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**DRAFT**

TITLE V

LAW ENFORCEMENT ENHANCEMENT PROVISIONS

PART A

Sec. 1. This Part may be cited as the Drug Penalties Enhancement Act of 1986.

Sec. 2. Sections 401(b)(1)(A) and (B) of the Controlled Substances Act (21 U.S.C. 841 (b)(1)(A)) are amended to read as follows:

"(1)(A) In the case of a violation of subsection (a) of this section involving--

"(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 substance referred to in subclauses (I) through (III);"

"(iii) 25 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

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

"(vi) 40 grams or more of a mixture or substance containing a detectable amount of fentanyl or 10 grams or more of a mixture or substance containing a detectable amount of any analog of fentanyl;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death results from the use of such substance shall be not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance

with the provisions of title 18 or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph nor shall the term of imprisonment imposed under this subparagraph run concurrently with any other term of imprisonment under this subparagraph or under any other provision of law. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein."

"(B) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death results from the use of such substance shall be sentenced to life

imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment. Notwithstanding the prior sentence, and notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death results, nor shall such a term of imprisonment run concurrently with any other term of imprisonment under this subparagraph or under any other provision of law, nor shall a person so sentenced be eligible for parole during the term of such a sentence."

Sec. 3. Section 401 of the Controlled Substances Act (21 U.S.C. 841) is further amended as follows:

(a) In subsection (b), paragraph (1)(C) is amended by striking out the phrase "a fine of not more than \$50,000" and inserting in lieu thereof "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is and individual or \$1,000,000 if the defendant is other than an individual", and by striking out the phrase "a fine of not more than \$100,000" and inserting in lieu

thereof the phrase "a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual";

(b) In subsection (b), paragraph (2) is amended by striking out the phrase "a fine of not more than \$25,000" and inserting in lieu thereof "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual", and by striking out the phrase "a fine of not more than \$50,000" and inserting in lieu thereof " a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual";

(c) In subsection (b), paragraph (3) is amended by striking out the phrase "a fine of not more than \$10,000" and inserting in lieu thereof "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$100,000 if the defendant is an individual or \$250,000 if the defendant is other than an individual", and by striking out the phrase a fine of not more than \$20,000" and inserting in lieu thereof "a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual";

(d) In subsection (b), paragraph (5) is amended to read as follows:

"(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed

"(A) the amount authorized in accordance with this section,

"(B) the amount authorized in accordance with the provisions of title 18,

"(C) \$500,000 if the defendant is an individual;  
or

"(D) \$1,000,000 if the defendant is other than an individual,

or both."; and

(e) subsection (d) is amended by striking out the phrase "a fine of not more than \$15,000" and inserting in lieu thereof "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual".

Sec. 4. Section 994 of title 28 of the United States Code is amended by--

(1) inserting the following after subsection (m):

"(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower



than that which is established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."; and

(2) redesignating subsections (n), (o), (p), (q), (r), (s), (t), (u), (v), and (w) as subsections (o), (p), (q), (r), (s), (t), (u), (v), (w), and (x), respectively.

Sec. 5. (a) Rule 35(b) of the Federal Rules of Criminal Procedure is amended by adding the following at the end thereof: "The court's authority to lower a sentence under this subdivision includes the authority to lower such sentence to a level below that which is established by statute as a minimum sentence."

(b) The amendment made by this section shall take effect on the date of the taking effect of Rule 35(b) of the Federal Rules of Criminal Procedure, as amended by section 215(b) of the Comprehensive Crime Control Act of 1984.

#### Analysis

This part contains a series of amendments to the provision in Title 21 (21 U.S.C. 841) that sets out penalties for large-scale domestic drug trafficking.

Section two amends 21 U.S.C. 841(b)(1)(A) to lower the amounts of drugs required to trigger the maximum sentences. It also increases the maximum term of imprisonment authorized for large scale drug trafficking from 20 to 40 years. Moreover, it provides mandatory minimum terms of five years for first offenses and ten years for second offenses. Fines are also increased to \$2,000,000 for first offenders who are individuals (\$5,000,000

for defendants other than individuals) and to \$4,000,000 and \$10,000,000 for repeat offenders. The fine provisions also cross-reference the Criminal Fine Enforcement Act of 1984 in title 18 to clarify that that Act's provisions, which can increase fines even beyond these levels to double the amount of the defendant's gain, are applicable.

Section two also contains mandatory terms of imprisonment for large scale drug traffickers in cases where death results from someone using their drugs. This provision was inspired by the death of basketball player Len Bias. Imprisonment in such a case would be not less than twenty years and could extend to life imprisonment. In a case where death resulted and the defendant already had another drug trafficking conviction (whether or not death had resulted from the events that gave rise to the earlier conviction) the defendant would have to be sentenced to life imprisonment.

Finally, section two's amendment of 21 U.S.C. 841(b)(1)(A) adds two new types of particularly dangerous controlled substances to those already listed in 21 U.S.C. 841(b)(1)(A) that require the most severe penalties. It would extend those penalties to persons trafficking in 25 grams or more of "crack" or a gram of fentanyl or any analog of this frequently deadly substance.

Section two also amends 21 U.S.C. 841(b)(1)(B) to raise the term of imprisonment for trafficking in smaller amounts of controlled substances from fifteen to twenty years. Fines are also increased for trafficking in smaller amounts. The fine would be the greater of \$1,000,000 or twice the gain for an

individual and to \$5,000,000 or twice the gain for an entity other than an individual. For an individual sentenced under 841(b)(1)(B) who had a previous drug conviction, the fine would be the greater of \$2,000,000 or four times the gain, and the fine for an entity other than an individual that had a previous drug conviction would be the greater of four times the gain or \$10,000,000.

Section three makes a series of amendments to the fine provisions in 21 U.S.C. 841 that apply to trafficking in small amounts of drugs generally believed not to be quite as harmful as cocaine, heroin, and LSD.

Subsection 3(a) amends 21 U.S.C. 841(b)(1)(C). That provision presently authorizes a fine of up to the greater of \$50,000 (\$100,000 for a second offense) or that authorized in the Fine Enforcement Act. The amendment would raise the fine to the greater of \$250,000 or twice the gain for an individual and to \$1,000,000 or twice the gain for an entity other than an individual. For an individual sentenced under 841(b)(1)(C) who had a previous drug conviction, the fine would be the greater of \$500,000 or four times the gain, and the fine for an entity other than an individual that had a previous drug conviction would be the greater of four times the gain or \$2,000,000.

Subsection 3(b) amends 21 U.S.C. 841(b)(2) which sets out fines for trafficking in schedule IV controlled substances. The present authorized fine is the greater of \$25,000 (\$50,000 for a second offense) or that authorized in the Fine Enforcement Act. The amendment would raise the fine to the greater of \$250,000 or

twice the gain for an individual and to \$1,000,000 or twice the gain for an entity other than an individual. For an individual sentenced under 841(b)(2) who had a previous drug conviction, the fine would be the greater of \$500,000 or four times the gain, and the fine for an entity other than an individual that had a previous drug conviction would be the greater of four times the gain or \$2,000,000.

Subsection 3(c) amends 21 U.S.C. 841(b)(3) which sets out fines for trafficking in schedule V controlled substances. The present authorized fine is the greater of \$10,000 (\$20,000 for a second offense) or that authorized in the Fine Enforcement Act. The amendment would raise the fine to the greater of \$100,000 or twice the gain for an individual and to \$250,000 or twice the gain for an entity other than an individual. For an individual sentenced under 841(b)(3) who had a previous drug conviction, the fine would be the greater of \$200,000 or four times the gain, and the fine for an entity other than an individual that had a previous drug conviction would be the greater of four times the gain or \$500,000.

Subsection 3(d) amends 21 U.S.C. 841(b)(5) which sets out fines for persons convicted of cultivating controlled substances on federal land. The fine is \$500,000 for individuals and \$1,000,000 for entities other than individuals. Unlike most other parts of section 841, 841(b)(5) does not provide for enhanced fines for a second conviction. The amendment rewrites 841(b)(5) to clarify that persons who commit such an offense can be imprisoned as well as fined and to set out the maximum fine as

that authorized in section 841 (which is now in excess of \$500,000 or \$1,000,000 for many offenses), that authorized pursuant to the Fine Enforcement Act in Title 18, or \$500,000 for individuals or \$1,000,000 for entities other than individuals.

Subsection 3(e) amends 21 U.S.C. 841(d) which sets out a fine of \$15,000 for possession of piperidine with intent to manufacture PCP. Of course the fine is actually that authorized by the Criminal Fine Enforcement Act, the greater of \$250,000 for individuals (\$500,000 for organizations) or double the defendant's gain. The effect of the amendment is to leave the fine for an individual at the greater of \$250,000 or twice the gain but to raise the fine authorized to the greater of \$1,000,000 or twice the gain for a defendant other than an individual.

Section four of this part amends 28 U.S.C. §994 to provide that the sentencing guidelines to be issued by the United States Sentencing Commission reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed to take into account a defendant's substantial assistance in the investigation or prosecution of others. The amendment expressly provides that such a lower sentence may be below a level established by statute as a minimum sentence. Pursuant to 18 U.S.C. §3553, effective November 1, 1987, the courts will be required to use the guidelines in imposing a sentence. The amendment is needed since defendants would be extremely unlikely to provide information on accomplices if they knew that, despite their cooperation, they would be subject to substantial or mandatory prison terms. Without the assistance of defendants, the government's task of

investigating and prosecuting the top levels of a drug ring, for example, would be practically impossible. Moreover, the ability of a court to sentence below a statutory minimum, such as that established by Part A for violations of the Controlled Substances Act involving large quantities of controlled substances, is necessary to encourage such cooperation.

