Public Comment

Proposed Amendments 2001

VOLUME II

The Honorable Diane E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South
Washington, DC 20002-8002

Re: Proposed Changes to Sentencing Guidelines for Counterfeiting Offenses

Dear Judge Murphy:

The Department of the Treasury would first like to thank the Commission for its attention throughout the amendment process to the challenges raised by new trends in counterfeit currency production. As we have expressed in our written submissions as well as in our presentation to the Commission, the exponential increase in digitally-based counterfeiting has resulted in a proliferation of guideline sentences that we believe do not properly reflect the seriousness of the offense and the threat it poses to the integrity of the United States currency worldwide. However, it is our opinion that the proposed amendments to Section 2B5.1 published in the Federal Register, 65 Fed. Reg. 66792 (Nov. 7, 2000), will serve to lower the guideline sentences even further in more than 90% of counterfeit manufacturing cases. Accordingly, we respectfully request that the Commission consider our comments on the proposed amendments set forth below.

Change to Commentary

As an initial matter, we support the Commission's decision to eliminate the "merely photocopy notes" language found in the commentary. This change more accurately reflects the capabilities of today's copiers to generate passable notes, and resolves a conflict in the district courts. More importantly, it also makes a much-needed change to remove any technology-specific references in the guidelines.

New Base Offense Level

We also believe that the Commission's decision to raise the base offense level to 10 is a positive step. However, we reiterate our position that a base offense level of 11 is warranted given the increase in digitally-generated notes. As these notes are generally produced and passed in small quantities, the total amount seized often does not register on the fraud loss table in §2F1.1, and these offenders receive a sentencing windfall for their ability to access counterfeit notes virtually "on demand."

Sophisticated Means Enhancement

We fully support the intent of this proposed enhancement but have concerns regarding its application. As we set forth in our presentation to the Commission, it is crucial to recognize that sophistication cannot be tied to any particular method of production. There are offset printers who use digital technology to create extremely high-quality notes, and there are producers who use digital technology to create very crude simulations. Accordingly, an enhanced penalty for individuals who go to great lengths to produce a more deceptive note should not be associated with any particular "means." Instead, such an enhanced penalty would be more properly applied to individuals who are able to simulate the unique security features incorporated in our currency. Enhancement

of a counterfeit note to include our currency's distinctive counterfeit deterrents would require more labor, more skill and a more studied effort to defraud which we believe would render the producer more culpable.

Should the Commission determine that a more sophisticated attack on the integrity of the currency merits a heightened penalty, we believe that 18 U.S.C. §474A, Deterrents to counterfeiting of obligations and securities, could provide an effective explanatory aid. That section defines "distinctive counterfeit deterrent" as including "any ink, watermark, seal, security thread, optically variable device, or other feature or device; (A) in which the United States has an exclusive property interest; or (B) which is not otherwise in commercial use or in the public domain and which the Secretary designates as being necessary in preventing the counterfeiting of obligations or other securities of the United States." 18 U.S.C. §474A(c)(2).

We, therefore, recommend applying such an enhancement in cases where a manufacturer has taken additional steps beyond capturing the front and back images of United States currency in an effort to simulate the distinctive counterfeit deterrents defined in 18 U.S.C. §474A(c)(2).

Finally, it has been our position throughout this process that any amendments to Section 2B5.1 should be technology neutral. Given the pace at which analog, digital and other electronic methods have evolved thus far, it is impossible to predict what future technologies may emerge in counterfeiting. Accordingly, we advise against referring to any particular forms of technology either in the guideline itself or in the commentary.

Adjusted Offense Level for Manufacturing

While the Commission has indicated that it shares our view of the seriousness of these offenses in its decision to raise the base offense level, the proposed amendments will actually result in lower sentences in 94% of manufacturing cases. We feel strongly that the elimination of the adjusted offense level of 15 for manufacturing, even when the two-level enhancement is added, will not provide a sufficient penalty for the expanding group of digitally-based counterfeiters.

Statistics from Fiscal Year (FY) 2000 indicate that 99% of domestic plant suppressions conducted by the Secret Service involved digitally-based manufacturing. See attached Chart A. Under the proposed amendment, manufacturers who produce less than $10,000 worth of counterfeit, and such manufacturers constituted 94% of FY 2000's plant suppressions (see Chart B), will score out with a lower offense level than they would have with the adjusted offense level of 15 currently in place.

This downward move is particularly problematic at the lowest dollar amounts. Because of the difficulties inherent in connecting digitally-based counterfeit to its point of origin, most offenders will be held responsible solely for whatever amount of inventory they have in their possession at the time of the suppression. When that inventory stays low, so does the guideline range. If a manufacturer is charged with producing less than $2,000, which was the case in 80% of FY 2000 domestic plant suppressions, the adjusted offense level will be 12 under the proposal. This reduction for the group of manufacturers expanding at the fastest rate will only encourage digital counterfeiters to "print and print often."

As a general matter, we agree with the Commission that guideline sentences should reflect the degree of economic harm inflicted. In the case of digitally-based counterfeit, however, the issue is complicated by the inherent difficulty in ascertaining exactly how

much counterfeit has been produced. In these cases, economic harm is not always fully measured by the amount seized at the plant suppression. In order to forward the goal of proportionality in this context, we would ask that the Commission consider either:

1. Implementing our original proposal of a two-level enhancement for cases involving over $70,000 while retaining the 15 adjusted offense level. As we suggested initially, this would do much to eliminate the windfall created by the cap currently in place.
2. Applying a four-level enhancement for all manufacturing cases rather than the proposed two-level enhancement. If the Commission prefers a "sliding scale" approach to reflect the amount of currency produced, we would recommend a consistent four-level enhancement for manufacturing. Manufacturing is a much more serious offense than passing and even a low-dollar manufacturer requires more than an adjusted offense level of 12 to meet the goals of punishment and deterrence. Under our proposal, a manufacturer who is charged with producing $2,000 or less, which was the case in 80% of all domestic plant suppressions in FY 2000, will receive an adjusted offense level of 14, one point less than under the current scheme. A manufacturer who produces more than $2,000, but less than $5,000 (another 8% in FY 2000) would score out at 15, just as he would under the current guideline.

Either of these options would enhance proportionality as well as better reflect the seriousness of the offense.

Should the Commission reject the above proposals, we would ask that you merely retain the existing structure, at least for this year. While the current guideline does not address the windfall for manufacturers who produce over $70,000, it is our position that the elimination of the 15 adjusted offense level poses a more serious threat to the goal of proportionality.

We recognize that the Commission was concerned with the lack of proportionality in the existing cap. This inequity was one of our primary concerns when we first began to consider seeking amendments to Section 2B5.1, and it informed our recommendation to add a two-level enhancement for high-volume manufacturers. However, the cap currently affects only a very small number of offenders. Fiscal year 2000 statistics reveal that only three plant suppressions involved more than $70,000. These three represent less than 1% of the year's suppressions. The elimination of the adjusted offense level of 15 will result in lower sentences for 94% of manufacturers. If the choice is to reduce the penalty for more than 90% of manufacturers or provide a windfall for fewer than 1%, we would better accept the latter.

