carriers. In addition, common carriers have escaped liability where 2,500-3,000 pounds of cocaine were placed in unmanifested or falsely manifested cargo boxes or containers. A simple comparison of the bills of lading with the external marks on the cartons or an actual external count of the cargo by the carrier would have revealed these discrepancies.

The amendment will continue protection for common carriers where contraband is contained in the baggage of a passenger being lawfully transported or in manifested cargo with external marks and quantities which match the bill of lading, unless the owner, operator, or person in charge participated in or had knowledge of the violation or was grossly negligent in preventing or discovering the violation. However, in the case of prohibited merchandise or controlled substances, common carriers will be subject to seizures for transporting such items in unmanifested cargo, in cargo whose external character did not match the documents or for articles concealed on the conveyance, but outside the cargo. After investigation, the common carrier would be subject to forfeiture unless the owner or operator, master, or officers can show that they did not know and through the exercise

of the highest degree of care and diligence could not have known that the contraband was on board. This standard is identical to the standard contained in 19 U.S.C. § 1584 for common carrier penalties for unmanifested drugs and is intended to encourage greater vigilance by common carriers. Of course, common carriers can avail themselves of the remission and mitigation procedure in 19 U.S.C. § 1618.

Subsection (d) defines "owner or operator," "master," and similar terms relating to the person in charge to include responsible managerial and supervisory personnel to reflect modern practices relating to cargo manifests. Subsection (e) makes the carrier responsible for expenses arising out of seizures under Subsection (c) which relate to discoverable, unmanifested drugs and prohibited merchandise.

13. 19 U.S.C. § 1595(a) - Searches and Seizures

19 U.S.C. § 1595(a) is amended to expand the Customs civil search and seizure warrant in Section 595 of the Tariff Act (19 U.S.C. § 1595) to cover any article subject to seizure rather than just the imported merchandise. This amendment would permit this civil warrant to be issued to seize conveyances, monetary instruments, and evidence of violations of the Customs laws which are subject to forfeiture under laws enforced by Customs.

14. 19 U.S.C. § 1595(a) - Forfeitures

Section 596 of the Act (19 U.S.C. § 1595a) is amended to permit the civil seizure and forfeiture of merchandise introduced or attempted to be introduced contrary to law. This provision is intended to fill a gap which was caused when former Section 593 was moved in 1948 to the criminal code as 18 U.S.C. § 545. In addition, although 19 U.S.C. § 1592 permits the seizure of prohibited goods, this is in some cases unsatisfactory. While it is true that most laws which restrict or prohibit merchandise provide for forfeiture, some, such as the motor vehicle laws and coffee laws, merely deem the goods to be a "prohibited importation" but do not provide for a separate forfeiture.

15. 19 U.S.C. § 1613 - Proceeds of Forfeited Property

Section 613 of the Act (19 U.S.C. § 1613) is amended to treat monetary amounts tendered in lieu of merchandise subject to forfeiture in the same manner as the proceeds of sale. This would permit the Secretary or his designee to grant relief from the forfeiture in certain instances but would still permit the deposited funds to be used to pay expenses of the seizure and to be placed in the Forfeiture Fund to be used for the same purposes for which forfeiture proceeds may be used. In addition Section 613(d) would treat agency seizure expenses in the same manner as court costs and marshal's expenses. A recent court decision held that only seizure expenses incurred by the custodia

legis after a complaint is filed are priority claims. Thus, under this interpretation, agency expenses incurred prior to referral for judicial proceedings would not be paid in some instances where the proceeds of sale are insufficient to cover preferred mortgage liens and all the expenses incurred by the seizing and custodial agencies. The amendment would remedy the situation by putting agency expenditures on an equal footing with marshal fees and court costs, allowing them to be paid before liens.

16. 19 U.S.C. § 1619 - Compensation to Informers

Section 619 of the Act (19 U.S.C. § 1619) is amended to allow the Secretary of the Treasury to pay such persons up to 25 percent of the net amount recovered from the forfeiture of such items, not to exceed \$250,000. It should be noted that this section was only amended to permit the Secretary to award informants compensation up to 25 percent, whereas in the past the amount of the award was mandated at 25 percent, with no discretion to reduce the award.

17. 19 U.S.C. § 1622 - Foreign Landing Certificates

Section 622 of the Act (19 U.S.C. § 1622) is amended to permit the Secretary of the Treasury to require landing certificates to comply with international obligations such as bilateral or multilateral agreements to reduce or prevent smuggling.

18. 19 U.S.C. § 1628 (New section) - Exchange of Information

Section 628 is a new section added to the Act (19 U.S.C. § 1628) which clarifies the Secretary's authority to exchange information with foreign customs and law enforcement authorities.

19. 19 U.S.C. § 1629 (New section) - Inspections and Preclearance in Foreign Countries

Section 629 is a new section added to the Act (19 U.S.C. § 1629) through which the Secretary is granted specific authority to operate Customs facilities in foreign countries. He is also given the authority to extend United States Customs laws to foreign locations with the consent of the country concerned.

Part 2'

20. 19 U.S.C. § 1630 - Undercover Investigative Operations of the Customs Service

New Section 1630 of Title 19, United States Code, is expected to be created by the Act; however, this is not clear from the text of the Act itself, which does not specify where, if anywhere, in the Tariff Act this provision should be placed.

Section 3131 of the Act authorizes the Secretary of the Treasury to utilize commercial "cover" corporations, bank accounts, and to lease property and pay for services without complying with the normal requirements which would reveal Government involvement when such activities are needed in authorized investigative activities. Many of the larger smuggling, export, and currency investigations require Customs special agents and other officers to assume commercial "cover" identities and to set up "cover" operations. At present, Customs officers must often rely on the utilization of "cover" corporations and businesses established by local and state (or other federal) enforcement agencies. This has proven awkward and, in some cases, may have actually compromised the investigation. In addition, the new section would make it clear that the usual laws governing bank deposits and space rentals do not apply in such undercover situations. The proposed authority parallels the authority of other federal law enforcement authorities such as the FBI and DEA. As stated above, this section of the Act does not contain codification directions as in other provisions. It will probably be codified as 19 U.S.C. § 1630.