Section five of this part amends Rule 35(b) of the Federal Rules of Criminal Procedure, as amended by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, to provide explicit authority to the court to lower a sentence to a level below that which is established by a statutory minimum. Subdivision (b) of the Rule, as it will take effect on November 1, 1987, provides authority for the court, within one year after the imposition of a sentence, to lower a sentence to reflect the defendant's subsequent, substantial assistance in the investigation or prosecution of another person, to the extent that such assistance is a factor in the applicable guidelines or policy statements of the Sentencing Commission. The amendment in section 5 is a conforming amendment to the immediately preceding amendment.

PART B

Sec. 1. This Part may be cited as the Drug Possession Penalty Act of 1986.

Sec. 2. Section 404 of the Controlled Substances Act (21 U.S.C. 844) is amended to read as follows:

§ 844. Penalty for simple possession

"(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, and shall be fined a minimum of \$1,000 but not more than \$5,000, or both, except that if he commits such offense after a prior conviction under this subsection, or a prior conviction for any drug or narcotic offense chargeable under the law of any state, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than two years, and shall be fined a minimum of \$2,500 but not more than \$10,000, except, further, that if he commits such offense after two or more prior convictions under this subsection, or two or more prior convictions for any drug or narcotic offense chargeable under the law of any state or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than ninety days but not more than

three years, and shall be fined a minimum of \$5,000 but not more than \$25,000. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be taxed the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in 28 U.S.C. §§1918, 1920\$, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provisions of title 18 that the defendant lacks the ability to pay.

"(b) As used in this section, the term "drug or narcotic offense" means any offense chargeable under the law of any state which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this chapter."

#### Analysis

This part rewrites the provisions of 21 U.S.C. 844 setting out the punishment for simple possession of controlled substances. It provides for the imposition of a mandatory fine of between \$1,000 and \$5,000 for a first offense, for a mandatory fine of between \$2,500 and \$5,000 if the defendant already has been convicted of one other state or federal narcotics offense, and for a mandatory fine of between \$5,000 and \$25,000 if the



defendant has previously been convicted of two other such offenses.

Moreover, the section would provide for a mandatory term of imprisonment of at least fifteen days and up to two years for persons guilty of simple possession who have a previous state or federal drug conviction. It provides for a mandatory term of imprisonment of between ninety days and three years for persons guilty of simple possession who have two or more previous state or federal drug convictions. The imposition or execution of mandatory minimum sentences under the section could not be suspended or deferred.

The revised section 844 would eliminate the provision in the current section whereby a first offender can be given pretrial diversion and for all practical purposes the offense does not appear as part of the person's criminal record.

The revisions to section 844 are designed to demonstrate the seriousness with which the federal government views drug use. In short, it sets the federal government squarely on record as opposing any notion that "social" or "recreational" use of drugs is acceptable behavior. While normally simple possession cases are prosecuted by the States, except in cases arising on federal enclaves, such a federal law would be helpful in certain cases and would set a good precedent which could be emulated by the States and municipalities.

PART C

Sec. 1. This part may be cited as the Continuing Drug Enterprise Penalty Act of 1986.

Sec. 2. Subsection 408(a) of the Controlled Substances Act (21 U.S.C.848(a) is amended as follows:

(a) by striking out the phrase "to a fine of not more than \$100,000," and inserting in lieu thereof "to a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual,"; and

(b) by striking out the phrase "to a fine of not more than \$200,000," and inserting in lieu thereof "to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of title 18, United States Code, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual".

Sec. 3. Section 408 of the Controlled Substances Act (21 U.S.C. 848) is further amended--

(a) by redesignating subsections (b) and (c) as (c) and (d), respectively;

(b) by inserting the following new subsection after subsection (a):

"(b) Any person who engages in a continuing criminal enterprise shall be imprisoned for life or sentenced to death, and fined in accordance with subsection (a), if--

"(1) such person is the principal administrator,

organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

"(2) (A) the violation referred to in subsection (c) (1) involved at least 300 times the quantity of a substance described in section 401(b) (1) (A) of this Act, or

"(B) 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 dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 401(b) (1) (A) of this Act."; and

(c) by adding at the end thereof the following:

"(e) A person who has been found guilty of an offense under this section shall be sentenced to death if, after consideration of the factors set forth in subsection (f) in the course of a hearing held pursuant to subsection (g), it is determined that imposition of a sentence of death is justified.

"(f) Factors to be considered in determining whether a sentence of death is justified

"(1) Mitigating Factors. -- In determining whether a sentence of death is justified, the jury, or if there is no jury, the court, shall consider each of the

following mitigating factors and determine which, if any, exist:

"(A) the defendant was less than eighteen years of age at the time of the offense;

"(B) the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution; and

"(C) the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution.

The jury, or if there is no jury, the court, may consider whether any other mitigating factor exists.

"(2) Aggravating Factors. -- In determining whether a sentence of death is justified, the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any exist:

"(A) the defendant has previously been convicted of an offense under this subchapter, or of an offense under State law or under the law of a foreign country or political subdivision thereof, involving the manufacture, distribution, sale, or possession with intent to sell of a controlled substance as defined in this

subchapter, for which a sentence of death or life imprisonment was authorized;

"(B) in the commission of the offense the defendant knowingly caused the death of, or created a grave risk of death to, another person;

"(C) in the commission of the offense a person or persons with respect to whom the defendant occupies a position of organizer, a supervisory position, or any other position of management knowingly caused the death of another person and the defendant was aware of a substantial risk that such a death might occur;

"(D) the defendant, or any person with respect to whom the defendant occupies a position of organizer, a supervisory position, or any other position of management, engaged in any conduct and thereby caused bodily injury to another person or damaged the tangible property of another person with intent to retaliate against any person for providing information concerning the offense at any official proceeding or to a law enforcement officer."

"(E) the defendant knew or intended that the offense would result in the unlawful obtaining of controlled substances by persons under 21 years of age; and

"(F) in the course of the offense the defendant employed or made use of one or more persons under 21 years of age;

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

"(g) Special hearing to determine whether a sentence of death is justified

"(1) Notice by the Government. -- If, in a case involving an offense described in this section, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this section, he shall, a reasonable time before the trial, or before acceptance by the court of a plea of guilty, or at such time thereafter as the court may permit upon a showing of good cause, sign and file with the court, and serve on the defendant, a notice--

"(A) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this section; and

"(B) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The court may permit the attorney for the government to amend the notice upon a showing of good cause.

"(2) Hearing Before a Court or Jury. -- If the attorney for the government has filed a notice as required under paragraph (1) and the defendant is found guilty of an offense described in this section, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. Prior to such a hearing, no presentence report shall be prepared by the United States Probation Service, notwithstanding the provisions of Rule 32(e) of the Federal Rules of Criminal Procedure. The hearing shall be conducted--

"(A) before the jury that determined the defendant's guilty;

"(B) before a jury impaneled for the purpose of the hearing if--

"(i) the defendant was convicted upon a plea of guilty;

"(ii) the defendant was convicted after a trial before the court sitting without a jury;

"(iii) the jury that determined the defendant's guilt was discharged for good cause; or

"(iv) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

"(C) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to subparagraph (B) shall consist of twelve members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

"(3) Proof of Mitigating and Aggravating Factors. -- At the hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under subsection (f). Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial. Any other information relevant to a mitigating or aggravating factor may be presented by either the attorney for the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The attorney for the government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence



of death. The attorney for the government shall open the argument. The defendant shall be permitted to reply. The attorney for the government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

"(4) Return of Special Findings. -- The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return a special finding as to each mitigating and aggravating factor, concerning which information is presented at the hearing, required to be considered under subsection (f). The jury must find the existence of a mitigating or aggravating factor by a unanimous vote.

"(5) Return of a Finding Concerning a Sentence of Death. -- If, in the case of an offense described in this section, an aggravating factor required to be considered under subsection (f) is found to exist, the jury, or if there is no jury, the court, shall then consider whether all the aggravating factors found to exist sufficiently outweigh all the mitigating factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factors alone are sufficient

to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall return a finding as to whether a sentence of death is justified.

"(6) Special Precaution to Assure Against Discrimination. -- In a hearing held before a jury, the court, prior to the return of a finding under paragraph (5), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, national origin, creed, or sex of the defendant. The jury, upon return of a finding under paragraph (5), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, national origin, creed, or sex of the defendant was not involved in reaching the juror's individual decision.

"(h) Imposition of a sentence of death

"Upon a finding under paragraph (5) of subsection (g) that a sentence of death is justified, the court shall sentence the defendant to death. Upon a finding under paragraph (5) of subsection (g) that a sentence of death is not justified, or under paragraph (4) of subsection (g) that no aggravating factor required to be found exists, the court shall impose a sentence of life imprisonment or life imprisonment without parole.

"(i) Review of a sentence of death

"(1) Appeal. -- In a case under this section in which a sentence of death is imposed, the sentence shall be subject

to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified for the filing of a notice of appeal. An appeal under this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.

"(2) Review. -- The court of appeals shall review the entire record in the case, including --

"(A) the evidence submitted during the trial;

"(B) the information submitted during the sentence hearing;

"(C) the procedures employed in the sentencing hearing; and

"(D) the special findings returned under paragraph (4) of subsection (g).

"(3) Decision and Disposition. --

"(A) If the court of appeals determines that --

"(i) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

"(ii) the information supports the special finding of the existence of an aggravating factor required to be considered under subsection (f) it shall affirm the sentence.

"(B) In any other case, the court of appeals shall remand the case for consideration under subsection (g).

"(C) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

"(j) Implementation of a sentence of death

"A person who has been sentenced to death pursuant to the provisions of this section shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgement of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of such State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does not provide, and the sentence shall be implemented in the latter State in the manner prescribed by such law. A sentence of death shall not be carried out upon a woman while she is pregnant.

"(k) Use of State Facilities

"A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purpose, and shall

pay the costs thereof in an amount approved by the Attorney General."