The above recommendations reflect the experience of the Secret Service in investigating digitally-based counterfeit manufacturing. Should the Commission determine that any of our comments or suggestions require more thorough discussion or the presentation of additional evidence, we would be pleased to participate in another briefing or to prepare supplemental documentary submissions before this issue moves on to Congress. We appreciate the Commission's attention to this matter and hope that our comments on the proposals will assist the Commission in its deliberations on this important issue.

Sincerely,

Elisabeth A. Bresee
Acting Under Secretary (Enforcement)

Attachments

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

January 2, 2001

Honorable Diana E. Murphy
Chair
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Dear Judge Murphy:

Under the Sentencing Reform Act of 1984, the Criminal Division is required to submit at least annually to the United States Sentencing Commission a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o). We are pleased to submit this report, pursuant to this provision. It is our view that the sentencing guidelines are operating relatively well on the whole.

Specific Commission Priorities

We agree with the priorities established by the Commission for this amendment cycle and appreciate having had the opportunity to discuss the development of these priorities with the Commission earlier in this amendment cycle. These priorities include: economic crimes; nuclear, chemical, and biological weapons; money laundering; the Protection of Children from Sexual Predators Act of 1998; the Methamphetamine Anti-Proliferation Act of 2000, which addresses a variety of substances, including methamphetamine, amphetamine, and "Ecstasy"; the Victims of Trafficking and Violence Protection Act of 2000; other crime legislation enacted during the second session of the 106th Congress, including legislation addressing the drug "GHB" and scholarship fraud; counterfeiting of bearer obligations of the United States; firearms; the safety valve; obscenity; stalking; criminal history; immigration; the payment to, or receipt by, federal employees of unauthorized compensation; offenses implicating the privacy interests of taxpayers; and circuit conflicts.

Chief among our concerns are the economic crime amendments, which were addressed at the Commission's excellent symposium held recently; nuclear, chemical, and biological weapons; money laundering; the safety valve; statutory directives and other crime legislation; and circuit conflicts. Several of these merit specific discussion. As to the economic crime amendments, we believe it is important for the Commission to develop a new loss table that provides increased penalties for offenders at most levels, particularly at the middle and upper ranges. In many cases penalties are inadequate to serve the purposes of sentencing for white collar offenders, including just punishment, deterrence, and incapacitation. While the Commission has recently addressed specific types of economic offenses, including identity theft and cellular cloning, there are many other offenses that have been largely untouched by these amendments, including health care and procurement fraud. Moreover, the fact that the Internet has created vast opportunities for large-scale fraud deserves the attention of the Commission. A new loss table should address all areas of white collar crime in order to bring about greater deterrence, while maintaining proportionality and fairness in sentencing.

With respect to nuclear, chemical, and biological weapons, we have submitted a guideline amendment proposal to the Commission addressing such offenses as possession and threats involving these weapons and have worked productively with the staff in this area. Our proposal would fill gaps in the current guidelines, for example, the absence of a guideline to address offenses covered by 18 U.S.C. § 175 (relating to biological weapons), § 229 (relating to chemical weapons), and certain violations of § 831 (concerning prohibited transactions involving nuclear materials). In addition, the proposal we submitted would address other offenses that are now inadequately handled by the guidelines, including offenses relating to weapons of mass destruction, 18 U.S.C. § 2332a, when committed with biological, chemical, or radiological materials. While we have not proposed a specific amendment for importation and exportation offenses involving such weapons, we believe the Commission should raise penalties for these offenses as well. As you know, the National Defense Authorization Act for Fiscal Year 1997 urged the Sentencing Commission to provide increased penalties for offenses relating to importation, exportation, and attempted importation or exportation of nuclear, biological, or chemical weapons or related materials or technologies under specified provisions of law.

Money laundering is another area where we urge the Commission to act expeditiously. The Department has attempted to cooperate fully with Commission staff in developing a revised guideline that would be fair, workable and effective. Attorneys from our Asset Forfeiture and Money Laundering Section have spent many hours meeting with Commission staff and have shared their concerns and perspectives directly with the Commission at a recent meeting. The development of guidelines amendments for money laundering has taken many years and has been the subject of intense interest among the bench and bar. We urge the Commission to complete its work on this project during this amendment cycle.

Ongoing Commission Priorities

We recognize that the Commission's agenda is quite demanding and that it faces many difficult guideline amendment decisions in the coming months. Nevertheless, we believe the Commission can address certain additional areas of the sentencing guidelines as part of its long-term goals. Among these areas should be the further refinement of criminal history so that those with particularly serious criminal backgrounds are appropriately distinguished from those with less serious backgrounds who may merit more lenient treatment. The nature and severity of past offenses are significant in this regard, as is the issue of whether they involved an act of violence.

Another area for ongoing consideration is refinement of the guideline for acceptance of responsibility. The guideline should contain an incentive for early guilty pleas that permit the government to avoid preparing for trial and the court to allocate its resources efficiently. The current guideline allows for reduction in sentence by one level (in addition to the two for acceptance of responsibility generally) either for timely notification of authorities of an intention to enter a guilty plea or for timely provision of complete information to the government concerning the offender's involvement in the offense, §3E1.1(b). Subsection (b)(2) of the guideline specifically includes the goal of permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, but achieving this goal is difficult because of the alternative basis for reduction provided by subsection (b)(1). Thus, an offender who makes a timely disclosure but, nevertheless, waits until the eve of trial to plead guilty may receive this third level of reduction in the offense level. Tightening the guideline to create an incentive for timely pleas that save government resources is an important area for the Commission's consideration.

We also urge the Commission in its endeavors generally to take into account a provision of the Sentencing Reform Act of 1984 that, in our view, has received only passing attention in the past. The provision in question addresses the purposes of the Commission and provides that one purpose is to establish sentencing policies and practices for the Federal criminal justice system, that, among other things, "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process ...." 28 U.S.C. § 991(b)(1)(C). The Commission's recent report by an expert on sexual predators is an example of how the Commission can make use of social science research in its development of the sentencing guidelines. There are many other opportunities for such enlightenment that would serve the Commission well in the future. Moreover, the Commission can also gain knowledge from the experience of state sentencing commissions and should seek information from such commissions more often. These commissions often address the same types of issues for purposes of state sentencing law that are of interest federally, and the research, policy analysis, and experience of these state commissions can serve federal interests as well.

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to continuing to work with the Commission in a cooperative spirit as it addresses the many items on its agenda.