### Part 3

#### 21. Customs Service Authorizations and Forfeiture Fund

Part 3 contains the Customs appropriation bill for Fiscal Year 1987 and amendments to the Customs Forfeiture Fund. A discussion of the forfeiture amendments are contained in the discussion of Subtitle D of Title I, supra.

### Part 4

#### 22. 46 U.S.C. § 12109(b) - Recreational Vessels

46 U.S.C. § 12109(b), the documentation laws, are amended to make it clear that while documented yachts do not have to make formal entry, they must report their arrival to Customs and declare any goods on board. Recent changes to the language in the documentation laws have led to some confusion with some private yacht owners believing that they were exempt from all Customs regulations. In fact, they are only exempt from formal entry and clearance procedures.

#### 23. 19 U.S.C. § 507 - Assistance for Customs Officers

19 U.S.C. § 507, which Customs officers use to request the assistance of others, is amended by eliminating references to a three-mile distance and by raising the criminal penalties for failure to render assistance. Customs officers must frequently rely on assistance by state and local agencies and civilians in performing their duties. For example, suspect planes picked up on radar may land before Customs officers can arrive. Local police or airport authorities are frequently called upon and asked to detain the pilot and passengers until Customs can

arrive. Subsection (b) would provide immunity to persons other than federal employees assisting Customs offices in good faith. This provision is based on various "good Samaritan" laws and is intended to reassure aid of federal officials. The liability of federal employees will continue to be governed by existing case law, which permits a qualified immunity defense to a federal official who was acting in good faith with a reasonable belief in the validity of his or her action. See Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972).

24. 31 U.S.C. § 5316 - Reports on Exports and Imports of Monetary Instruments

31 U.S.C. § 5316(a)(2) is amended to raise to \$10,000 the minimum amount which must be reported by a person who receives monetary instruments. This amendment merely conforms the reporting requirements to amendments to 31 U.S.C. § 5316(a)(1) contained in Pub. L. 98-473.

Part 5

25. 21 U.S.C. § 959 - Possession, Manufacture, or Distribution for Purposes of Unlawful Importation

21 U.S.C. § 959 is amended to make it unlawful for a United States citizen or any person aboard a United States aircraft to possess controlled substances with an intent to manufacture or distribute, or for any person aboard an aircraft to possess with an intent to manufacture or distribute a controlled substance knowing or intending that it be unlawfully introduced into the United States or within a distance of twelve miles from the coast. These provisions close certain gaps in the law as it relates to aircraft.

Policy Considerations

Government prosecutors handling drug-smuggling cases should be particularly aware of 19 U.S.C. § 1590, the new anti-air smuggling statute.

This new statute provides that it is unlawful for a pilot to transport, or for any person on board any aircraft to possess, merchandise knowing or intending that the merchandise will be introduced into the United States contrary to law. It also prohibits the transfer ("air drop") of merchandise from an aircraft to a vessel on the high seas or in the customs waters of the United States where the transfer has not been authorized by the Secretary of the Treasury and any of the following are applicable: (1) the aircraft is owned by a citizen of the United States, (2) the aircraft is registered in the United States, (3) the vessel is a "vessel of the United States" within the meaning of 19 U.S.C. § 1703(b), or (4) the transfer is made under



circumstances indicating the intent to make it possible for such merchandise, or any part thereof, to be introduced into the United States unlawfully. The criminal penalty where any of the merchandise is a controlled substance is a fine of not more than \$250,000, imprisonment for not more than 20 years, or both, regardless of the amount of drug involved. Otherwise, the penalty is a \$10,000 fine, imprisonment for not more than 5 years, or both. A civil penalty of twice the value of the merchandise involved - but not less than \$10,000 - may be the sole penalty or may be imposed in addition to the criminal penalty. Additionally, the vessel or aircraft involved in the act would be forfeitable to the United States.

To aid in this connection, the statute provides various rebuttable presumptions that constitute prima facie evidence that the vessel or aircraft was involved in smuggling merchandise into the United States.

Except for Part 3, which deals with the FY '87 appropriation for the Customs Service and with the Customs Forfeiture Fund, and which has a separate effective date, the effective date of the Customs Enforcement Act of 1986 is October 27, 1986.

#### Criminal Division Contact

Questions regarding the provisions of Subtitle B of Title III may be directed to William J. Corcoran (786-4704) of the Narcotic and Dangerous Drug Section, or to Ellen McClain, Office of Chief Counsel, U.S. Customs Service, (566-2482), as well as to Jorge Rios-Torres at the Office of Enforcement Operations (633-3684).

Title III, Subtitle C - "Maritime Drug Law Enforcement  
Prosecution Improvements Act of 1986"

Summary

The Act of September 15, 1980 (Pub. L. 96-350) made it unlawful for persons on board vessels of the United States or subject to the jurisdiction of the United States to knowingly or intentionally manufacture or distribute, or to possess with the intent to manufacture or distribute, a controlled substance. Subtitle C of Title III of the new Act (the "Maritime Drug Law Enforcement Prosecution Improvements Act of 1986") amends that law, previously codified at Sections 955a, 955b, 955c, and 955d of Title 21, and which is reportedly being moved to 46 U.S.C. App. § 1901 et seq., <sup>63/</sup> to eliminate two prosecutorial problems which have arisen in the prosecution of criminal cases brought thereunder.