### Analysis

This part amends the Continuing Criminal Enterprise Statute (21 U.S.C. 848) to increase fines and to provide for the death penalty for persons found to be a major leader of a very large scale continuing drug enterprise.

Section two amends the fine provisions of the Continuing Criminal Enterprise statute to raise maximum authorized fines. The present law sets the fine levels at \$100,000 for a first conviction under the statute and \$200,000 for a second conviction. Of course the Criminal Fine Enforcement Act of 1984, which generally places fines at the lower of \$250,000 or double the gain obtained by the defendant in committing the offense, has effectively raised the maximum authorized fines.

Nevertheless, even the increased maximums authorized under that Act are not adequate. The provision would raise the maximum authorized fine to the greater of that authorized in the Criminal Fine Enforcement Act or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, in the case of a first conviction. In the case of a second conviction under the CCE statute the maximum authorized fine would be the greater of twice that authorized by the Criminal Fine Enforcement Act or \$4,000,000 for an individual or \$10,000,000 for an organization.

The section's reference to twice the amount authorized under the Criminal Fine Enforcement Act in title 18 for a second conviction ensures that a person convicted of a second offense could face a fine of up to four times the gain of the crime. This could result in an even higher fine than the \$4,000,000 (or \$10,000,000 for a defendant who is other than an individual) fine authorized by the CCE statute. The amendment thus blends together the salutary concept in the CCE statute that fines should be doubled for a second conviction and the equally salutary concept in the Criminal Fine Enforcement Act that authorized fines should be increased even beyond a dollar amount set out in the statute based on the gain derived by the defendant in committing the offense.

Section three provides for the death penalty as a possible punishment for the principal administrators, organizers or leaders of very large continuing criminal enterprises. The government may seek the death penalty in cases where the enterprise, as defined in section 848, received at least \$10 million in illegal drug money in a twelve-month period or where the violation involved trafficking in 300 times the quantity of controlled substances referred to in 21 U.S.C. 841(b)(1)(A) as justifying the maximum punishment. It also sets out detailed procedures which must be followed in cases in which the government seeks the death penalty. These procedures are patterned after death penalty bills that have been considered and approved by the Senate Judiciary Committee (and one of which, S. 1765 easily passed the Senate in the 98th Congress) which are

designed to reflect the holdings of the Supreme Court in cases in which it has upheld state death penalty provisions. If the government determines that the death penalty is warranted, it must, in advance of trial, give special notice of this to the defendant. Then, if the defendant is convicted, there is a post-verdict sentencing hearing at which the government must introduce evidence of aggravating factors and the defendant may introduce evidence of mitigating factors.

Aggravating factors listed in the section include such matters as that the defendant had previously been convicted of a drug felony for which a sentence of life imprisonment was authorized, that the defendant knowingly caused the death of another person in the course of the offense, or that the defendant knew or intended that the commission of the offense would result in the unlawful obtaining of controlled substances by persons under 21. Evidence of other aggravating factors may also be considered. Mitigating factors listed in the section are that the defendant was less than eighteen years old, under unusual duress, or had a significantly diminished mental capacity. The fact finder may consider whether other mitigating factors exist.

Following the introduction of evidence, the fact finder (usually the jury that determined guilt) must first determine whether any aggravating factor has been established beyond a reasonable doubt. If not, the death penalty may not be imposed. If, however, the fact finder finds an aggravating factor, it must consider whether any mitigating factor was established by a

preponderance of the evidence. Then, the jury must determine whether any aggravating factors found outweigh any mitigating factors found, or if no mitigating factors are found, whether any aggravating factor or factors alone justify the imposition of the death penalty. If the jury so finds, the defendant shall be sentenced to death.

In Coker v. Georgia, 433 U.S. 584 (1977), the Supreme Court struck down the death penalty for rape of an adult female. However, it did not hold that the death penalty cannot be imposed for any crime which does not result in death. For example, treason and espionage have long carried a death penalty, and both this Administration and the Senate Judiciary Committee have concluded that nothing in the Supreme Court's recent decisions would bar the imposition of the death penalty for these heinous crimes. See Sen. Rpt. No. 99-282, 99th Congress, 2nd Sess., pp. 9-10. The enormous and pervasive threat to the fabric and security of the United States posed by large scale drug trafficking is in our judgment as great or greater than that from espionage and treason. Consequently, we believe the death penalty provision for the leaders of the largest drug trafficking organizations operating in this country is justified and would likely be held constitutional.



PART D

Sec. 1. This part may be cited as the Controlled Substances Import and Export Penalties Enhancement Act of 1986.

Sec. 2. Sections 1010(b)(1) and (2) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1) and (2)) are amended to read as follows:

"(1) In the case of a violation of subsection (a) of this section involving--

"(A) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

"(B) 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 or 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 clauses (i) through (iii);

"(C) 25 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

"(D) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

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

"(F) 40 grams or more of a mixture or substance containing a detectable amount of fentanyl or 10 grams or more of a mixture or substance containing a detectable amount of any analog of fentanyl;

the person committing such violation shall be sentenced to a term of imprisonment of not less than 5 years and not more than 40 years and if death results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this subsection, or for a felony under any other provision of this title or title II or other law of a State, the United States, or a foreign country relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not less than 10 years and not more than life imprisonment and if death results from the use of such substance shall be sentenced to life imprisonment, a fine not to

exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph nor shall the term of imprisonment imposed under this paragraph run concurrently with any other term of imprisonment under this paragraph or under any other provision of law. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

. "(2) In the case of a violation under subsection (a) of this section involving a controlled substance in schedule I or II, the person committing such violation shall, except as provided in paragraphs (1) and (3), be sentenced to a term of imprisonment of not more than 20 years and if death results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this subsection, or for a felony under any other provision of this title or title II or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become

final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment. Notwithstanding the prior sentence, and notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this paragraph which provide for a mandatory term of imprisonment if death results, nor shall such a term of imprisonment run concurrently with any other term of imprisonment under this paragraph or under any other provision of law, nor shall a person so sentenced be eligible for parole during the term of such a sentence."

Sec. 3. Section 1010(b)(3) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(3)) is amended--

(1) by striking out ",except as provided in paragraph (4)";  
and

(2) by striking out the phrase "fined not more than \$50,000" and inserting in lieu thereof "fined not to exceed the greater of

that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual".

### Analysis

This part contains amendments of section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. §960(b)) to conform the penalties for import and export violations generally to those established by Part A of this title of the bill for violations of the Controlled Substances Act (CSA). This part also conforms the specific quantities of controlled substances which trigger enhanced penalties to the quantities and substances listed in Part A of this title.

Section 2 of this part generally applies the penalties included in Part A of this title under 21 U.S.C. §841(b)(1)(A) and (B) to the parallel import and export provisions of 21 U.S.C. §960(b)(1) and (2), concerning large quantities of specified drugs and any schedule I or II substance, respectively. Section 2 also includes for purposes of these import and export violations the amendment contained in Part A of this title providing for life imprisonment when death results from the use of a substance involved in a violation. Including this amendment in the Controlled Substances Import and Export Act for the most serious categories of offenses is consistent with the view that the result of death from the use of a substance involved in a violation justifies a severe penalty not only for the unlawful

manufacture and distribution of controlled substances, but also for their unlawful importation.

Section 3 amends 21 U.S.C. §960(b)(3), concerning schedule III, IV, and V substances and small quantities of marihuana and hashish. It should be noted that, unlike the CSA, the Controlled Substances Import and Export Act (21 U.S.C. §960(b)(3)) currently treats all schedule III, IV, and V substances alike for purposes of sentencing and subjects all these substances to the level of penalties imposed for schedule III substances under the CSA. This part preserves this scheme and increases the fines for schedule III, IV, and V substances, as well as for small quantities of marihuana and hashish, to the levels established in Part A of this title for schedule III substances.

PART E

Sec. 1. This part may be cited as the Juvenile Drug Trafficking Act of 1986.

Sec. 2. Part D of the Controlled Substances Act is amended by adding after section 405A a new section as follows:

"Employment of minors in controlled substance trafficking"

"Sec. 405B. (a) Any person at least twenty-one years of age who violates section 401(a)(1) of this Act while acting in concert with a person under twenty-one years of age is punishable by a term of imprisonment, or a fine, or both, up to twice that authorized by section 401(b) of this Act, and at least twice any special parole term authorized by section 401(b) of this Act, for a first offense.

"(b) Any person at least twenty-one years of age who violates section 401(a)(1) of this Act while acting in concert with a person under twenty-one years of age, after a prior conviction or convictions under subsection (a) of this section have become final, is punishable by a term of imprisonment, or a fine, or both, up to three times that authorized by section 401(b) of this Act for a first offense under that section, and at least three times any special parole term authorized by section 401(b) of this Act for a first offense under that section."

"(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended and probation shall not be granted. An individual convicted under this section of an offense for which a mandatory minimum term of imprisonment is set out in section 401(b) of this Act shall not be eligible for parole under section 4202 of Title

18 until the individual has served the mandatory term of imprisonment required by section 401(b) as enhanced by this section.

Sec. 3. Section 401(b) of the Controlled Substances Act (21 U.S.C. 841(b) is amended by deleting the phrase "or 405A" and inserting in lieu thereof ", 405A, or 405B".

Sec. 4. Section 401(c) of the Controlled Substances Act (21 U.S.C. 841(c)) is amended by striking out "405A" each place it appears and inserting in lieu thereof ", 405A, or 405B".

Sec. 5. The table of contents of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is amended by inserting after the item relating to section 405A the following:

"405B. Employment of minors in controlled substance trafficking."

Sec. 6. Section 405A of the Controlled Substances Act (21 U.S.C. 845a) is amended, in subsection (a), by adding after the word "distributing" the words "or manufacturing" and by striking the words "a public or private elementary or secondary school" and inserting in lieu thereof "a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university".