Sincerely,

James K. Robinson
Assistant Attorney General

Laird C. Kirkpatrick
Commissioner Ex-officio

U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, DC 20530-0001*

January 12, 2001

Honorable Diana E. Murphy
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Dear Judge Murphy:

The Department of Justice submits the following comments regarding the proposed amendments to the federal sentencing guidelines published for comment in the Federal Register in November, 2000. These comments concern: Amendment 2 (counterfeiting), Amendment 5 (aggravated assault), Amendment 6 (fraudulent misrepresentations), and Amendment 7 (mitigating role).

AMENDMENT 2. Counterfeiting Offenses

Amendment 2 would amend the counterfeiting guideline, §2B5.1, in several respects. It would increase the base offense level from level 9 to 10; delete the minimum offense level of 15 for manufacturing offenses and replace it with a two-level enhancement; and delete commentary that suggests that the manufacturing adjustment does not apply if the defendant "merely photocopies." We agree with the increased base offense level and commentary change. However, we object to the deletion of the minimum offense level of 15 for manufacturing offenses. Deleting the floor will provide a windfall to many counterfeiters in the form of reduced punishment at a time when technology has made the offense increasingly easier to commit. We strongly believe this is the wrong message to send and that the floor of 15 should be retained.

AMENDMENT 5. Circuit Conflict Concerning Aggravated Assault

The proposed amendment includes two options to amend §2A.2 to address a circuit conflict regarding whether the four-level enhancement for the use of a dangerous weapon during an aggravated assault is impermissible double counting in a case in which the object used as a weapon was not inherently dangerous, such as a chair. We agree with the goal of both options to

resolve the circuit conflict in a manner that clarifies that the weapon enhancement in subsection (b)(2) of the guideline applies even though the reason for the application of the aggravated assault guideline is the presence of the weapon. However, both options may inadvertently raise additional issues for litigation. We would favor a simple statement that the weapon enhancement in subsection (b)(2) applies in a case involving a weapon even where the applicability of the aggravated assault guideline itself is predicated upon the involvement of the weapon. We do not believe there is a need for a more in-depth explanation in the commentary to §2A2.2 of the rationale for applying the weapon enhancement. As between the two options, we believe that Option 1 is more straightforward and consistent with the structure of other guidelines and that, while Option 2 attempts to address several concerns, it may raise similar problems to those in Option 1.

Including an explanation of the Commission's rationale for the applicability of the weapon enhancement is problematic in several respects. First, both options state in proposed Application Note 2 that the base offense level itself incorporates the presence of the dangerous weapon. However, since the aggravated assault guideline also applies in situations in which there is no weapon, the proposed language in Note 2 may lead to litigation that the aggravated assault guideline should not apply in such cases. In addition, Note 2 may raise a negative inference that other enhancements in the aggravated assault guideline are not applicable in the absence of a specific statement regarding their treatment in both the base offense level and specific offense characteristics. Eliminating the rationale for resolution of the circuit conflict would cure these problems. However, if the rationale is not deleted, the note should be clarified to indicate that the presence of a weapon is one of the aggravating factors taken into account in the base offense level.

In a related vein, both Options 1 and 2 state at the end of proposed Application Note 2 that in a case involving a dangerous weapon <u>with intent to cause bodily injury</u>, the court shall apply both the base offense level and the weapon enhancement. The underlined words may lead courts to believe that it is acceptable to avoid application of the weapon enhancement in a case in which the government has not shown an intent to cause bodily injury. However, there are other instances in which both the base offense level and the weapon enhancement should apply. Thus, we prefer the simple statement recommended above to the effect that the weapon enhancement in subsection (b)(2) applies in a case involving a weapon even where the applicability of the aggravated

assault guideline itself is predicated upon the involvement of the weapon.

AMENDMENT 6. Circuit Conflict Concerning Certain Fraudulent Misrepresentations

Amendment 6 addresses a circuit conflict regarding the applicability of an enhancement to the fraud guideline concerning actions on behalf of a charitable, educational, religious, or political organization, or government agency, §2F1.1(b)(4)(A). Specifically, the amendment addresses the question whether the enhancement applies where the defendant did not misrepresent his or her authority to act on behalf of the organization but rather only misrepresented that he or she was conducting an activity on behalf of the organization. We agree with the proposed resolution of this circuit conflict to assure the applicability of the enhancement in question to a defendant working for a charity, for example, who raises funds ostensibly for the charity and then diverts them to personal use. This situation presents increased culpability not captured by the amount of the fraud alone. However, the proposed language should be modified to delete the word "solely" from proposed Application Note 5(B) in the phrase "acting 'solely' to obtain a benefit for the organization or agency . . . ." A defendant who represents that he or she was acting to obtain a benefit for the organization or agency, whether or not solely for this purpose, but who diverts the proceeds to personal use is equally culpable. For example, a defendant working for a fund-raising organization under contract with a charity may indicate that some of the funds are to be paid to the former, but his or her culpability is not lessened when funds are diverted to personal use simply because the contributor is aware that some of the funds are intended for the benefit of the fund-raising organization.

We are also concerned with a change in Application Note 5 concerning persons presently covered by the enhancement. It now applies to persons who misrepresent that they are "acting on behalf of" a charitable or other specified organization. The amendment would make the enhancement applicable to a person who misrepresents that he was an "employee or authorized agent" of a such an organization. This additional change, while likely intended to be non-substantive, is unnecessary and may produce litigation by defendants claiming that a narrowed effect was intended.

Finally, we do not believe that the proscription against application of the Chapter 3 enhancement for abuse of a position of trust or use of a special skill is necessary, as proposed in

Application Note 5. The harm addressed in §2F1.1(b)(4)(A) concerns fraudulent conduct that leads the victim to believe that funds solicited will go to a charitable or similar organization or a government entity. The fact that the defendant is able to conduct such a fraud because he or she works for the charity is a separate harm addressed by Chapter 3 and should not be subsumed in the misrepresentation relating to the use to be made of the funds. If Application Note 5 were adopted as proposed, a person who uses his or her position of trust to conduct a fraud relating to a charitable organization would receive no greater sentence than one who uses his or her position in connection with a non-charity (except to the extent the level 10 floor currently in 2F1.1(b)(4) affects an otherwise low sentence). Therefore, we would recommend deleting the proposed commentary at the end of Application Note 5 regarding the application of §3B1.3. If, nevertheless, the Commission is intent upon retaining this commentary, it should be limited to the situation in which the defendant was an employee or agent of a covered organization or agency who represented that he or she was acting for its benefit. As currently drafted, the limitation placed on the application of §3B1.3 could also apply where the defendant falsely represented that he or she was an employee of a covered organization or government agency and used a special skill to commit the fraud. The published explanation preceding the proposed amendment language indicates that the limitation on the applicability of §3B1.3 was intended to apply only in the case of an employee of a covered organization or agency.