First, criminal defendants arrested on board foreign or "stateless" vessels frequently have asserted as a defense at trial that the boardings which resulted in their arrests were not made in compliance with international law. It is a well-established principle of international law, however, that individual citizens do not have standing to assert legal claims or defenses based on alleged non-compliance with international law and that such matters are to be resolved by the governments of the concerned nations through normal diplomatic channels. Consistent with this principle, the new Act provides that claims that a boarding was not made in compliance with international law may only be made by the affected foreign nation, not by an individual criminal defendant and not in a federal criminal trial.

Second, some federal courts have required federal prosecutors to prove a vessel's status (viz., domestic, foreign, or stateless), the consent of a foreign government to a boarding, or the denial by a foreign state of a claim of registry as an element of the offense at trial. Prosecutors have experienced numerous problems in obtaining the documentation necessary to prove such matters from the concerned foreign government in a timely manner and in a format which renders the documentation admissible as evidence at trial. Several prosecutions have been jeopardized as a result. This subtitle eliminates this problem by providing that such

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<sup>63/</sup> The proscription previously codified at 21 U.S.C. § 955a is now codified at 46 U.S.C. App. § 1903, with the attempt and conspiracy provision previously codified at 21 U.S.C. § 955c being contained in 46 U.S.C. App. § 1903(j).

matters may be proved at trial by a certification obtained from the Secretary of State or his designee.

Counsel should note that the definition of the term "vessel subject to the jurisdiction of the United States," previously codified at 21 U.S.C. § 955b(c), has been substantially expanded and now includes (i) vessels registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States; (ii) vessels located within the customs waters of the United States; and (iii) vessels located in the territorial waters <sup>64/</sup> of another nation where the nation consents to the enforcement of United States law by the United States. By expanding the definition of "vessel subject to the jurisdiction of the United States," the subtitle creates a new offense outlawing the manufacture, distribution, or possession with intent to manufacture or distribute, of a controlled substance aboard a vessel located within the "territorial waters" of another country where that country affirmatively consents to enforcement action by the United States.

Finally, the new Act expands the definition of "stateless vessels" to include vessels on which the master fails to respond to Coast Guard inquiries concerning the vessel's nationality.

#### Policy Considerations

It should be emphasized that this subtitle of the Anti-Drug Abuse Act is not designed to, nor will it, alter the current enforcement practices of the Coast Guard. It is directed essentially at problems of prosecution, not enforcement. Therefore, interagency consultation under Presidential Directive/NSC-27 will continue. That procedure provides an inherent check upon the enforcement program vis-a-vis non-United States flag vessels on the high seas. The Coast Guard and the other involved United States Government departments and agencies have scrupulously adhered to principles of international law in the maritime drug law enforcement program, and that policy will remain unchanged.

#### Criminal Division Contact

Questions concerning this Subtitle should be directed to William Corcoran (786-4704) in the Narcotic and Dangerous Drug

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<sup>64/</sup> The term "territorial waters" is undefined in the new Act and may have a definition different from that of "territorial sea." See "Analysis and Discussion" of Title II of the new Act (the "International Narcotics Control Act"), supra.

Section. In addition, copies of significant pleadings or decisions regarding the provisions of this subtitle should be sent to the Narcotic and Dangerous Drug Section, Criminal Division, Department of Justice, 1400 New York Avenue, N.W., Washington, D.C. 20005.

## Title III, Subtitle G. Transportation Safety

### Summary

Subtitle G of Title III of the Anti-Drug Abuse Act of 1986 amends the Federal Aviation Act of 1958, Title 49, United States Code, Appendix, to provide additional federal penalties for certain aviation-related conduct. It also broadens federal, state, and local ability to scrutinize, and, for state governments, to proscribe, a variety of aviation-related conduct, most of which may relate to drug-trafficking activity (although the establishment of such relationship is not a prerequisite for many of the remedial actions contained in these new provisions).

### Analysis and Discussion

The Federal Aviation Act of 1958 has been modified by the Anti-Drug Abuse Act to: (1) authorize state governments to establish criminal penalties, including the seizure and forfeiture of aircraft, for various aviation violations relating to aircraft registration certificates and false or misleading aircraft marks [new 49 U.S.C. App. § 1472(b)(3)]; (2) provide that the operator of an aircraft shall make available for inspection an aircraft's certificate of registration upon request by a federal, state, or local law enforcement officer [new 49 U.S.C. App. § 1401(g)]; (3) provide a maximum penalty of five years in prison and a fine of \$25,000 for a variety of aviation violations relating to aircraft registration certificates, airman certificates, navigation or anticollision lights, and fuel-system modifications [49 U.S.C. App. § 1472(q), as amended]; (4) incorporate a presumption relating to fuel-system modifications; (5) modify the rules relating to forfeiture under these provisions; (6) increase the fine for violations of port of entry or clearance regulations from \$500 to \$5,000 [49 U.S.C. App. § 1474(a), as amended]; and (7) require notification to the Secretary of the Treasury with regard to the sale, conditional sale, transfer, or conveyance of an ownership interest in any aircraft for which a certificate or registration has been issued under the Federal Aviation Act [new 49 U.S.C. App. § 1509(f)].

### Policy Considerations

As with the provisions of the Aviation Drug-Trafficking Control Act, Pub. L. 98-499 (enacted October 19, 1984) [see the Handbook on the Comprehensive Crime Control Act of 1984], in order to effectuate the purpose of these new provisions, all aircraft-related drug convictions of persons who hold certificates subject to the provisions of the Federal Aviation Act of 1958 (e.g., aircraft registration certificates, airman certificates) should be brought to the attention of the Investigations and Security Division of the Federal Aviation Administration. Even if criminal charges are not contemplated,

or an acquittal results because of technicalities which would not impede an administrative proceeding, prosecutors should refer the matter to the attention of the Federal Aviation Administration.

Criminal Division Contact

Questions concerning this subtitle should be referred to Gary Schneider (786-4700) in the Narcotic and Dangerous Drug Section.

