

## PROPOSED AMENDMENT: FRAUDULENT MISREPRESENTATION

*Synopsis of Proposed Amendment.*—The proposed amendment resolves a circuit conflict regarding the scope of the enhancement in §2F.1.1(b)(4)(A) for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency. Specifically, the conflict concerns whether the misrepresentation applies only in cases in which the defendant does not have any authority to act on behalf of the covered organization or government agency or if it applies more broadly (*i.e.*, to cases in which the defendant, who has a legitimate connection to the covered organization or government agency, misrepresents that the defendant was acting solely on behalf of the organization or agency).

At the July 7, 2000, meeting, the Commission instructed the staff to draft the staff's recommendation that the enhancement applies if the defendant's misrepresentation facilitated the commission of the offense. Under this approach, the enhancement would apply regardless of the defendant's connection (or lack thereof) to the organization or government agency. Accordingly, the proposed amendment provides for application of the enhancement if (A) the defendant represented that the defendant was an employee of a covered organization or a government agency; or (B) the defendant was an employee of a covered organization or a government agency who represented that the defendant was acting solely for the benefit of the organization or agency when, in fact, the defendant intended to divert all or part of that benefit (for example, for the defendant's personal gain). Under either scenario, it is the representation that enables the defendant to commit the offense.

To avoid double counting in the case of an employee described in (B) who also holds a position of trust, the proposed amendment provides an application note instructing the court not to apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) if the same conduct forms the basis both for the enhancement in §2F1.1(b)(4)(A) and the adjustment in §3B1.3.

The proposed amendment also addresses the issue of the "simple embezzler" who happens to work for a covered organization or government agency. The proposed amendment provides that embezzlement of funds by an employee of a covered organization or government agency, without more, is not sufficient to trigger application of the enhancement. However, such an employee who also holds position of trust may be subject to an adjustment pursuant to §3B1.3.

### Proposed Amendment:

#### §2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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Commentary

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Application Notes:

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5. *Subsection (b)(4)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan. Misrepresentation.—Subsection (b)(4)(A) applies in any case in which (A) the defendant represented that the defendant was a employee or authorized agent of a charitable, educational, religious, or political organization, or government agency when, in fact, the defendant was not such an employee or agent; or (B) the defendant was a employee or agent of the organization or agency and represented that the defendant was acting solely to obtain a benefit for the organization or agency, when in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(4)(A) would apply, for example, to the following:*

- (A) *A defendant who solicits contributions for a non-existent famine relief organization.*
- (B) *A defendant who solicits donations from church members by falsely claiming to be a fund raiser for a religiously affiliated school.*
- (C) *A defendant, chief of a local fire department, who conducts a public fund raiser representing that the purpose of the fund raiser is to procure sufficient funds for a new fire engine when, in fact, the defendant diverts some of the funds for the defendant's personal benefit.*

*If the conduct that forms the basis for an enhancement under subsection (b)(4)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) do not apply an adjustment under §3B1.3.*

*The embezzlement of funds alone is not sufficient to warrant application of subsection (b)(4)(A). The embezzled funds must have been solicited pursuant to a misrepresentation that the defendant was acting to obtain a benefit for the organization or agency. However, if a defendant who embezzles funds holds a position of public or private trust, §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.*

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