AMENDMENT 7. Circuit Conflict Concerning Certain Drug Defendants and Mitigating Role

Amendment 7 makes a number of changes to the mitigating role guideline, §3B1.2. While several of these changes are improvements, such as setting forth in the guideline that there must be more than one "participant" in order for the mitigating role adjustment to apply, there are two objectionable features. First, the proposal deletes Application Note 2 from §3B1.2, which states in part that the minimal role adjustment is intended to be used infrequently. Second, the proposed amendment resolves a circuit conflict in a manner we believe is inappropriate in most situations--by indicating that a defendant convicted of drug trafficking whose role was limited to transporting or storing drugs and who is accountable only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving a mitigating role adjustment.

Deletion of Application Note 2 is a significant change that goes well beyond resolving the circuit conflict that is the

ostensible reason for amending the mitigating role guideline. Deletion of this note would send a strong signal that the four-level reduction for minimal participation should be applied more frequently. First, the note now expressly states that the downward adjustment for a minimal participant is intended to be used infrequently. It also provides examples of the appropriate use of this reduction relating to an off loader of part of a drug shipment or a courier for a single smuggling transaction. Given the scant guidance provided by §3B1.2 as to eligibility for treatment as a minimal participant, the proposed deletion of the infrequency language is particularly significant.

The coupling of the deletion of Application Note 2 with the proposed resolution of the circuit conflict is particularly troubling. It is an invitation to grant a role reduction to drug couriers. While there may be unusual circumstances in which a reduction for mitigating role in the offense may be appropriate for a defendant convicted of drug trafficking whose role was limited to transporting or storing drugs and who is accountable only for the quantity of drugs the he or she personally transported or stored, we believe these circumstances are rare indeed. In our view, the quantity transported or stored by a defendant who commits an offense with other participants often does not reflect the true extent of relevant conduct in cases involving multiple participants. The courier's relevant conduct can easily fail to take into account the true quantity of drugs involved in the offense when other participants have not been apprehended.

Moreover, even in a case in which a defendant actually transports or stores the full amount involved in jointly undertaken activity, his or her responsibility for the total quantity is generally inconsistent with a role reduction. Since the other participants have entrusted the defendant to transport or store the entire quantity of drugs involved in the offense, the defendant's role is ordinarily too significant for treatment as a minor or minimal participant. Only in an unusual case--for example, where the quantity is very small, or there is some other indication that the defendant's level of involvement in the offense is low despite his or her being entrusted with the total drug quantity--should a reduction in the offense level for mitigating role be permitted. Thus, the commentary should be amended to indicate that a role reduction should be precluded in the situation described in the proposed amendment except in rare cases.

We look forward to continuing to work with the Commission on the development of the amendments discussed above.

Sincerely,

James K. Robinson
Assistant Attorney General

STATEMENT

of the

FEDERAL PUBLIC AND COMMUNITY DEFENDERS

on

Proposed Amendments to the Sentencing Guidelines published on November 7, 2000

Submitted by
Jon Sands
Assistant Federal Public Defender,
District of Arizona
Chair, Sentencing Guidelines Committee of the
Federal Public and Community Defenders

[157]

January 8, 2001

PROPOSED AMENDMENT 1

Proposed amendment 1 affects three guidelines – §§ 2C1.3 (conflict of interest), 2C1.4 (payment or receipt of unauthorized compensation), and 2C1.5 (payments to obtain public office). The synopsis of proposed amendment indicates that the proposed amendment is responding to increased statutory maximums enacted more than 11 years ago for offenses set forth in 18 U.S.C. §§ 203, 204, 205, 207, 208, and 209.

The offenses set forth in those provisions all relate to conflicts of interest involving, and unlawful payments to, public officials. All of the offenses except the offense set forth in section 209 had been felonies for which the maximum prison term was two years.[1] The maximum prison term under section 209 had been one year.

Congress changed the maximum prison term for these offenses in title IV of the Ethics Reform Act of 1989, Pub. L. No. 101-194, §§ 101(a), 402-06, 103 Stat. 1716. That Act added 18 U.S.C. § 216, which sets forth the penalties for those offenses.[2] Section 216 calls for a maximum prison term of one year (18 U.S.C. § 216(a)(1)), unless the offense is committed willfully, in which case the maximum prison term is five years (18 U.S.C. § 216(a)(2)). Under Apprendi v. New Jersey, __ U.S. __, 120 U.S. 2348 (2000), the government must plead and prove that the defendant acted willfully before the sentencing court can impose a sentence in excess of one year.

The proposed amendment would make three changes. First, § 2C1.3 would be designated as the offense guideline applicable to the offenses set forth in sections 203-05 and 207-09. Second, § 2C1.3(b)(1) would be revised by adding an alternative basis for enhancement. The new enhancement (of two levels) would be applicable if the offense involved (1) payment, offer, or promise of money or thing of value in consideration for the use, or promised use, of influence to procure an appointive position for any person, or (2) the solicitation or receipt of money or thing of value in consideration for a promise of support, or use of influence, in obtaining an appointive federal position. We do not object to these changes.

The third change would add a cross-reference provision in § 2C1.3. The cross reference would call for the use of § 2C1.1 (bribery) if the offense involved a bribe and §

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[1]In addition, an offense under sections 203 and 204 carried lifetime disqualification from holding an office of honor, trust, or profit under the United States.

[2]Ethics Reform Act of 1989, Pub. L. No. 101-194, § 407, 103 Stat. 1716.

2C1.2 (unlawful gratuity) if the offense involved an unlawful gratuity. For example, the sentencing court would use the § 2C1.1 if the court, applying the relevant conduct rules of § 1B1.3 and using a preponderance standard, determined that the offense involved a bribe – thereby relieving the government of the burden of proving beyond a reasonable doubt all of the elements of a bribery offense. Thus, whether the defendant acted corruptly in making or receiving a payment would be determined by the court, based upon information that does not have to qualify as admissible under the Federal Rules of Evidence, using the lowest-possible burden of persuasion. We oppose this change.

We have been concerned for a long time that the increased use of cross references alters the nature of the guidelines, moving from a mixed charge-offense, real-offense system to closer to a pure real-offense system. The original Commission, for good reasons, rejected a pure real-offense system. After attempting to fashion a pure real-offense system, the Commission decided that such a system was impractical and "risked return to wide disparity in sentencing practice." *See* U.S.S.G. Ch. 1, Pt. A(4)(a). We believe that the Commission should not, ad hoc, abandon that decision.

PROPOSED AMENDMENT 2

Proposed amendment 2 would make three changes in § 2B5.1 (offenses involving counterfeit bearer obligations of the United States). First, the amendment would increase the base offense level from 9 to 10. Second, the amendment would revise the enhancement of subsection (b)(2) to call for a two-level increase instead of a minimum offense level of 15. Third, the amendment would revise application note 4 to eliminate the phrase "merely photocopy notes or otherwise."