## Title XV - National Forest System Drug Control

### Summary

In addition to setting forth the authority of up to 500 officers and employees of the National Forest Service to investigate federal offenses with regard to the manufacture (e.g., cultivation), distribution, or dispensing of marihuana and other controlled substances within the boundaries of the National Forest System, the "National Forest System Drug Control Act of 1986" creates a new substantive offense to specifically proscribe the use of "boobytraps" on federal property in connection with the manufacture, distribution, or dispensing of controlled substances. This would include the use of such devices to protect marihuana being grown in a National Forest.

### Analysis and Discussion

#### A. "Boobytrap" Offense in Detail (21 U.S.C. § 841(e))

The "boobytrap" provision of this new law, codified at 21 U.S.C. § 841(e)(1), provides that anyone "who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than \$10,000." <sup>65/</sup> The term of imprisonment and fine are doubled for a second or subsequent violation of this subsection through application of 21 U.S.C. § 841(e)(2).

#### B. Definition of "Boobytrap" (21 U.S.C. § 841(e)(3))

"Boobytrap" is defined in Subsection (3) of 21 U.S.C. § 841(e) to mean "any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached."

### Policy Considerations

With regard to enforcement powers under new 21 U.S.C. § 841(e), because of the placement of this new proscription in Title 21 rather than in the explosives and firearms provisions of

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<sup>65/</sup> See the in-depth discussion of the applicability, vel non, of the alternative fines provisions of Title 18 to Title 21 offenses contained in Appendix B to this handbook.

Title 18, it would appear that investigative jurisdiction for this offense would reside in either the National Forest Service (which has received broadened drug enforcement powers in an earlier part of Title XV) or the Drug Enforcement Administration, rather than in the Bureau of Alcohol, Tobacco and Firearms. Still, because of the provisions of Section 15007 of Title XV, any new drug enforcement authority granted to the National Forest Service by this title may only be exercised following an agreement approved by the Secretary of Agriculture and the Attorney General. Any such agreement may end up limiting the authority of the National Forest Service with regard to this provision or as to whatever other drug enforcement authority the National Forest Service would have received through the provisions of Title XV with regard to enforcement powers under the Controlled Substances Act. Pursuant to the Act, and to be incorporated in any memorandum of understanding concerning the Act, the authorities of the National Forest Service will be restricted in the exercise of any new authority to the boundaries of the National Forest System. Any investigation whose scope exceeds these boundaries will have to be coordinated with the local DEA office.

Until such agreement is in force, only DEA (and the FBI, by an earlier Attorney General directive) can enforce the provisions of the Controlled Substances Act, including this new provision, although the National Forest Service may continue to exercise whatever inherent authority it has with regard to such criminal activity, as specifically provided for in Section 15002(b) of this title.

It is also possible that limited enforcement powers with regard to new 21 U.S.C. § 841(e) may be delegated to the Bureau of Alcohol, Tobacco and Firearms by agreement between the Attorney General and the Secretary of the Treasury.

As an aside, prosecutors should be aware that last-minute attempts within the Executive Branch to have Congress change new 21 U.S.C. § 841(e) from Title 21 to a section in Title 18, as well as to change the fine provision of this provision to correspond to the Criminal Fine Enforcement Act, both proved unproductive, although these matters were never specifically raised in, or rejected by, Congress.

#### Criminal Division Contact

Questions concerning the provisions of new 21 U.S.C. § 841(e) should be directed to Gary Schneider (786-4700) in the Narcotic and Dangerous Drug Section.



APPENDIX A

# SHORTHAND CHRONOLOGY OF DRUG-RELATED BILLS ENACTED SINCE 1970

<u>eff. date*</u>	<u>name</u>	<u>major provisions</u>
10/15/70	Organized Crime Control Act of 1970 (P.L. 91-452)	RICO (18 U.S.C. 1961 et seq); dangerous special offender; immunity
5/1/71	Bank Records and Foreign Transactions Act (P.L. 91-508)	reporting requirements for domestic and foreign currency transactions (Title 31 - "Bank Secrecy Act")
5/1/71	Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513)	drug provisions unified in Title 21 - Controlled Substances Act, Controlled Substances Import and Export Act
5/14/74	Narcotic Addict Treatment Act of 1974 (P.L. 93-281)	dispensing of narcotic drugs for maintenance/detoxification treatment
11/10/78	Psychotropic Substances Act of 1978 (P.L. 95-633) [certain parts relating to psychotropic substances convention eff. 7/15/80]	piperidine reporting (21 U.S.C. 830); enhanced phencyclidine/piperidine penalties (21 U.S.C. 841(b)(5) [since repealed] and 841(d); forfeiture of drug proceeds (21 U.S.C. 881(a)(6))
9/15/80	Act of 9/15/80 (P.L. 96-350)	high-seas offenses (21 U.S.C. 955a-d)
9/26/80	Infant Formula Act of 1980 (P.L. 96-359)	distribution of 1,000 pounds of marihuana (21 U.S.C. 841(b)(6)), now since incorporated into 21 U.S.C. 841(b)(1)(A)
9/13/82	Act of 9/13/82 (P.L. 97-258)	recodification of Title 31
5/31/84	Controlled Substance Registrant Protection Act (P.L. 98-305)	"pharmacy robbery" [and burglary] statute (18 U.S.C. 2118)
10/12/84	Comprehensive Crime Control Act of 1984 (P.L. 98-473)	enhanced drug penalties (including limited "mixture or substance" language); extended forfeiture provisions; bail reform; emergency scheduling; distribution within 1,000 feet of school (21 U.S.C. 845a); sentencing reform; Title 31 amendments (attempt, wiretap, RICO, rewards); investment of illicit drug profits (21 U.S.C. 854); cultivation on federal property; foreign evidence
10/19/84	Aviation Drug-Trafficking Control Act (P.L. 98-499)	Title 49 amendments relating to airman certificates