#### Analysis

Section two of this part provides for additional penalties for persons who make use of juveniles in drug trafficking. It provides that anyone over 21 who acts in concert with a person under 21 in violating 21 U.S.C. 841(a) is subject to an enhanced



fine and jail term. Such a person would be subject to double the fine and period of imprisonment authorized in 21 U.S.C. 841(b) for a first offense in which he acted in concert with a juvenile, and to triple the fine and period of imprisonment for a second or subsequent conviction. The phrase "acting in concert" was deliberately chosen to include not just the situation where the adult offender and the juvenile are in an employer-employee relationship, respectively. While it would certainly cover the situation where minors are used to distribute drugs, act as lookouts, couriers, or cashiers, or perform other duties related to drug trafficking; it would also cover relationships not so formal, as where the juvenile is more of an "independent contractor" distributing drugs on consignment. It would also cover the situation where a drug seller sold drugs to a person under 21 knowing, or having reason to know from the quantity or other circumstances, that the minor intended to resell them. Sections three, four, and five, make technical and conforming changes necessitated by section two.

Section six of this part amends section 405A of the Controlled Substances Act (21 U.S.C. 845a). Currently section 405A, which was added in 1984, prohibits the distribution of controlled substances within 1000 feet of a public or private elementary or secondary school. Persons violating this section are subject, for a first offense, to a prison term and fine twice that otherwise applicable, and for a subsequent offense, to life imprisonment. The amendment would strengthen this section by expanding the prohibited activity to include manufacturing as

well as distributing a controlled substance, thereby reaching such conduct as operating a "crack" house or PCP laboratory within the prohibited distance. This concept is included in a bill, S. 2562, introduced by Senator Chiles. The amendment would also expand the category of protected educational institutions to include vocational schools, colleges and universities, on the ground that drug trafficking in, on, or near such institutions poses an equivalent danger to the nation's young people and to the security and mission of the institutions themselves.

## PART F

Sec. 1. This part may be cited as the "Chemical Diversion and Trafficking Act of 1986."

Sec. 2. Title II of the Comprehensive Drug Abuse Prevention and Control Act is amended by adding a new Section 311 (21 U.S.C. 831):

"Sec. 311.(a)(1) Except as provided under paragraph (3) of this subsection any person who manufactures, distributes, imports or exports a substance listed under subsection (d) shall maintain records and make reports as the Attorney General may by regulation require concerning the distribution, sale, importation or exportation of said listed substances. Such records shall be in a form such that they are readily retrievable from ordinary business records and shall be kept and made available, for at least 5 years, for inspection and copying by officers or employees of the United States authorized by the Attorney General. In establishing regulations concerning required records and reports, the Attorney General may establish a threshold quantity for recordkeeping and reporting requirements for each listed chemical. The Attorney General may include in the information required to be maintained or reported the following:

"(A) The quantity, form, and manner in which, and date on which, the substance was distributed, imported or exported.

"(B)(i) In the case of the distribution or exportation to an individual, the name, address, and age of the individual and the type of identification presented to confirm the identity of the individual.

"(ii) In the case of the distribution or exportation to an entity other than an individual, the name and address of the entity and the name, address, and title of the individual ordering or receiving the substance and the type of identification presented to confirm the identity of the individual and of the entity.

"(2) Except as provided under paragraph (3) of this subsection, no person may distribute or export a substance listed under subsection (d) unless the recipient or purchaser presents to the distributor a certification of lawful use and identification, to establish the identity of the recipient or purchaser (and any entity which the recipient or purchaser represents), of such a type as the Attorney General establishes by regulation.

"(3) It shall be unlawful to purchase a reportable amount of any chemical listed under subsection (d) in units small enough so that the making of records or filing of reports under this section is not required for the purpose of evading the recordkeeping reporting requirements created by this section and the regulations promulgated thereunder.

"(4) Under such conditions and to such extent as the Attorney General establishes, paragraphs (1), (2) and (3) shall not apply to—

"(A) the distribution of listed substances between agents or employees within a single facility (as defined by the Attorney General), if such agents or employees are acting in the lawful and usual course of their business or employment;

"(B) the delivery of listed substances to or by a common or contract carrier for carriage in the lawful and usual course of its business, or to or by a warehouseman for storage in the lawful and usual course of its business; but where such carriage or storage is in connection with the distribution or importation of substances to a third person, this subparagraph shall not relieve the distributor or importer from compliance with paragraph (1) or (2); or

"(C) any distribution or importation with respect to which the Attorney General determines that the reports or records required by paragraph (1) or the presentation of identification or certification required by paragraph (2) is not necessary for the enforcement of this subchapter.

"(b) It shall be unlawful:

"(1) To import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any substance listed under subsection (d) unless the substance is imported for commercial, scientific or other legitimate uses, and--

"(A) In the case of substances listed in subsection (d)(1), pursuant to a permit issued by the Attorney General, or

"(B) In the case of substances listed in subsection (d)(2), pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe.

"(2) It shall be unlawful to export from the United States to any other country a substance listed under subsection (d) unless there is furnished (before export) to the Attorney General documentary proof that importation is not contrary to the laws or regulations of the country of destination for consumption for medical, commercial, scientific, or other legitimate purposes and--

"(A) In the case of substances listed in subsection (d)(1), pursuant to a permit issued by the Attorney General, or

"(B) In the case of substances listed in subsection (d)(2), pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe.

"(c) The Attorney General may by rule:

"(1) Add substances to paragraph (d) if--

"(A) he finds that such substance is a precursor or essential chemical which can be used to manufacture a controlled substance, and

"(B) such substance is being used in the manufacture of controlled substances in violation of this title, and

"(C) he finds that the inclusion of such substance in subsection (d) is necessary to curtail the manufacture of controlled substances in violation of this title.

"(2) Delete a substance listed in subsection (d) if he finds that its listing no longer meets the criteria set forth in paragraph (1).

"(d) The provisions of this title shall apply to the following:

"(1) Precursor chemicals

- |                               |                     |
|-------------------------------|---------------------|
| (A) N-Acetyl-anthranilic Acid | (F) Ephedrine       |
| (B) Anthranilic Acid          | (G) Pseudoephedrine |
| (C) Ergotamine tartrate       | (H) Benzyl cyanide  |
| (D) Ergonovine maleate        | (I) Benzyl chloride |
| (E) Phenylacetic acid         | (J) Piperidine      |

"(2) Essential chemicals

- (A) Potassium permanganate
- (B) Acetic anhydride
- (C) Acetone
- (D) Ethyl ether

"(e) Any information which is reported to or otherwise obtained by the Attorney General under this section and which is exempt from disclosure pursuant to subsection (a) of Section 552 of Title 5 by reason of subsection (b)(4) thereof shall be considered confidential and shall not be disclosed, except that such information may be disclosed to officers or employees of the United States concerned with carrying out this title or title III or when relevant in any proceeding for the enforcement of this title or title III or when necessary to meet U.S. treaty obligations.

"(f) For the purposes of this title:

"(1) The term "import" has the same meaning given such term in Section 1001 of title III (21 U.S.C. 951 (a)(1)).

"(2) The term "customs territory of the United States" has the same meaning given such term in section 1001 of title III (21 U.S.C. 951(a)(2)).

"(g) No person may distribute, sell, import, export, or otherwise transfer to another person any commercial tableting machine or encapsulating machine unless the purchaser, recipient, transferee, or his agent presents to the distributor or supplier a certification of lawful use and identification to confirm the identity of the recipient or purchaser (and any entity which the recipient or purchaser represents) of such a type as the Attorney General by regulation may establish.

"(h) Any person who distributes, sells, imports, exports or otherwise transfers to another person any commercial tableting machine or encapsulating machine shall report the transfer to the Attorney General in such a form as the Attorney General may by regulation require. The Attorney General may require such information as the date of sale or transfer, name and address of transferee, purpose for which equipment is intended, serial numbers and make/model of equipment."

Sec. 3. (a) Section 401(d)(1) (21 U.S.C. 841(d)(1)) of the Controlled Substances Act is amended by--

(1) deleting the word "piperidine" and replacing it with the words "precursor chemical or essential chemical listed under Section 311(d)"; and

(2) deleting the word "phencyclidine" and replacing it with the words "any controlled substance".

(b) Section 401(d)(2) (21 U.S.C. 841(d)(2)) of the Controlled Substances Act is amended by--

(1) adding the words "or distributes" after the word "possesses";

(2) deleting the word "piperidine" the first place it appears and replacing it with the words "precursor chemical or essential chemical listed under Section 311(d)";

(3) deleting the word "piperidine" the second place it appears and replacing it with the words "precursor chemical or essential chemical"; and

(4) deleting the word "phencyclidine" and replacing it with "any controlled substance".

(c) Section 401(d) of the Controlled Substances Act (21 U.S.C. 841(d)) is amended by--(1) deleting "or" in paragraph (1); and (2) adding new paragraphs (3) and (4) after paragraph (2) as follows:

"(3) imports or exports a precursor or essential chemical listed under Section 311(d) except as provided for by this Act, or

"(4) possesses any precursor chemical or essential chemical listed under Section 311(d), with knowledge that the recordkeeping or reporting requirements of Section 311(a) of this title or regulations issued thereunder have not been adhered to".

Sec. 4. Section 402(a)(9) (21 U.S.C. 842(a)(9)) of the Controlled Substances Act is amended by--

"(1) deleting the word "piperidine" and replacing it with the words "a precursor chemical or essential chemical listed under Section 311(d)";

"(2) adding after the citation "section 310(a)(2)" "or section 311(a)(2)"; and

"(3) adding "or certification" after "identification".