The synopsis of proposed amendment indicates that the purpose of the amendment is to "promote[] proportionality in sentencing for counterfeiting vis-a-vis other, similar economic crimes," citing fraud offenses. The base offense level under § 2B5.1, however, already is greater than the base offense levels for the two principal economic crimes. The base offense level for an offense under § 2B5.1 is 9. The base offense level under the theft guideline is 4 and under the fraud guideline is 6. Even adding two levels for more-than-minimal planning does not make the offense level under the theft or fraud guideline greater than the base offense level under § 2B5.1.[3] We believe that the present base

[3]We note that one of the options in the Commission's economic crime package proposes to drop the enhancement for more-than-minimal planning.

offense level under § 2B5.1 is appropriately proportional to the base offense levels of similar economic offenses. We oppose that part of the amendment that would increase the base offense level of § 2B5.1.

We do not oppose the change to subsection (b)(2) or to the language of application note 4.

PROPOSED AMENDMENT 3

Proposed amendment 3 would designate § 2H3.1 (interception of communications or eavesdropping) as the offense guideline applicable to several offenses dealing with unlawful disclosure or inspection of tax return information. The amendment would also add a specific offense characteristic calling for a three-level decrease if the offense involved (1) inspection, but not disclosure, of a tax return information or (2) knowing or reckless disclosure of information furnished to a tax-return preparer in connection with preparation of a tax return.

We have no objection to the proposed amendment.

PROPOSED AMENDMENT 4

Proposed amendment 4 addresses the meaning of the term "stipulation" as used in § 1B1.2(a). The amendment would revise the phrase "plea agreement containing a stipulation" in the first paragraph of application note 1 to read "plea agreement (written or made orally on the record) containing a stipulation." The amendment would similarly revise the first two sentences of the third paragraph of application note 1. We support the proposed amendment.

This is not the first time that the Commission has visited this issue. The Commission, effective November 1, 1991, added language to the second paragraph of application note 1 referring to a stipulation "set forth in a written plea agreement or made between the parties on the record during a plea proceeding."[4] Effective November 1, 1992, the Commission amended § 1B1.2(a) itself, changing the phrase "in the case of a

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[4]U.S.S.G. App. C, amend. 434.

conviction by plea of guilty or nolo contendere" to read "in the case of a plea agreement (written or made orally on the record).[5] In both instances, the Commission stated that it was clarifying the meaning of the term "stipulation."

The Commission intends the stipulation method of determining the applicable guideline to be a "limited" exception to the general rule of § 1B1.2.[6] We believe that the addition of the proposed language should ensure that the exception to the general rule is applied in a limited way. We support the proposed amendment.

PROPOSED AMENDMENT 5

Proposed amendment 5 presents two options for addressing a circuit split concerning the applicability of the dangerous weapon enhancement of § 2A2.2(b)(2) in a case in which the defendant's use of a dangerous weapon with intent to do bodily harm triggers application of § 2A2.2. The proposal presents two options. Option 1 addresses that matter only; option 2 would make numerous additional changes in § 2A2.2. We do not support either option.

For reasons set forth at length by the court in United States v. Farrow, 198 F.3d 179 (6th Cir. 1999), we recommend that the Commission add the following new application note to § 2A2.2:

> "4. If the 'dangerous weapon' is not an inherently dangerous object, a single aspect of a defendant's conduct may not be used for two different guideline-calculation purposes. For example, if a defendant's use of a pencil with intent to cause bodily injury makes an assault aggravated, then that use (an aspect of the defendant's conduct) has been taken into consideration in determining that this guideline is the applicable offense guideline and cannot be the basis for applying subsection (b)(2)."

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[5]U.S.S.G. App. C, amend. 438.

[6]*See* U.S.S.G. § 1B1.2, comment. (n.1); U.S.S.G App. C, amend. 591 (sentencing court must apply offense guideline set forth in Appendix A "unless the case falls within the limited 'stipulation' exception set forth in § 1B1.2(a)").

PROPOSED AMENDMENT 6

Subsection (b)(4)(A) of § 2F1.1 calls for a two-level enhancement (with a floor of 10) if the offense involved "a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency." The purpose of the enhancement is to recognize that "defendants who exploit victims' charitable impulses or trust in government create particular social harm."[7]

Proposed amendment 6 would amend application note 5 to § 2F1.1 to state that subsection (b)(4)(A) applies if

> (A) the defendant represented that the defendant was an 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 an 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).

The new application note would further provide that "[e]mbezzlement 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."

We agree with the Commission that an enhancement is appropriate for conduct that seeks to exploit a person's charitable instinct. We also believe that the enhancement should not apply simply because the victim of the offense is a charity (or a government agency). Charities no longer operate by relying solely upon gifts and donations. Not-for-profit organizations have entered the marketplace and, like for-profit organizations, sell goods and services. The purchaser of a teddy bear with screen printed t-shirt for $12.99 from the Rock and Roll Hall of Fame and Museum or a CD recording of George Szell conducting Brahm's Second and Third Symphonies for $16.00 from The Cleveland Orchestra is motivated principally by marketplace considerations. Likewise, a person who attends a bingo game sponsored by a not-for-profit organization is motivated primarily by the opportunity to win some money. We do not believe that the enhancement is appropriate when a not-for-profit organization behaves like a for-profit

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[7]U.S.S.G. § 2F1.1, comment. (backg'd).

organization by being involved in the sale of goods or services or when the not-for-profit organization is conducting a gambling operation. It is simply unrealistic that a person falsely claiming to represent a not-for-profit organization who sells phony lottery tickets has taken advantage of the purchasers' charitable impulse or trust in government.

Revised application note 5 seems to recognize this concern by stating that "[e]mbezzlement of funds alone is not sufficient to warrant application of subsection (b)(4)(A)." We believe that the Commission should strengthen proposed application note 5 in this regard. We recommend that the quoted sentence be revised to read: "Embezzlement of funds *from a charity* ~~alone~~ is not sufficient, *by itself,* to warrant application of subsection (b)(4)(A)." We also recommend the addition of language indicating that the enhancement applies only to conduct related to soliciting donations to a charity, and not to quid pro quo or gambling transactions.

PROPOSED AMENDMENT 7

Proposed amendment 7 addresses whether a drug courier is precluded from receiving a mitigating role adjustment under § 3B1.2 if the courier is being held accountable only for the quantity of drugs that the courier personally handled. We support most of the changes made by the proposed amendment.

As originally promulgated, § 3B1.2 was ambiguous about whether it was to be applied based upon the offense of conviction – the approach of those who hold a courier ineligible for a role reduction if the courier is held accountable only for the drugs personally handled – or upon relevant conduct. The opening sentence of the guideline referred to (and still refers to) "the offense." At the time the guidelines were promulgated, the Commission had not defined the phrase "the offense," so that phrase might have been read to limit consideration to the offense of conviction. On the other hand, § 1B1.3(a) has always stated that the principles of relevant conduct apply to determinations made under the guidelines of chapter 3. Further, subdivisions (a) and (b) of the guideline used (and continue to use) the phrase "any criminal activity," which suggests a broader approach to determinations under § 3B1.2 than offense of conviction.