## CHRONOLOGY OF DRUG-RELATED BILLS (Cont'd)

<u>eff. date*</u>	<u>name</u>	<u>major provisions</u>
1/20/87	Electronic Communications Privacy Act of 1986 (P.L. 99-508)	extends Title-III coverage to "electronic communications" (18 U.S.C. 2510 <u>et seq.</u> )

\* The effective date of criminal legislation is generally the date of enactment, whether with or without the President's signature. When the President has signed the bill, the time of the President's signature is the true time that the legislation is enacted and, unless some other date is indicated for the provision to go into effect, effective. Where a criminal statute is effective as of the President's signature (viz., it does not contain a delayed effective date) but the exact time of signature is both unknown and at issue (because the offense could have occurred on the date but before this time), it may be necessary to establish the time of signature by appropriate testimony or affidavit as part of the criminal proceedings under the new statute. Where a bill is enacted into law without the signature of the President (viz., at the end of the 10-day period following the bill's being forwarded to the President, where the bill has not been vetoed during that time), it is effective, absent some language to the contrary, at the moment following the 10-day period, at which time the President loses his ability to veto the legislation.

Many bills, however, have a delayed effective date which is contained at the end of the bill or following certain provisions of the bill. For example, the Criminal Fine Enforcement Act, although enacted on October 30, 1984, provided that the "alternative fine" provisions would only be effective for offenses occurring after December 31, 1984.

For the bills listed in this chart, the effective date is that of the bill or of the major drug-related portions of the overall bill. Confirmation of the actual date of enactment of a statute can be accomplished through reference to the relevant sections of the United States Code.

CHRONOLOGY OF DRUG-RELATED BILLS (Cont'd)

<u>eff. date*</u>	<u>name</u>	<u>major provisions</u>
1/1/85	Criminal Fine Enforcement Act (P.L. 98-596)	provides alternative fines for all federal offenses (18 U.S.C. 3623)
1/1/85	Deficit Reduction Act of 1984 (P.L. 98-369)	tax returns regarding cash transactions in trade or business (26 U.S.C. 6050I)
10/27/86	Anti-Drug Abuse Act of 1986 (P.L. 99-570)	minimum-mandatory sentences; controlled substance analogues; drug paraphernalia; mandatory life imprisonment for "principal administrator" of CCE; money laundering (18 U.S.C. 1956); transactions in criminally derived property (18 U.S.C. 1957); "mixture or substance" language broadened; use or employment of a person under 18, distribution to a pregnant woman (21 U.S.C. 845b); forfeiture of substitute assets (18 U.S.C. 1963(n) and 21 U.S.C. 853(p)); air drops (19 U.S.C. 1590(b)); customs law amendments; deportation changes; Career Criminal Act expanded to include serious drug offenses; maritime improvements (21 U.S.C. 955a-d); "boobytrap" on federal property (21 U.S.C. 841(e)); "Mansfield Amendment" revision; revised drug-possession penalties (21 U.S.C. 844)
11/10/86	Criminal Law and Procedure Technical Amendments Act of 1986 (P.L. 99-646)	clarifies the definition of cocaine and isomer; authorizes the Attorney General to enter into cooperative agreements with state and local law enforcement agencies regarding cooperative enforcement and regulatory activities under the CSA (21 U.S.C. 873(a)); extending the enforcement powers of 21 U.S.C. 878 to state and local law enforcement officers designated by the Attorney General; forfeiture amendments
11/15/86	Firearm Owners' Protection Act (P.L. 99-308)	extends 18 U.S.C. 924(c) to specified drug-trafficking crimes; revises and moves the Career Criminal Act (new 18 U.S.C. 924(e))

APPENDIX B

## PRESENT STATUS OF CRIMINAL FINES IN DRUG CASES

Prior to the enactment of the Comprehensive Crime Control Act of 1984 (Pub. L. 98-473), the criminal fines to be imposed in drug cases were those included in the specific penalty sections of Title 21 (viz., 21 U.S.C. §§ 841(b) and 960(b)). With enactment of the CCCA, this changed because of the creation of a general "alternative fines" provision - 18 U.S.C. § 3571 - which overrides the maximum fines authorized by the statute describing the offense if the fines in 18 U.S.C. § 3571 are greater (up to \$250,000 for felonies), as called for in 18 U.S.C. § 3559. These provisions are to go into effect with the rest of the Sentencing Reform Act that was passed as part of the CCCA. (The effective date for the SRA was to have been November 1, 1986, but this date was delayed one year until November 1, 1987, by Section 4 of Pub. L. 99-217.) The CCCA also created a specific Title 21 "alternative fine" provision - 21 U.S.C. § 855 - which allowed for the imposition of an alternative fine of twice the gross profits or other proceeds derived from the offense. Section 855 was effective as of the President's signature on the CCCA, October 12, 1984. Not wishing to wait until the SRA became effective to incorporate the Title 18 alternative fine provision into law, Congress shortly after enactment of the CCCA, on October 30, 1984, enacted the Criminal Fine Enforcement Act (Pub. L. 98-596), which provided alternative fines for all federal offenses occurring after December 31, 1984. This provision, codified at 18 U.S.C. § 3623, is currently in effect, and should remain in effect until November 1, 1987, when the SRA is presently expected to repeal the chapter of Title 18 in which 18 U.S.C. § 3623 is placed. 66/

Complicating matters somewhat is the questionable effect these "alternative fines" provisions - in either 18 U.S.C. § 3623 or § 3571 - will have on later-enacted statutes, such as the Anti-Drug Abuse Act of 1986 (Pub. L. 99-570).