Sec. 5. Section 403(a) (21 U.S.C. 843(a)) of the Controlled Substances Act is amended by--(1) in paragraph 4(B) deleting the word "piperidine" and replacing it with the words "a precursor chemical or essential chemical listed under Section 311(d)"; (2) in paragraph 4(B) adding after the citation "Section 310(a)" the phrase "or Section 311(a)"; (3) in paragraph 4(B) adding "or certificate" after "identification" where it appears; (4) in paragraph 4(B) striking out "or" after the semicolon; and (5) adding the following paragraphs after paragraph (5) as follows:

(6) possesses any drug manufacturing equipment, tableting or encapsulating machines, or gelatin capsules with intent to manufacture a controlled substance except as authorized by this subchapter;

(7) manufactures, distributes, sells, or imports any drug manufacturing equipment, tableting or encapsulating machines, or gelatin capsules knowing, or having reasonable cause to believe, that they will be used to manufacture a controlled substance except as authorized by this subchapter.

Sec. 6. Sec. 511(a) of the Controlled Substances Act (21 U.S.C. 881) is amended by adding a new subsection (9) as follows:

"(9) all chemicals listed under Section 311(d) which have been manufactured, possessed, distributed or intended to be distributed, imported, or exported in violation of this title as well as all conveyances and equipment, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any way facilitate the transportation, sale, receipt, possession, or concealment of precursor chemicals and essential chemicals in violation of this title, except as provided for under 4(A) and (B) above."

Sec. 7. The Attorney General shall maintain an active program, both domestic and international, to curtail the diversion of precursor chemicals and essential chemicals used in the illicit manufacture of controlled substances. This program shall include appropriate controls on the purchase, sale, import and export of these chemicals and development of cooperative efforts with foreign drug control authorities.

Sec. 8. Section 102 (21 U.S.C. 802) of the Controlled Substances Act is amended by--

(1) in paragraph 11, adding after the words "a controlled substance" the words "or a precursor chemical or essential chemical listed under Section 311(d)";

(2) adding a new paragraph (31) as follows:

"(31) The term "precursor chemical" means a substance that may be used in the chemical process of manufacturing controlled substances and which is incorporated into the final product and is therefore critical to its manufacture."; and

(3) adding a new paragraph (32) as follows:

"(32) The term "essential chemical" means a substance that may be used in the chemical process of manufacturing controlled substances as a solvent, reagent or catalyst."

Sec. 9. Section 310 (21 U.S.C. 830) of the Controlled Substances Act is amended by adding the words ", ephedrine, or phenylacetic acid" after each reference to piperidine in subsection (a).

Sec. 10. Section 506(a) (21 U.S.C. 876(a)) of the Controlled Substances Act is amended by adding after the words "with respect to controlled substances," the words "precursor chemicals or essential chemicals,".



## Background

Clandestine manufacture of major drugs of abuse has long been a major contributing factor to the availability of drugs in the illicit traffic. The clandestine manufacture of hallucinogenic drugs such as LSD has spanned three decades. The same is true for potent stimulant drugs such as the amphetamines and methamphetamine. The clandestine manufacture of PCP, one of the most dangerous drugs of abuse of our time, began in the 1970's and continues through today.

Recently, there has been a startling and dangerous development in the area of clandestine laboratories. The clandestine manufacture of analogs of potent narcotics which can be over one thousand times more potent than heroin has turned an already dangerous problem into one of potentially disastrous proportions. Potent narcotic analogs have been responsible for over 100 deaths in Southern California alone and there is a great potential for their spread to other parts of the Nation. In addition, analogs of stimulant/hallucinogenic drugs have fueled even greater drug use among the young professionals and college age students.

These new drugs of abuse have one thing in common. They are for the most part synthetic drugs and are produced by drug traffickers utilizing chemicals that are widely available in commercial channels. In addition to their use in the clandestine manufacture of synthetic drugs, many of these chemicals are used in the manufacture and processing of heroin and cocaine. For example, research disclosed that 95 percent of ether going into Colombia was used for illicit purposes. One-half of this came from the United States. Several South American countries such as Colombia, Brazil, Venezuela and Ecuador are enacting laws concerning this problem. Since virtually all the chemicals used by drug traffickers were at some point legally manufactured, all of them have at some point been diverted from their intended legitimate uses by drug traffickers. The diversion of these chemicals is facilitated by the fact that no controls over their distribution exist.

These chemicals fall into two major types -- precursor chemicals and essential chemicals. Precursor chemicals are chemicals which are used in the chemical process of manufacturing the drug and which are incorporated into the final product. Examples of these are piperidine, used in the manufacture of PCP, anthranilic acid used in the manufacture of methaqualone, and phenylacetic acid, a P2P precursor, used in the manufacture of methamphetamine. An essential chemical is a substance that may be used in the manufacturing process as a solvent, reagent or catalyst. Examples of these are ethyl ether, used to process cocaine, and acetic anhydride, used to process heroin.

DEA has maintained an active voluntary precursor control program since the early 1970s. This program has been successful over the years in providing investigative leads that have resulted in the disruption of numerous clandestine laboratory operations. However, while the voluntary reporting system has been successful in producing investigative leads, the level of clandestine laboratory operations and the level of drug deaths and injuries attributable to clandestinely produced drugs clearly demonstrate

that this voluntary system has not significantly reduced availability of these chemicals.

One of the most significant advancements in the effort against clandestine laboratory operations was the passage of the piperidine reporting and purchaser identification provisions of the "Psychotropic Substances Act of 1978." This legislation provided for mandatory reporting of piperidine transactions and required identification for piperidine purchasers. The mandatory controls over piperidine were the first imposed on a precursor chemical and established the fact that limited controls can be placed on the chemicals used in clandestine labs without unduly burdening the chemical industry.

The "Chemical Diversion and Trafficking Act of 1986" establishes an entirely new system of controls over certain sales of selected precursor and essential chemicals. The Act establishes a new framework of record-keeping, reporting and proper identification designed to keep the key precursors and essential chemicals out of the hands of drug traffickers and identify suspicious purchasers of these chemicals.

#### Approach of the Bill

The "CHEMICAL DIVERSION AND TRAFFICKING ACT OF 1986" establishes a system of recordkeeping and identification requirements that are designed to keep precursor and essential chemicals out of the hands of drug traffickers and identify suspicious purchasers of these chemicals. The key to the success of such a system is to achieve these objectives without placing an undue burden on those who legitimately distribute, sell or utilize these substances. The CHEMICAL DIVERSION ACT accomplishes this by avoiding the type of licensing and control system that exist for those who handle the controlled drugs that can be produced from these chemicals. Instead, the Act builds on the basic records that already exist in some form in the business community.

Under the provisions of the Act, any person who manufactures, distributes, sells, imports and exports any of the chemicals listed in the Act would be required to maintain records concerning what chemicals were sold, to whom they were sold, etc. This information would ordinarily be kept in the business records of any company. The additional requirement of the Act is that these records be maintained for at least five years, that they be readily retrievable and that they be subject to inspection. Additionally, the purchaser of the listed chemical would be required to provide identification and this information would also be required to be maintained by the seller. Failure to keep records or make reports would be punishable offenses as would providing false identification. To avoid unnecessary paperwork, the Attorney General may establish minimum quantitative criteria for required records for each substance. Therefore, small quantity sales would not require records and reports. The Act also provides for routine exemptions for common carriers, warehousemen, etc.

Unlike existing piperidine legislation, routine reporting of transactions would not be required. The Attorney General does, however, have the authority to establish additional reporting requirements by regulation should they be deemed necessary. The piperidine reporting requirement

will be maintained under Section 310 (21 U.S.C. 830) and two additional precursor chemicals, ephedrine and phenylacetic acid, are added to this required reporting statute.

The extensive international traffic in precursor and essential chemicals and the impact of this traffic on the availability of clandestinely manufactured drugs in the United States, dictates that greater control be exercised over import and export. Therefore, the Act establishes a system whereby listed precursor chemicals can only be imported and exported pursuant to a permit issued, in advance, by the Attorney General. Listed essential chemicals could only be imported and exported pursuant to an advance declaration. This is similar to the system currently in use for controlled drugs.

The Act also establishes penalties for trafficking in listed precursor and essential chemicals as well as civil penalties for violations of the recordkeeping and reporting requirements. An additional area that is addressed in the Act is the trafficking in the manufacturing equipment used to produce drugs in violation of the Controlled Substances Act. The Act establishes criminal penalties for knowing and intentional trafficking in drug manufacturing equipment and also establishes a requirement for the reporting of sales or other transfer of commercial tableting and encapsulating machines.

#### Section-by-Section Analysis

##### Sec. 1 - Title

Sec. 2 - This is the section that provides the basic frame work of the control mechanisms of the "Chemical Diversion and Trafficking Act of 1986" by adding to the Controlled Substances Act a new Section 311 (21 U.S.C. 831) which provides for the following:

Paragraph 311(a)(1) makes mandatory the maintenance of records and the making of reports by any person who distributes, imports or exports a listed precursor or essential chemical. It also requires that the records be kept separately, be readily retrievable and available for inspection for five years. The Attorney General is authorized to designate by regulation the required records and reports, including establishing a minimum threshold for each substance under which records and reports need not be made. Failure to make required reports or keep required records would be punishable under 21 U.S.C. 842 or 843.

Subparagraphs 311(a)(1)(A) and (B) provide details as to the extent of the information the Attorney General may require. This primarily involves names, addresses, dates, type of chemical, quantity and other relevant information concerning distribution, import or export.

Paragraph 311(a)(2) establishes an identification requirement similar to the existing piperidine legislation. However, there is an additional requirement of certification by the purchaser that the purchase is not for unlawful purposes. The exact form of the certification would be established by regulation. But, it is expected that it will include, at a

minimum, that the purchase is not for unlawful purposes and that the purchaser has not made purchases from other sources in order to avoid record and reporting requirements.

Paragraph (a)(3) makes it unlawful purchase reportable amounts of any listed chemicals in units small enough to avoid the recordkeeping and reporting requirements of this section for purposes of evading these requirements.