The Commission resolved the ambiguity, effective November 1, 1990, in an amendment to the introductory commentary to part B of chapter 3.[8] The amendment

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[8]U.S.S.G App. C, amend. 345.

added to that commentary a sentence stating that "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct) . . . and not solely on the basis of elements and acts cited in the count of conviction."[9] A literal reading of § 3B1.2, therefore, requires the sentencing court, in determining if a defendant is entitled to a role reduction, to compare the defendant's relevant conduct to the total relevant conduct engaged in by all of the participants. Thus, precluding a courier accountable only for drugs personally handled from receiving a role reduction is, in our view, inconsistent with the letter and spirit of § 3B1.2.

The policy behind applying § 3B1.2 in this way is sound. A courier has few skills, is paid a relatively small amount, and is easily replaced. For purposes of deterrence, a lower penalty is sufficient to deter a courier who is paid, say, $3,500 to deliver a drug, while a higher penalty is required to deter a person who expects to profit substantially (say, $300,000) from the drugs so delivered. For purposes of preventing crime, incapacitating the drug profiteer will have a greater impact than incapacitating the courier, who is easily replaced.

The goal of proposed amendment 7 is to ensure that a courier held accountable only for drugs personally handled "is not precluded from receiving a mitigating role adjustment." We endorse that goal. We support the changes to application notes 1 and 3 and their redesignation as application notes 4 and 5, and we support adoption of new application notes 1 and 2. We support the deletion of current application notes 2 and 4 and of the background commentary. We believe, however, that proposed application note 3 needs revision.

Application note 3 consists of three parts. Part A carries forward, in modified form, language from the current background commentary and current application note 4. Part B adds new language relating to determining if a role reduction applies. Part C adds new language stating that a drug defendant held accountable only for drugs personally handled is not precluded from receiving a role reduction under this guideline. We recommend that part A be revised, that part B be deleted, and that part C be promulgated as drafted.

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[9]The Commission reinforced this when it added, effective November 1, 1991, a definition of the term "offense" to the commentary to § 1B1.1. U.S.S.G. App. C, amend. 388. The Commission has defined the term "offense" to mean "the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context."

The first sentence of part A carries forward language from the background commentary stating that § 3B1.2 "provides a range of adjustments for a defendant who plays a part in committing the offense that makes him *substantially less culpable* than the average participant" (emphasis added). That statement suggests that a minor participant must be substantially less culpable and creates an inconsistency with redesignated application note 4 (current application note 3). Redesignated application note 4 states that a minor participant is "any participant who is *less culpable* than most other participants, but whose role could not be described as minimal" (emphasis added). In view of the deletion of the background commentary, we recommend that the first sentence of part A be revised to read: "This section provides a range of adjustments for a defendant who is less culpable than the average participant."[10]

The first sentence of the second paragraph of part A, derived from current application note 4, states that a role reduction ordinarily is not warranted if the defendant "has received an offense level lower than the offense level warranted by the defendant's *actual criminal conduct* (because, for example, the defendant was convicted of a less serious offense or was held accountable for a quantity of drugs less than what the defendant otherwise would have been accountable under § 1B1.3 (Relevant Conduct)" (emphasis added). We find that statement to be confusing and inconsistent with the goal of proposed amendment 7.

One problem centers on the term "actual criminal conduct." Is "actual criminal conduct" different from relevant conduct? The term "actual criminal conduct" should not be broader than relevant conduct because the sentencing court, in applying the guidelines, cannot use conduct that goes beyond the scope of relevant conduct. It does not make sense for the term "actual criminal conduct" to be narrower than relevant conduct because the sentencing court, by considering the defendant's relevant conduct, will always take the defendant's actual criminal conduct into account (the greater includes the lesser). It would seem, then, that "actual criminal conduct" must mean relevant conduct.

If "actual criminal conduct" means relevant conduct, then the first sentence of the second paragraph of part A states a logical impossibility. That sentence refers to a defendant who "has received an offense level lower than the offense level warranted by the defendant's actual criminal conduct (because, for example, the defendant . . . was held accountable for a quantity of drugs less than what the defendant otherwise would have been accountable under § 1B1.3 (Relevant Conduct)." That cannot occur when applying

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[10]We also recommend deleting "substantially" in the second and third sentences of the second paragraph of part A.

the guidelines. A sentencing court, when determining the guideline sentence, can never hold a defendant accountable for less than what the defendant's relevant conduct calls for.[11] The court must select the offense level warranted by the drug quantity determined by application of the relevant conduct rules.[12]

A second problem with the first sentence of part A is the failure to carry forward an important concept in current application note 4 – that the lower offense level be due to the defendant having been convicted of an offense "significantly less serious" than warranted by the defendant's actual criminal conduct. The first sentence of part A drops the adjective "significantly." The deletion of "significantly" would seem to be at odds with the purpose of the amendment. A role reduction is not appropriate if the defendant is convicted of a significantly less serious offense than warranted by the defendant's relevant conduct because the much lower offense level for the significantly less serious offense serves as something of a proxy for the role reduction. Thus, in the example used

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[11]U.S.S.G. § 1B1.2(b) requires the sentencing court, "[a]fter determining the appropriate offense guideline section . . . [to] determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct)."

[12]After determining the applicable guideline range, the sentencing court can, of course, depart downward, resulting in a sentence less than that called for by the drug quantity for which the defendant is accountable under § 1B1.3. That determination, however, does not involve application of the guidelines but is a departure from the guidelines and must be justified under 18 U.S.C. § 3553(b).

A sentence called for by a plea agreement under Rule 11(e)(1)(C) may call for a sentence that is less than the sentence warranted by the drug quantity for which the defendant is accountable under § 1B1.3. Before the sentencing court can accept a plea agreement under Rule 11(e)(1)(C), however, the court must determine that either the sentence called for by the agreement is within the applicable guideline range or else departs from that range for "justifiable reasons." U.S.S.G. § 6B1.2(c). To make that determination, the court must first determine the guideline range, and that will be determined based upon the defendant's relevant conduct.

In the case of a plea agreement under Rule 11(e)(1)(B), the court must make similar findings – that the recommended sentence is within the applicable guideline range or departs from that range for justifiable reasons. Again, to make that determination, the court must first determine the guideline range, and the guideline range will be determined based upon the defendant's relevant conduct.

For a plea under rule 11(e)(1)(A), the court must determine if the remaining charges "adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." To make such a determination, the court must determine the applicable guideline range based upon the defendant's relevant conduct.

in the second paragraph of part A, a role reduction for the defendant is unnecessary, and inappropriate, because an offense level 14 drug trafficker is being sentenced at offense level 6, 4 levels less than the defendant's offense level would have been had the defendant been convicted of the offense level 14 offense and received a 4-level reduction under § 3B1.2.