Most of the drug-related statutes enacted as part of the ADAA made specific reference to the fines provisions in Title 18, thereby obviating any question as to the applicability of the "alternative fines" provisions then existing or to go into effect

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66/ Unless Congress amends 18 U.S.C. § 3571, the repeal of Section 3623 would delete a provision in 18 U.S.C. § 3623 that is not currently in Section 3571 allowing for an alternative fine of twice the gross gain or twice the gross loss derived from or caused by the offense. The specific "twice gross profits" provision at 21 U.S.C. § 855 would not be affected by this repeal.

on November 1, 1987. However, several of the new statutes, such as the new penalties for drug possession (Section 1052 of the ADAA, amending 21 U.S.C. § 844), drug paraphernalia (Section 1822 of the ADAA, to be codified at 21 U.S.C. § 857), and the use of "boobytraps" on federal property (Section 15005 of the ADAA, to be codified at 21 U.S.C. § 841(e)), have lower fines than otherwise available in the "alternative fines" provisions, but make no reference to Title 18 fines.

After discussion within the Criminal Division, it is our initial conclusion that the statutes which were enacted as part of the ADAA which do not make a specific reference to Title 18 fines do not receive the enhanced fines allowed for in 18 U.S.C. § 3623. However, the effect that the alternative fines contained in the soon-to-be-effective SRA (viz., 18 U.S.C. § 3571) will have on these statutes and other later-enacted statutes is unclear. We anticipate that policy advice relating to all of these issues will be forthcoming in the near future.

Questions regarding this issue may be referred to the Narcotic and Dangerous Drug Section or the Appellate Section.

APPENDIX C



ROUTINE

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SECTION 01 OF 02 //N16247//

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COMDTNOTE 16247

SUBJ: ENFORCEMENT OF DRUG TRAFFICKING LAWS

- A. ANTI-DRUG ABUSE ACT OF 1986, P.L. 99-570
- B. MARITIME LAW ENFORCEMENT MANUAL, COMDTINST M16247.1

1. REFERENCE (A) AMENDED 22 USC 2291 (C), "MANSFIELD AMENDMENT", RESULTING IN GREATER FLEXIBILITY IN THE ENFORCEMENT OF LAW AGAINST ILLICIT DRUG TRAFFICKING IN FOREIGN TERRITORIAL WATERS, AND AMENDED 21 USC 955A, THE PROHIBITION AGAINST DRUG TRAFFICKING. THE FOLLOWING GUIDANCE IS PROVIDED TO DELINEATE THE LIMITS AND REQUIREMENTS FOR EXERCISING LAW ENFORCEMENT ACTION CONSISTENT WITH THESE STATUTORY CHANGES.

- 2. 22 USC 2291 (C), AS AMENDED, NOW STATES IN PART:
  - (1) NO OFFICER OR EMPLOYEE OF THE UNITED STATES MAY DIRECTLY EFFECT AN ARREST IN ANY FOREIGN COUNTRY AS PART OF ANY FOREIGN POLICE ACTION WITH RESPECT TO NARCOTICS CONTROL EFFORTS . . . THIS PARAGRAPH DOES NOT PROHIBIT AN OFFICER OR EMPLOYEE FROM ASSISTING FOREIGN OFFICERS WHO ARE EFFECTING AN ARREST.
  - (2) UNLESS . . . APPLICATION OF THIS PARAGRAPH . . . WOULD BE HARMFUL TO THE NATIONAL INTERESTS OF THE UNITED STATES, NO OFFICER OR EMPLOYEE OF THE UNITED STATES MAY ENGAGE OR PARTICIPATE IN ANY DIRECT POLICE ACTION IN ANY FOREIGN COUNTRY WITH RESPECT TO NARCOTICS CONTROL EFFORTS . . . NOTHING IN PARAGRAPH (1) SHALL BE CONSTRUED TO ALLOW UNITED STATES OFFICERS OR EMPLOYEES TO ENGAGE OR PARTICIPATE IN ACTIVITIES PROHIBITED BY THIS PARAGRAPH . . .
  - (4) WITH THE AGREEMENT OF A FOREIGN COUNTRY, PARAGRAPHS (1) AND (2) SHALL NOT APPLY WITH RESPECT TO MARITIME LAW ENFORCEMENT

OPERATIONS IN THE TERRITORIAL SEA OF THAT COUNTRY. THE APPLICATION OF SUBPARAGRAPH (4) IS RESTRICTED TO OPERATIONS WITHIN A CONSENTING COASTAL STATE'S TERRITORIAL SEA. THIS TERM REFERS TO THE BELT OF SEA MEASURED FROM THE COASTAL STATE'S BASELINE AS RECOGNIZED IN ACCORDANCE WITH MULTILATERAL INTERNATIONAL CONVENTIONS AND CUSTOMARY INTERNATIONAL LAW. THEREFORE, IT IS IMPERATIVE THAT UNITS BE AWARE OF THE PRECISE LOCATION OF ANY SUSPECTED VIOLATOR (I.E. THE HIGH SEAS, TERRITORIAL SEAS, OR INTERNAL WATERS) BEFORE TAKING LAW ENFORCEMENT ACTION.