Paragraph 311(a)(4) provides an exemption for agents, employees, common carriers, and those exempted by the Attorney General. This, again, is the same as currently exists for piperidine and, in some cases, controlled drugs.

Subsection 311(b) establishes a import/export permit requirement for listed precursors and a declaration requirement for essential chemicals. It also sets the grounds that can be used to deny permits or declarations.

Subsection 311(c) establishes a mechanism and criteria for adding or deleting chemicals from the lists.

Subsection 311(d) establishes two lists. One list is for precursors and the other for essential chemicals.

Subsection 311(e) establishes confidentiality of information and exemption from release under FOI except for enforcement purposes.

Subsection 311(f) defines "customs territory" and "import." Other definitions are included elsewhere in the CSA.

Subsection (g) provides for required identification for tableting and encapsulating machines, as well as for certification of lawful use by the purchaser.

Subsection (h) establishes a reporting requirement for the distribution, sale, import or export of tableting or encapsulating machines.

Sec. 3 - This section has three primary purposes. Sec. 3(a) amends Sec. 401(d)(1) (21 U.S.C. 841 (d)(1)) of the CSA to expand criminal penalties for possession with intent to illicitly manufacture to all listed chemicals.

Section 3(b) amends Sec. 401(d)(2) (21 U.S.C. 841(d)(2)) of the CSA to expand criminal penalties for possession or distribution with knowledge that it will be used in illicit manufacture to all listed chemicals.

Section 3(c) provides for an import/export violation and an illegal possession violation when chemicals are possessed with knowledge that the recordkeeping and reporting requirements have not been adhered to.

Sec. 4 - This section amends Sec. 402(a)(9) (21 U.S.C. 842(a)(9)) of the CSA to expand to all listed chemicals the civil penalty for distribution or sale a violation of identification requirements.

Sec. 5 - This section establishes a prohibited act under 403(a) (21 U.S.C. 843(a)) for manufacture, distribution, sale, import or export of drug manufacturing equipment tableting or encapsulating machines, or gelatin capsules with intent to violate the CSA.

Sec. 6 - Authority to seize and forfeit chemicals under Sec. 511 (21 U.S.C. 881).

Sec. 7 - Establishes intent of Congress that the Attorney General will maintain an active program against the diversion and trafficking of chemicals both domestically and worldwide.

Sec. 8 - Amends the definition of distribute to include delivery of a listed precursor or essential chemical. Also establishes definitions for "precursor chemicals" and "essential chemicals."

Sec. 9 - Amends Section 310 (21 U.S.C. 830) by adding ephedrine and phenylacetic acid to those chemicals for which reporting is required as distinguished from the recordkeeping and other requirements under the proposed section 311 (21 U.S.C. 831). This establishes piperidine-type reporting for ephedrine and phenylacetic acid.

Sec. 10 - Amends Section 506(a) (21 U.S.C. 876(a)) authorizing the Attorney General to issue subpoenas with respect to "precursor chemicals" and "essential chemicals."

## SECTION ANALYSIS FOR PART 6 -- MONEY LAUNDERING

Part H consists of a series of proposals designed to combat money laundering, the lifeblood of drug traffickers and organized crime racketeers. As included here, Part H is nearly identical to S. 2683 a bill reported by the Judiciary Committee and passed unanimously on August 9, 1986, as an amendment to H.J. Res. 668, the pending budget resolution. Part H is a somewhat scaled-back version of an Administration bill, S. 1335, which in turn was derived in part from the recommendations of the President's Commission on Organized Crime.

In summary, Part H attacks money laundering primarily by defining that activity and directly punishing money laundering as an offense (in comparison with present law which punishes only the failure to file certain currency transaction reports). The bill also includes stiff penalties and criminal and civil forfeiture provisions as additional sanctions for money launderers. Moreover, to facilitate investigation and prosecution, the offense of money laundering would be added as a predicate for purposes of the wiretap, RICO and ITAR (Interstate Travel in Aid of Racketeering) statutes, and the Right to Financial Privacy Act would be amended to encourage financial institutions voluntarily to provide law enforcement authorities with information about suspected criminal activities. The bill also strengthens the Bank Secrecy Act by providing the Treasury Department with administrative summons power for use in civil investigations, enhancing the civil penalties available for violations of the Act, and closing a loophole in the existing criminal reporting

scheme by which some courts have held that the practice of "smurfing" -- the breaking down of large reportable transactions into discrete smaller transactions intended to evade the reporting requirements -- does not violate the law.

The changes proposed in Part H from S. 2683, which is recognized as consensus legislation, are few but important. First, the Right to Financial Privacy Act provision is slightly recast by eliminating the word "only" in the description of the kind of information that may be provided, and by setting forth a standard to guide financial institutions as to how much material they may lawfully divulge, i.e., enough to permit the government to obtain further information pursuant to legal process. These changes, although minor and primarily in emphasis, are intended to encourage banks to make full use of the law's ability to enable banks to cooperate voluntarily with law enforcement in identifying suspicious financial transactions. Second, a technical amendment is made to section 3(b) to eliminate any inference that banks are legally obligated to notify their customers when a grand jury subpoenas account information. And lastly, the provision permitting civil forfeiture of property in this country which represents the proceeds of a foreign drug offense has been broadened by the deletion of language in S. 2683 which would require that the property be "involved in a financial transaction". The purpose of this forfeiture provision is to prevent the United States from being used as a haven for foreign drug offense proceeds. Thus it should not necessary for forfeiture that those proceeds be involved in a financial transaction.

PART H

Sec. 1. This Part may be cited as the "Controlled Substances Act Technical Amendments Act of 1986."

<sup>2.</sup>  
~~Sec. 21.~~ Paragraph (14) of section 102 of the Controlled Substances Act (21 U.S.C. 802(14)) is amended in the second and third sentences by striking out the word "the" after the words "the term 'isomer' means" and inserting in lieu thereof "any".

<sup>3.</sup>  
SEC. ~~22.~~ Paragraph (4) of subsection (a) of schedule II of the Controlled Substances Act (21 U.S.C. 812) is amended to read as follows:

"(4) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph."

~~Sec. 23. (a) Subparagraph (A) of section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A)) is amended—~~

~~(1) in clause (i) to read as follows:~~

~~"(i) 100 grams or more of a mixture or substance containing a detectable amount of a narcotic drug in schedule I or II other than a narcotic drug consisting of—~~



31. such term of imprisonment and shall, if there was  
32. such a prior conviction, impose a special parole term  
33. of at least 8 years in addition to such term of imprison-  
34. ment."

35. ~~(b) Paragraph (5) of section 401(b) of the Controlled  
36. Substances Act (21 U.S.C. 841(b)(5)) is amended by adding  
37. the words "the fines provided in" after the word "Notwith-  
38. standing".~~

39. <sup>4.</sup> SEC. ~~39~~. Subsection (b) of section 405A of the Con-  
40. trolled Substances Act (21 U.S.C. 845a(b)) is amended by  
41. inserting "parole" after "(2) at least three times any  
42. special".

43. <sup>5.</sup> SEC. ~~40~~. Section 503(a) of the Controlled Substances  
44. Act (21 U.S.C. 873(a)) is amended by—

45. (1) striking out "and" at the end of paragraph (5);

46. (2) striking out the period at the end of paragraph

47. (6) and inserting in lieu thereof "; and"; and

48. (3) adding at the end thereof the following:

49. "(7) notwithstanding any other provision of law,  
50. enter into contractual agreements with State and local  
51. law enforcement agencies to provide for cooperative  
52. enforcement and regulatory activities under this Act."

53. <sup>6.</sup> SEC. ~~41~~. Section 508 of the Controlled Substances Act  
54. (21 U.S.C. 878) is amended by—

1 inserting (1) inserting "(a)" before "Any officer or  
2 employee";

3 (2) inserting after "Drug Enforcement Adminis-  
4 tration" the following: "or any State or local law  
5 enforcement officer"; and

6 (3) adding at the end thereof the following new  
7 subsection:

8 "(b) State and local law enforcement officers performing  
9 functions under this section shall not be deemed Federal em-  
10 ployees and shall not be subject to provisions of law relating  
11 to Federal employees, except that such officers shall be sub-  
12 ject to section 3374(c) of title 5, United States Code."

18 Sec. 7.

19 (a) Paragraph (3) of section 1010(b) of the Controlled  
20 Substances Import and Export Act (21 U.S.C. 960(b)(3)) is  
21 amended by striking out ", except as provided in paragraph  
(4)".

PART I

SEC. 1. This part may be cited as the "Controlled Substance  
Analog Enforcement Act of 1986."

SEC. 2. Part D of the Controlled Substance Act is amended  
by adding after section 403 the following new section 403A (21  
U.S.C. 843):

## 1 "§ 403A. Prohibited acts D

2 "Any person who knowingly or intentionally manufac-  
3 tures with intent to distribute, possesses with intent to dis-  
4 tribute, or distributes a controlled substance analog all or  
5 part of which substance is intended for human consumption  
6 shall be fined not more than \$250,000, or imprisoned not  
7 more than fifteen years, or both. Any person who knowingly  
8 or intentionally possesses a controlled substance analog all or  
9 part of which substance is intended for human consumption  
10 shall be fined not more than \$25,000, or imprisoned not more  
11 than one year, or both. This section does not apply to a  
12 person who manufactures, possesses, or distributes a sub-  
13 stance in conformance with the provisions of an approved  
14 new drug application or an exemption for investigational use  
15 within the meaning of section 505 of the Federal Food,  
16 Drug, and Cosmetic Act (21 U.S.C. 355). For purposes of  
17 this section, section 505 of the Federal Food, Drug, and Cos-  
18 metic Act (21 U.S.C. 355) shall be applicable to the intro-  
19 duction or delivery for introduction of any new drug into  
20 intrastate, interstate, or foreign commerce."