We recommend that the second paragraph of part A of proposed application note 3 carry forward the substance of current application note 4, rather than attempt to expand current application note 4. We suggest, therefore, that the first sentence of the second paragraph of part A be revised to read as follows: "However, a reduction for mitigating role under this section ordinarily is not warranted if the defendant has received an offense level that is significantly lower than the offense level warranted by the defendant's relevant conduct because the defendant has been convicted of an offense significantly less serious than warranted by the defendant's relevant conduct."

The first sentence of part B of proposed application note 3 states a truism. The second sentence of part B unnecessarily and gratuitously impugns the common sense and fact-finding ability of federal judges. The commentary to § 3B1.1, the aggravating-role guideline, contains no similar statement (such as, "As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the government's bare assertion, that an aggravating-role adjustment is warranted"). Moreover, in our experience, federal judges do not find facts based upon a bare assertion by any party. There is no reason to expect federal judges to behave differently when determining whether a defendant qualifies for a mitigating-role reduction. We recommend deletion of part B of proposed application note 3.

Here is redlined version of proposed application note 3 reflecting our recommendations (material we suggest adding in italic; material we suggest deleting struck through):

3. Applicability of Adjustment.–

(A) ~~Substantially~~ Less Culpable than Average Participant.– This section provides a range of adjustments for a defendant who is less culpable than the average participant.

However, a reduction for mitigating role under this section ordinarily is not warranted if the defendant has received an offense level that is significantly lower than the offense level warranted by the defendant's relevant conduct

because the defendant has been convicted of an offense significantly less serious than warranted by the defendant's relevant conduct. In such a case, the defendant is not ~~substantially~~ less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 14 under § 2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under § 2D2.1), no reduction for a mitigating role is warranted because the defendant is not ~~substantially~~ less culpable than a defendant whose only conduct involved the simple possession of cocaine.

~~(B) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.~~

~~(C)~~*(B)* Applicability to Certain Defendants.– A defendant who is convicted of a drug trafficking offense , whose role in that offense was limited to transporting or storing drugs and who, based on the defendant's criminal conduct, is accountable under § 1B1.3 (Relevant Conduct) only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving an adjustment under this guideline.

Issues for Comment

Issue 1. For reasons set forth above, we believe that a courier should be eligible for a role reduction under § 3B1.2 and that a courier can be a minimal participant as well as a minor participant.

Issue 2. Proposed application note 3(C) addresses a problem that affects a large number of cases and responds to a problem that has occurred with some frequency. We are unaware at this time of similar problems in other guidelines. However, we do not oppose adding language that is more general as long as the drug-courier language remains. The issue that has provoked the need for this proposed amendment ought to be addressed specifically.

COMMENTS OF

THE NEW YORK COUNCIL OF DEFENSE LAWYERS

REGARDING PROPOSED 2000 AMENDMENTS TO

THE SENTENCING GUIDELINES

Respectfully Submitted,

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John R. Wing, President
Brian E. Maas, Chairman, Sentencing Guidelines Committee

January 5, 2001

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NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED 2000 AMENDMENTS TO THE SENTENCING GUIDELINES

Once again, we would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than 150 attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Division in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as a defense lawyers. In the pages that follow, we address the proposed amendments published in the Federal Registry on November 7, 2000 which are of interest to our organization.

I: <u>COMMENTS REGARDING PROPOSED AMENDMENT AS TO UNAUTHORIZED COMPENSATION</u>

We oppose the proposed amendment because of our concern that the proposed addition to the Application Notes of the cross-reference to Guideline §§2C1.1 and 2C1.2,which cover the bribery and gratuity offenses, will likely result in defendants convicted of conflict of interest offenses being sentenced inappropriately under the cross-referenced harsher Guidelines. This concern is based on the Commission's own statement that many of the cases sentenced under Guidelines §§2C1.3 and 2C1.4 involve in some way a bribe or gratuity. However, it does not necessarily follow that "many of these defendants likely could have been charged under a bribery or gratuity statute...." Rather, it seems likely that these defendants were convicted of a conflict of

interest crime either because of a prosecutorial determination that the facts of a case did not warrant bringing charges under 18 U.S.C. § 201 or § 202 or from a jury's finding that the evidence did not warrant conviction under the bribery or gratuity statutes. Under such circumstances, it would be inappropriate to add an Application Note cross-referencing the bribery and gratuity guidelines so that the mere involvement of a bribe or gratuity in the offense compels the court to impose the more serious sentence.

In addition, the proposed amendment may well subject a defendant convicted of a violation of 18 U.S.C. § 209 to being sentenced as though his offense involved a bribe or gratuity which was not charged and, therefore, not subjected to a jury finding, thereby depriving the defendant of his constitutional right to being convicted of such an offense by proof beyond a reasonable doubt, arguably in violation of the United States Supreme Court's recent decision in New Jersey v. Apprendi, 530 U.S. 466 (2000). In light of the Apprendi decision, this amendment will likely result in burdensome and unnecessary litigation.

Moreover, we do not believe that the application of the enhancements proposed for inclusion at § 2C1.3(b)(1) and (2) to the offenses now covered by § 2C1.4 fairly addresses the Commission's concern that the Guideline at § 2C1.4(a) does not adequately implement the sentencing options for defendants who engaged in willful conduct as set forth at 18 U.S.C. § 216(a)(2). As drafted, the proposed enhancements to be added to § 2C1.3(1)(B) are not limited to willful conduct and could be applied to convictions for non-willful violations of 18 U.S.C. § 209. We are particularly concerned that the proposed two point enhancement for circumstances where the offense involved the promise or receipt of money in consideration for the use of influence will be indiscriminately applied to both willful and non-willful violation. Therefore, at a minimum, it should be made clear that the enhancements should only apply to willful violations eligible for

sentencing under 18 U.S.C. § 216(a)(2).

II: COUNTERFEITING OFFENSES

We oppose the proposed modification of the base offense level in Guideline § 2B5.2 for counterfeiting from level 9 to level 10. The base offense level of 9 currently set forth in § 2B5.1 is already 1 point higher than the offense level of 8 which is applied to those fraud offenses for which the "more than minimal planning" enhancement is added. Given that the base offense level for counterfeiting applies to all individuals who possess and pass counterfeit instruments, regardless of the total value of counterfeit instruments possessed or passed, we question the premise of this amendment which suggests that even this most basic counterfeiting offense warrant sentencing at a level 2 offense levels higher than that applied to the most basic fraud offenses. In light of the enhancements set out at § 2B5.1(b) we believe that the guidelines as currently structured deal adequately with any enhanced conduct relating to the counterfeiting offenses.