- 3. THE FOLLOWING GUIDELINES ARE APPLICABLE TO DRUG RELATED LAW ENFORCEMENT ACTIONS FROM USCG UNITS:
  - A. ENFORCEMENT OF LAW (U.S. OR FOREIGN) ON THE HIGH SEAS, U.S. TERRITORIAL SEAS AND U.S. INTERNAL WATERS. ACTIONS WILL BE CONDUCTED IN ACCORDANCE WITH REFERENCE (B).
  - B. ENFORCEMENT OF U.S. LAW AGAINST U.S. VESSELS IN THE TERRITORIAL SEA OR INTERNAL WATERS OF A CONSENTING FOREIGN COUNTRY. REFERENCE (A) IS NOT CONSIDERED TO HAVE AFFECTED USCG AUTHORITY TO ENFORCE U.S. LAW. ACTIONS WILL BE CONDUCTED IN ACCORDANCE WITH REFERENCE (B).
  - C. ENFORCEMENT OF U.S. LAW AGAINST FOREIGN VESSELS IN THE TERRITORIAL SEA AND INTERNAL WATERS OF A CONSENTING FOREIGN

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COUNTRY. REFERENCE (A) REMOVED ANY QUESTION OF MANSFIELD RESTRICTIONS CONCERNING ENFORCEMENT OF U.S. LAW AGAINST FOREIGN FLAG VESSELS AND THE INDIVIDUALS ONBOARD WHILE LOCATED IN A CONSENTING COASTAL STATE'S TERRITORIAL SEAS. MANSFIELD IS ALSO CONSIDERED INAPPLICABLE TO ENFORCEMENT OF U.S. LAW BY USCG UNITS IN A CONSENTING STATE'S INTERNAL WATERS. ACTIONS WILL BE CONDUCTED IN ACCORDANCE WITH REFERENCE (B). COASTAL STATE CONSENT TO ENTRY OF THE USCG UNIT INTO ITS TERRITORIAL WATERS DOES NOT BY ITSELF PROVIDE U.S. JURISDICTION OVER FOREIGN FLAG VESSELS. A FOREIGN FLAG VESSEL LOCATED IN A COASTAL STATE'S TERRITORIAL WATERS MUST BE SUSPECTED OF VIOLATING U.S. LAW TO BE SUBJECT TO USCG LAW ENFORCEMENT. IN ADDITION TO THE COMDT SNO FOR ENTRY INTO A COASTAL STATE'S TERRITORIAL WATERS FOR LAW ENFORCEMENT PURPOSES, A COMDT SNO MUST BE OBTAINED FOR NON CONSENSUAL BOARDINGS, SEIZURES OF FOREIGN FLAG VESSELS, AND ARRESTS OF INDIVIDUALS ON BOARD.

D. ENFORCEMENT OF FOREIGN LAW AGAINST FOREIGN FLAG VESSELS IN THE TERRITORIAL SEA OF A CONSENTING FOREIGN COUNTRY. THE FOLLOWING ACTIONS ON BEHALF OF THE CONSENTING COASTAL STATE ARE PERMITTED IF CONDUCTED IN THE COASTAL STATE'S TERRITORIAL SEA: BOARDINGS, SEARCHES, SEIZURES, ARRESTS OF INDIVIDUALS, AND COOPERATIVE LAW ENFORCEMENT ACTIONS, INCLUDING JOINT BOARDINGS, TRANSPORTATION OF BOARDING PARTIES AND SUSPECTS, TRANSPORTATION OF SEIZED VESSELS, DETENTIONS OF INDIVIDUALS, AND TECHNICAL SUPPORT.

E. ENFORCEMENT OF FOREIGN LAW AGAINST FOREIGN VESSELS IN THE INTERNAL WATERS OF A FOREIGN COUNTRY. SUBSECTION (2) OF MANSFIELD SPECIFICALLY PROHIBITS U.S. OFFICERS OR EMPLOYEES FROM PARTICIPATING IN ANY DIRECT POLICE ACTION IN ANY FOREIGN COUNTRY. CONSISTENT WITH PAST PRACTICE, ARRESTS OF INDIVIDUALS, DETENTIONS OF INDIVIDUALS RESTRICTING FREEDOM OF MOVEMENT UNTIL ARRIVAL OF LOCAL POLICE, JOINT BOARDINGS, AND TRANSPORTATION OF SUSPECTS IN THE CONSENTING COASTAL STATE'S INTERNAL WATERS FOR VIOLATION OF FOREIGN LAW IS NOT PERMITTED. COOPERATION SUCH AS PROVIDING EQUIPMENT OR INFORMATION IS AUTHORIZED. COASTAL STATE REQUESTS FOR COOPERATIVE ACTIONS REQUIRING THE PRESENCE OF USCG MEMBERS OR UNITS, SUCH AS TECHNICAL SUPPORT OR TRANSPORTATION OF BOARDING PARTIES, WILL BE ADDRESSED ON A CASE BY CASE BASIS.

4. A COMDT SNO MUST BE OBTAINED PRIOR TO ENTERING A COASTAL STATE'S TERRITORIAL WATERS FOR LAW ENFORCEMENT PURPOSES. A REQUEST FOR A SNO MUST INCLUDE, WHEN AVAILABLE, THE NAME AND GOVERNMENTAL POSITION OF ANY FOREIGN OFFICIAL PURPORTING TO GRANT CONSENT TO ENTER ON BEHALF OF THE COASTAL STATE. A REQUEST FOR A SNO MUST INDICATE WHETHER THE SUSPECT VESSEL IS LOCATED IN THE COASTAL STATE'S TERRITORIAL SEA OR INTERNAL WATERS.

5. LAW ENFORCEMENT AUTHORITY OF USCG PERSONNEL EMBARKED ON U.S. NAVY VESSELS IS TO BE EXERCISED ONLY ON THE HIGH SEAS AND U.S. TERRITORIAL WATERS. ANY DEVIATION FROM THIS POLICY MUST BE APPROVED IN ADVANCE BY G-OLE.

6. COAST GUARD MEMBERS AND OTHER U.S. LAW ENFORCEMENT PERSONNEL MAY NOT INTERROGATE OR BE PRESENT DURING THE INTERROGATION OF U.S. CITIZENS ARRESTED IN A COASTAL STATE'S TERRITORIAL SEAS OR INTERNAL WATERS FOR VIOLATION OF FOREIGN LAW WITHOUT THE INDIVIDUAL'S WRITTEN PERMISSION. REGARDLESS OF THE NATIONALITY OF THE ARRESTING OFFICER, ARRESTEES OR DETAINEES WILL BE TREATED IN ACCORDANCE WITH COAST GUARD POLICIES WHILE ONBOARD USCG VESSELS AND USN VESSELS WITH TACLETS EMBARKED.