21 SEC. 3. Section 102 of the Controlled Substances Act  
22 (21 U.S.C. 802) is amended by adding at the end thereof the  
23 following new paragraphs:

24 "(31) The term 'controlled substance analog' as used in  
25 section 403A means a substance other than a controlled sub-  
26 stance that has a chemical structure substantially similar to

## 1 "§ 403A. Prohibited acts D

2 "Any person who knowingly or intentionally manufac-  
3 tures with intent to distribute, possesses with intent to dis-  
4 tribute, or distributes a controlled substance analog all or  
5 part of which substance is intended for human consumption  
6 shall be fined not more than \$250,000, or imprisoned not  
7 more than fifteen years, or both. Any person who knowingly  
8 or intentionally possesses a controlled substance analog all or  
9 part of which substance is intended for human consumption  
10 shall be fined not more than \$25,000, or imprisoned not more  
11 than one year, or both. This section does not apply to a  
12 person who manufactures, possesses, or distributes a sub-  
13 stance in conformance with the provisions of an approved  
14 new drug application or an exemption for investigational use  
15 within the meaning of section 505 of the Federal Food,  
16 Drug, and Cosmetic Act (21 U.S.C. 355). For purposes of  
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19 duction or delivery for introduction of any new drug into  
20 intrastate, interstate, or foreign commerce."

21 SEC. 3. Section 102 of the Controlled Substances Act  
22 (21 U.S.C. 802) is amended by adding at the end thereof the  
23 following new paragraphs:

24 "(31) The term 'controlled substance analog' as used in  
25 section 403A means a substance other than a controlled sub-  
26 stance that has a chemical structure substantially similar to

1 that of a controlled substance in schedules I or II or that was  
2 specifically designed to produce an effect substantially similar  
3 to that of a controlled substance in schedules I or II. Exam-  
4 ples of chemical classes in which controlled substance ana-  
5 logs are found include, but are not limited to, the following:  
6 phenethylamines, N-substituted piperidines, morphinans, eco-  
7 gonines, quinazolinones, substituted indoles, and arylcycloal-  
8 kylamines.

9       “(32) The term ‘human consumption’ includes applica-  
10 tion, injection, inhalation, or ingestion.”.

11       SEC. 4. The analysis of part D of the Controlled Sub-  
12 stances Act is amended by inserting after the item relating to  
13 section 403 the following:

“403A. Prohibited acts D.”.

~~Passed the Senate December 18 (legislative day, De-~~  
~~cember 9), 1985.~~

~~Attest:~~

~~JO-ANNE L. COE,~~  
~~Secretary.~~

[Amendments to be added at the end of S. 1437]

TECHNICAL AND CONFORMING AMENDMENTS

Sec. 5. Title 18 of the United States Code is amended as follows:

(a) Section 1791 is amended--

(1) in subsection (a) (1) by--

(A) redesignating subparagraphs (E) and (F) as (F) and (G), respectively; and

(B) inserting the following new subparagraph after subparagraph (D):

"(E) a controlled substance analog as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802);" and

(2) in subsection (b) (3) by--

(A) striking out "or" the second place it appears and inserting in lieu thereof a comma; and

(B) inserting ", or (1) (F)" after "(1) (E)".

(b) Section 1952(b) (1) is amended by--

(1) striking out "or" the first place it appears and inserting a comma in lieu thereof;

(2) inserting ", or controlled substance analogs" after "substances" ; and

(3) striking out "(6)".

(c) Section 2118 is amended--

(1) in subsection (a) by inserting ", or controlled substance analog all or part of which controlled substance

analog is intended for human consumption," after "substance";

(2) in subsection (b) by--

(A) inserting "or controlled substance analog all or part of which controlled substance analog is intended for human consumption" after "substance" the first place it appears; and

(B) inserting "or controlled substance analog" after "substance" the second place it appears; and

(3) in subsection (e) (1) to read as follows:

"(1) the terms 'controlled substance', 'controlled substance analog', and 'human consumption' have the meaning prescribed for those terms by section 102 of the Controlled Substances Act (21 U.S.C. 802);".

(d) Section 3142(c) (2) (I) is amended by inserting "or controlled substance analog" after "substance".

(e) (1) Section 3563(b) (8), as enacted by section 212(a) of the Comprehensive Crime Control Act of 1984, is amended by inserting "or controlled substance analog" after "substance".

(2) The amendment made by this subsection shall take effect on the date of the taking effect of such section 3563(b) (8).

(f) (1) Section 3607 is amended--

(A) in subsection (a) by inserting "a simple possession offense described in section 403A of the Controlled Substances Act (21 U.S.C. 843A) or" after "of" the first place it appears;



(B) in subsection (a)(1) by inserting "or controlled substance analogs" after "substances"; and

(C) in subsection (c) by inserting "a simple possession offense described in section 403A of the Controlled Substances Act (21 U.S.C. §843A) or" after "of" the first place it appears.

(2) The amendments made by this subsection shall take effect on the date of the taking effect of section 3607.

(6) The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended as follows:

(a) Section 102(11) (21 U.S.C. 802(11)) is amended by inserting "or a controlled substance analog" after "substance" each place it appears.

~~[See §802(2), (8), (10), (22), (23), and (26).]~~

(b) Section 307(f) (21 U.S.C. 827(f)) is amended by inserting "and controlled substance analogs" after "substances".

(c) Subsections (a) and (b) of section 405 (21 U.S.C. 845) are amended by--

(1) inserting "or section 403A" after "401(a)(1)";

(2) inserting "or a controlled substance analog" after "substance" the first place it appears; and

(3) inserting "in the case of a controlled substance or section 403A in the case of a controlled substance analog" after "section 401(b)" the first place it appears.

(d) Section 405A (21 U.S.C. 845A) is amended--

(1) in subsection (a) by--

(A) inserting "or section 403A" after "401(a)(1)";

(B) inserting "or a controlled substance analog" after "substance" the first place it appears; and

(C) striking out "841(b) of this title" and inserting in lieu thereof "401(b) in the case of a controlled substance or section 403A in the case of a controlled substance analog"; and

(2) in subsection (b) by--

(A) inserting "or section 403A" after "401(a)(1)";

and

(B) inserting "or a controlled substance analog" after "substance" the first place it appears.

(e) Section 501(c) (21 U.S.C. 871(c)) is amended by inserting "or controlled substance analogs" after "substances".

(f) Section 503 (21 U.S.C. 873) is amended--

(1) in subsection (a) by--

(A) inserting "and controlled substance analogs" after "substances" each place it appears; and

(B) inserting "and controlled substance analog" after "substance" each place it appears; and

(2) in subsection (d)(1)(A) by inserting "and controlled substance analogs" after "substances".

(g) Section 504 (21 U.S.C. 874) is amended by inserting "and controlled substance analogs" after "substances".

(h) Section 506(a) (21 U.S.C. 876(a)) is amended by inserting "or controlled substance analogs" after "substances".

(i) Section 509 (21 U.S.C. 879) is amended by inserting "or controlled substance analogs" after "substances".

(j) Section 511 (21 U.S.C. 881) is amended--

(1) in subsection (a) by--

(A) inserting "or controlled substance analogs" after "substances" each place it appears; and

(B) inserting "or controlled substance analog" after "substance" each place it appears;

(2) in subsection (f) by inserting "and all controlled substance analogs" after "schedule I" each place it appears; and

(3) in subsection (g) (1) by inserting "or controlled substance analogs" after "II".

(k) Section 515 (21 U.S.C. 885) is amended--

(1) in subsection (c) by inserting "or controlled substance analogs" after "schedule I"; and

(2) in subsection (d) by inserting "or controlled substance analogs" after "substances".

(l) Section 516(b) (21 U.S.C. 886(b)) is amended by inserting "or controlled substance analogs" after "substances".

(7) Section 1 of the Act of September 15, 1980 (21 U.S.C. 955a) is amended as follows:

(a) Subsections (a), (b), and (c) are amended by inserting "or a controlled substance analog all or part of which controlled substance analog is intended for human consumption" after "substance".

(b) Subsection (e) is amended by inserting "or controlled substance analog" after "substance" each place it appears.

(c) Subsection (g) is amended--

(1) in paragraph (1) by inserting "involving a controlled substance" after "section";

(2) in paragraph (2) by inserting "involving a controlled substance" after "Act"; and

(3) by adding the following new paragraph after paragraph (2):

"(3) Any person who commits an offense defined in subsection (a), (b), or (c) of this section involving a controlled substance analog shall be fined not more than \$250,000, or imprisoned not more than fifteen years, or both."

(8) Section 280E of the Internal Revenue Code of 1954 (26 U.S.C. 280E) is amended by inserting "or controlled substance analogs (within the meaning of section 102 of the Controlled Substances Act (21 U.S.C. 802))" after "Act)".

(9) Section 994 of title 28 of the United States Code is amended as follows:

(a) Paragraphs (1)(B) and (2)(B) of subsection (h) are amended by--

(1) striking out "section" the first place it appears and inserting in lieu thereof "sections";

(2) inserting "and 403A" after "401"; and

(3) inserting "and 843A" after "841".

(b) Paragraph (5) of subsection (i) is amended by--

- (1) inserting ", 403A," after "401;
- (2) inserting ", 843A," after "841; and
- (3) inserting "or controlled substance analog" after "substance".

(10) Section 902(q) of the Federal Aviation Act of 1958 (49 U.S.C. 1472q) is amended by--

(a) inserting "or controlled substance analog" after "substance" each place it appears; and

(b) striking out the second sentence and inserting in lieu thereof:

"For purposes of this subsection, the terms 'controlled substance' and 'controlled substance analog' have the meaning given such terms by section 102 of the Controlled Substances Act (21 U.S.C. 802)."

~~[Add amendments to sections that refer to marihuana, narcotics, and depressant or stimulant substances, etc.? See definition of depressant or stimulant substance in 21 U.S.C. §802(9).]~~

TECHNICAL AND CONFORMING AMENDMENTS TO S. 1437

SECTION-BY-SECTION ANALYSIS

Section 5(a) amends 18 U.S.C. §1791 to include controlled substance analogs among the specifically defined categories of contraband prohibited from federal prisons.

Section 5(b) amends 18 U.S.C. §1952(b) to include controlled substance analog offenses among the activities subject to the prohibition against interstate or foreign travel in aid of racketeering enterprises.

Section 5(c) amends 18 U.S.C. §2118, which prohibits robberies and burglaries of controlled substances from controlled substance registrants, to make the provision applicable to controlled substance analogs.

Section 5(d) amends 18 U.S.C. §3142(C)(2)(I), regarding conditions of release from pretrial detention, to include controlled substance analogs as one of the substances a defendant must refrain from using.

Section 5(e) amends 18 U.S.C. §3563(b)(8), as enacted by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, to include controlled substance analogs as one of the substances a defendant must refrain from using in accordance with a condition of probation imposed by the court in its discretion. This amendment shall take effect when the sentencing reform provisions of the Comprehensive Act become effective.

Section 5(f) amends 18 U.S.C. §3607 to make this section's special probation and expungement procedures for first-time

simple possession offenses involving controlled substances applicable to first-time simple possession offenses involving controlled substances analogs. In addition, the amendment includes controlled substance analog offenses among drug offenses for purposes of determining whether the offense to which the special probation and expungement procedures may be applicable is a first drug offense. This amendment shall take effect when the sentencing reform provisions of the Comprehensive Crime Control Act of 1984 become effective.

Section 6(a) amends section 102(11) of the Controlled Substances Act (21 U.S.C. §802(11)) to include a reference to controlled substance analogs in the definitions of "distribute" and "distributor."

Section 6(b) amends section 307(f) of the Controlled Substances Act (21 U.S.C. §827(f)) to provide that regulations issued under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §355(i)), regarding the investigational use of new drugs, include procedures necessary to insure the security and accountability of controlled substance analogs, as well as controlled substances.

Section 6(c) amends section 405 of the Controlled Substances Act (21 U.S.C. §845) to provide enhanced penalties for the distribution of controlled substance analogs to persons under twenty-one years of age.

Section 6(d) amends section 405A of the Controlled Substances Act (21 U.S.C. §845A) to provide enhanced penalties for

the distribution of controlled substance analogs in or near a school.

Section 6(e) amends section 501(c) of the Controlled Substances Act (21 U.S.C. §871(c)) to authorize the Attorney General to accept for the Department of Justice any form of devise, bequest, gift, or donation of property for the purpose of preventing or controlling the abuse of controlled substance analogs, as well as controlled substances.

Section 6(f) amends section 503 of the Controlled Substances Act (21 U.S.C. §873) to provide that cooperative arrangements entered into by the Attorney General with local, State, and federal agencies concerning the trafficking in, and abuse of, controlled substances also reach activities involving controlled substance analogs.

Section 6(g) amends section 504 of the Controlled Substances Act (21 U.S.C. §874) to authorize the Attorney General to appoint advisory committees with respect to preventing and controlling the abuse of controlled substance analogs, as well as controlled substances.

Section 6(h) amends section 506(a) of the Controlled Substances Act (21 U.S.C. §876(a)) to authorize the Attorney General to subpoena witnesses, to compel the attendance and testimony of witnesses, and to require the production of records relevant or material to an investigation relating to controlled substance analogs, as well as controlled substances.

Section 6(i) amends section 509 of the Controlled Substances Act (21 U.S.C. §879) to include offenses involving controlled



substance analogs in the provision's directive relating to search warrants.

Section 6(j) amends section 511 of the Controlled Substances Act (21 U.S.C. §881), concerning the seizure and forfeiture of controlled substances and related property, to include controlled substance analogs.

Section 6(k) amends section 515 of the Controlled Substances Act (21 U.S.C. §885) to make subsection (c), concerning the burden of going forward with regard to vehicles, vessels, or aircraft used in connection with controlled substances in schedule I applicable to vehicles, vessels, or aircraft used in connection with controlled substance analogs. It also makes the language of subsection (d) providing immunity to State and local officials lawfully engaged in the enforcement of drug laws applicable to the enforcement of laws relating to controlled substance analogs. (Subsection (d)'s provision regarding the immunity of federal officers applies to the enforcement of the proposed controlled substance analog provision without the need for amendment.)

Section 6(l) amends section 516(b) of the Controlled Substances Act (21 U.S.C. §886(b)), regarding reimbursements for purchases of controlled substances, to make the provision applicable to controlled substance analogs.

Section 7 amends section 1 of the Act of September 15, 1980 (21 U.S.C. §955a), regarding the manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels. The amendment makes the offenses

proscribed, with the exception of subsection (d) relating to importation, applicable to controlled substance analogs.

Section 8 amends section 280E of the Internal Revenue Code of 1954 (26 U.S.C. §280E), which disallows any deduction or credit for amounts paid or incurred in any trade or business consisting of trafficking in schedule I or II controlled substances in violation of federal or State law. The amendment extends this prohibition to the unlawful trafficking in controlled substance analogs.

Section 9(a) amends 28 U.S.C. §994(h) to add controlled substance analog offenses to the categories of drug and other offenses for which the sentencing guidelines issued by the United States Sentencing Commission must specify a sentence to a term of imprisonment at or near the maximum term authorized. It also adds controlled substance analog offenses to the drug crimes which must be considered under this provision for purposes of determining if the defendant has previously been convicted of two or more prior felonies consisting of crimes of violence or drug offenses.

Section 9(b) amends 28 U.S.C. §994(i) to add controlled substance analog offenses to the categories of drug offenses for which the sentencing guidelines issued by the United States Sentencing Commission must specify a sentence to a substantial term of imprisonment if the violation involved trafficking in a substantial quantity of a drug.

Section 10 amends section 902(q) of the Federal Aviation Act of 1958 (49 U.S.C. §1472q), which prohibits the knowing and

willful transportation by aircraft of controlled substances without an airman's certificate where the transportation is provided in connection with any controlled substance felony under federal or State law. The amendment extends this provision to the transportation of controlled substance analogs in connection with controlled substance analog felonies.

**DRAFT**

**TITLE VI**

**PUBLIC EDUCATION AND PRIVATE SECTOR INITIATIVES**

A BILL

To encourage and enhance the use of private sector initiatives in a concerted campaign of public education on the dangers of illegal drug use.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SEC. 601. This Act may be cited as the "Public Education and Private Sector Initiatives Act of 1986."

SEC. 602. (a) Notwithstanding any other provision of law, an agency may contract for property or services designed primarily to warn of the dangers of illegal drug use without complying with any requirement for competition in federal procurement, so long as at least 50% of the actual, reasonable costs of providing the property or service are being donated to the government.

(b) The provisions of this section shall take effect upon enactment and remain in effect for a period of two years thereafter.

Sec. 603. (a) Section 1461 of title 22 is amended to

insert, after the word "office" in the parenthetical, the following:

"or any information warning of the hazards of illegal drug use"

(b) The provisions of this section shall take effect upon enactment.

## PUBLIC EDUCATION AND PRIVATE SECTOR INITIATIVES

### SECTION BY SECTION ANALYSIS

This title makes two changes to remove statutory impediments to ongoing efforts to recruit private sector groups for volunteer programs to educate the public about the dangers of drug use. Both changes are limited in scope and do not reflect any fundamental criticism of the statutes being amended. Instead, they merely seek to change anomalies in the law, which we do not believe Congress ever intended, to ensure that they do not interfere with efforts to establish a public sector-private sector partnership to aid in the war on illegal drugs.

The Competition in Contracting Act, § 2711 of the Deficit Reduction Act of 1984, amending 41 U.S.C. 253, requires that wherever possible, competitive procedures be used in all federal procurement. This Act and other similar statutes embody a salutatory principle, but have had the unfortunate (and probably unforeseen) effect of making it more difficult to obtain volunteer services, particularly in producing public service announcements on the dangers of illegal drug use for television and radio.

In many instances, noted producers and directors have offered to prepare such public service announcements if the government will agree to pay their out of pocket expenses. However this limited expenditure of money by the government has the effect of bringing the transaction under the federal procurement statutes, triggering substantial red tape, including the requirement that the proposal be published in the Commerce Business Daily to solicit other proposals. Frequently, such publication means that the director or producer who developed the concept for the television or radio spot finds that other less talented individuals can take advantage of his original idea, and offer to produce it with lower out of pocket expenses (albeit at an equivalent decline in quality). Thus an Oscar-winning film producer may not be the "low bidder" on the contract, even though the government would get appreciably more for its money were he selected. We believe that in this limited circumstance, agencies should be authorized to accept such offers without going through normal procedures.

To resolve this problem, section 601 of title VI of the administration bill would create a narrow, two year exemption from the federal statutes mandating competition in procurement for services donated to the government to aid in the campaign against drug use--but only where at least 50% of the actual reasonable costs of providing the property and services have been donated. This exemption is limited in scope and duration because we do not want to imply that we are seeking to dispense with the salutatory principle of competition in government procurement in all cases. Instead, this limited exemption could be reviewed and

extended by the Congress in the near future if it proves to be effective.

Another statutory barrier to efforts to educate the public on the dangers of illegal drug use is contained in section 1461 of title 22, the general authorization of the United States Information Agency (USIA). This statute bars USIA from releasing any film, radio spot, or book to domestic audiences if it was prepared for a foreign audience. While such a prohibition on the domestic display of "political propaganda" might make sense as a general matter, there have been several occasions in which outstanding USIA films on the dangers of drug use could not be shown to domestic audiences for this reason. This is a particularly acute problem where there is a need for a film in a language other than english, since the USIA product may be the only one available. Hence, section 602 of this title would create a narrow exception from this prohibition for USIA film and other material warning against the dangers of illegal drug use.