7. AUTHORITY TO CONDUCT LAW ENFORCEMENT IN TERRITORIAL WATERS OF CONSENTING COASTAL STATES DOES NOT INCLUDE AUTHORITY TO PURSUE SUSPECTS ASHORE.

8. REFERENCE (A) REPLACED THE FOUR 21 USC 855A PROHIBITIONS AGAINST ILLICIT DRUG TRAFFICKING WITH A SINGLE OFFENSE.

IT IS UNLAWFUL FOR ANY PERSON ON BOARD A VESSEL OF THE UNITED

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STATES, OR ONBOARD A VESSEL SUBJECT TO THE JURISDICTION OF THE UNITED STATES, TO KNOWINGLY OR INTENTIONALLY MANUFACTURE OR DISTRIBUTE, OR TO POSSESS WITH INTENT TO MANUFACTURE OR DISTRIBUTE A CONTROLLED SUBSTANCE

A "VESSEL OF THE UNITED STATES" INCLUDES (A) U.S. DOCUMENTED OR NUMBERED VESSELS, (B) VESSELS OWNED IN WHOLE OR PART BY A U.S. CITIZEN, OR COMMERCIAL OR POLITICAL ENTITY, AND (C) U.S. DOCUMENTED VESSELS SOLD OR REGISTERED IN A FOREIGN COUNTRY IN VIOLATION OF U.S. LAW. A FOREIGN FLAG VESSEL IS A "VESSEL SUBJECT TO THE JURISDICTION OF THE UNITED STATES" IF IT (A) IS LOCATED IN THE CUSTOMS WATERS OF THE UNITED STATES, (B) IS LOCATED ON THE HIGH SEAS AND THE FLAG STATE HAS CONSENTED OR WAIVED OBJECTION TO ENFORCEMENT OF U.S. LAW, OR (C) IS LOCATED IN THE TERRITORIAL WATERS OF ANOTHER NATION AND THAT COASTAL STATE CONSENTS TO THE ENFORCEMENT OF U.S. LAW. A VESSEL WITHOUT NATIONALITY OR ASSIMILATED TO A VESSEL WITHOUT NATIONALITY IS A "VESSEL SUBJECT TO THE JURISDICTION OF THE UNITED STATES". THEREFORE, A VIOLATION REQUIRES PROOF THAT THE VESSEL MEETS ONE OF THE STATUTORY DEFINITIONS AND THAT THERE IS INTENT TO DISTRIBUTE OR MANUFACTURE CONTROLLED A SUBSTANCE.

9. THE POLICY CONTAINED IN THIS MESSAGE WILL BE PUBLISHED IN THE NEXT AVAILABLE CHANGE TO REFERENCE (B). SUGGESTIONS FOR MODIFICATIONS SHOULD BE ADDRESSED TO COMDT G-OLE.  
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APPENDIX D

## OUTLINE OF NEW MONEY LAUNDERING OFFENSES

New basic offenses of "money laundering" (18 U.S.C. § 1956) and "engaging in monetary transactions in property derived from specified unlawful activity" (18 U.S.C. § 1957):

(a) Money Laundering: "Financial transaction" type -  
18 U.S.C. § 1956(a)(1)

- (1) Conducts, or attempts to conduct, a financial transaction
- (2) With knowledge that the subject matter represents the proceeds of some form of U.S., state, or foreign unlawful activity
- (3) And the subject matter in fact represents the proceeds of "specified unlawful activity" -
  - (a) Any federal felony drug offense
  - (b) Any foreign felony drug offense
  - (c) Any RICO predicate except for Title 31
  - (d) Or any of a series of miscellaneous bank fraud, espionage, or export offenses
- (4) Involving either a transaction that is
  - (a) In a financial institution, or
  - (b) That affects interstate or foreign commerce
- (5) With knowledge that the transaction is designed (in whole or in part)
  - (a) To promote further "specified unlawful activity," or
  - (b) To -
    - (i) conceal or disguise the source, origin, location, or ownership of proceeds of specified unlawful activity, or
    - (ii) avoid a federal or state reporting requirement

(b) Money Laundering: "Transportation" type -  
18 U.S.C. § 1956(a)(2)

- (1) Transporting, or attempting to transport, a monetary instrument or funds
  - (a) From inside the United States to or through a place outside, or
  - (b) From outside the United States to or through a place inside
- (2) With
  - (a) The intent to promote the carrying on of "specified unlawful activity" -
    - (i) Any federal felony drug offense
    - (ii) Any foreign felony drug offense
    - (iii) Any RICO predicate except for Title 31
    - (iv) Or any of a series of miscellaneous bank fraud, espionage, or export offenses, or
  - (b) Knowledge
    - (i) That the subject matter represents the proceeds of some form of U.S., state, or foreign unlawful activity, and
    - (ii) That the transaction is designed to -
      - conceal or disguise the source, origin, location, or ownership of the proceeds of specified unlawful activity, or
      - avoid a federal or state reporting requirement

(c) Engaging in monetary transactions in property derived from specified unlawful activity -  
18 U.S.C. § 1957

- (1) Engages, or attempts to engage, in a "monetary transaction"
  - (i) e.g., deposit, withdrawal, transfer
  - (ii) by, through, or to a financial institution
- (2) In "criminally derived property"
- (3) Which is derived from "specified unlawful activity" -
  - (i) Any federal felony drug offense
  - (ii) Any foreign felony drug offense
  - (iii) Any RICO predicate except for Title 31
  - (iv) Or any of a series of miscellaneous bank fraud, espionage, or export offenses
- (4) And is of a value greater than \$10,000