As to the amendment which replaces the minimum level of offense level 15 for manufacturing offenses with a 2 level enhancement, we believe that this amendment would foster a fairer approach to the manufacturing of counterfeit instruments for the reasons set forth in the proposed amendment. However, as to the proposal to delete the language in Application Note 4, we do not see why the concern with digital technology should result in the elimination of the application note in its entirety. Rather, we would suggest that the Commission's concern could be addressed by rewording application note 4 to make clear that the enhancement in subsection B(2) would not apply to persons who photocopy notes to create items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny, regardless of the process used. In this way, it will be clear that the enhancement is applicable to defendants who use digital

technology to create "photocopy notes" that are passable while still making clear that this enhancement should not be applied to persons who photocopy notes in a way that creates notes so obviously counterfeit as to be unlikely to be accepted.

III: TAX PRIVACY

We do not disagree with the decision to refer the listed violations of Title 26 to Guideline § 2H3.1. However, we would suggest that the portion of the amendment which creates a base offense level of 6 should be clarified to make clear that the provision is intended to cover violations of 26 U.S.C. §§ 7213A and 7216.

However, we do object to the addition of a new Application Note 3 advising that the 2 point enhancement for "Abuse of Position of Trust" can be applied to a violation of any of these tax-related offenses. Given that, by definition, the persons who have been in a position to disclose or inspect the tax information in question have the ability to conduct the inspection or disclosure because of their occupying positions of public or private trust, this enhancement would be available in almost every case. As we do not believe that the Commission should create an automatic enhancement akin to the "more than minimal planning" enhancement as applied in the fraud context, we oppose this portion of the proposed amendment.

IV: PROPOSED AMENDMENT: CIRCUIT CONFLICT CONCERNING STIPULATIONS

We agree with the Commission's approach in this proposed Amendment which makes clear that statements made by defendants during plea proceedings are not to be considered stipulations for purposes of Guideline § 1B1.2 unless the statement was agreed to as part of the plea agreement itself. As to the proposal for rewarding the first sentence of the third paragraph of

Application Note 1 to clarify that a stipulation need to have been agreed to as part of the plea agreement before it can increase a defendant's sentence, we suggest that the Commission follow the language used in United States v. Nathan, 188 F.3d 190, 201 (3d Cir. 1999) which would make even clearer the limited circumstances under which a stipulation can bind the defendant. Specifically, the Nathan Court stated that the statement would be considered a "stipulation" only if (i) it is part of a defendant's written plea agreement; (ii) is explicitly annexed thereto; or (iii) both the government and the defendant explicitly agree at a factual basis hearing that the facts being put on the record are stipulations that might subject the defendant to the provisions of § 1B1.2(a). By following this wording, it reduces the possibility of there being any dispute as to what the actual plea agreement was.

V: PROPOSED AMENDMENT: CIRCUIT CONFLICT CONCERNING AGGRAVATED ASSAULT

We oppose both of the proposed options presented in this proposed amendment to the extent that both include language directing that the 4 point enhancement in Guideline § 2A2.2(b)(2) shall be applied in instances where an ordinary object such as a car or a chair is used in an aggravated assault with the intent to cause bodily injury. Although these proposed amendments address the concern expressed in several cases that it is unclear whether the Commission intended for this enhancement to apply to those situations where an ordinary object becomes a dangerous weapon for purposed of Guideline § 2A2.2, the amendments do not address the double counting concern raised first by the Second Circuit in United States v. Hudson, 972 F.2d 504, 506-07 (2d Cir. 1992) and most recently by the Sixth Circuit in United States v. Farrow, 198 F.3d 179, 188-193(6th Cir. 1999). The Farrow Court correctly found that the form of double

counting inherent in the application of the 4 point enhancement to cases involving ordinary objects does not serve any policy underlying Guideline § 2A2.2 and agreed with the Second Circuit decision in Hudson that the application of the 4 point enhancement to situations where an ordinary instrument is used in an aggravated assault is inconsistent with the graduated enhancement scheme set forth at § 2A2.2(b)(2). Id. at 189-90.

The logic of the Hudson and Farrow decisions is clear: a defendant becomes eligible for the base offense level of 15 for an aggravated assault whenever an inherently dangerous weapon is involved in the offense, and the base offense level is then enhanced in a graduated way depending on the risk of harm created by how the dangerous weapon is used. For instance, if the weapon is brandished during an assault, then the offense is enhanced by 3 points while the use of the dangerous weapon enhances the offense by 4 points.

This graduated scheme does not apply, however, when the aggravated assault involves an ordinary instrument used to cause bodily injury. In those circumstances, the mere involvement of an ordinary instrument would not trigger the application of the aggravated assault guideline. Rather, it is only the use of the ordinary instrument, e.g., the car in Hudson and Farrow or the chair in United States v. Williams, 954 F.2d 204 (4th Cir. 1992) or the flashlight in United States v. Johnstone, 107 F.3d 200 (3d Cir. 1997), as the instrument to inflict serious bodily injury which makes the defendant eligible for the base offense level of 15. Thus, as the Hudson and Farrow Courts point out, the use of the ordinary instrument is the precise conduct that both causes the defendant to be eligible for the base offense level of 15 and automatically renders the defendant eligible for the 4 point enhancement under subparagraph B(2) and any defendant using an ordinary instrument as a dangerous weapon will automatically be eligible for the 4 point enhancement and the resulting offense level of 19. As the Farrow Court pointed out, there is no reason to conclude

that the types of cases in which ordinary instruments are used as dangerous weapons mandate what is in effect a base offense level of 19. Id. at 194-95. The Guidelines already provide a separate enhancement if serious bodily injury is inflicted irrespective of whether a dangerous weapon was used or not. See § 2A2.2(b)(3).

Those courts that have found the enhancement to apply to situations where an ordinary instrument is used as a dangerous weapon generally acknowledge that they are engaged in a form of double counting but state that such double counting "is permissible because it is explicitly mandated by the clear and unambiguous language of § 2A2.2." Johnstone at 212-13. We believe that the more appropriate approach to double counting is discussed at length by the 6th Circuit in Farrow when it interprets Guideline § 1B1.1, Application Note 4 as being inapplicable to the cumulative use of the same conduct to both establish a base offense level and apply an enhancement. Farrow at 191-92. Although different guideline sections may be applied cumulatively, it is not appropriate to rely on the exact same conduct both for the establishment of a base offense level and for an enhancement. Farrow at 192.

As to the proposal incorporated in Option Two to set a base offense level of 19 if the offense involved serious bodily injury, we believe that the existing guideline is sufficiently clear as to the availability of a serious bodily harm enhancement. That approximately ten cases involving convictions under 18 U.S.C. § 113(a)(6) did not result in a bodily injury enhancement, as the Commission reports in support of the Proposed Amendment, should not automatically cause the Commission to believe that there is a need to create a new base offense level. The sentencing judge is in the best position to have a full appreciation of the true seriousness of the bodily injury inflicted and to determine the appropriateness of the bodily injury enhancement. That the base offense level was enhanced in more than 80% of the cases should suggest that the participants in the sentencing

process are fully aware of the availability and applicability of the enhancement and the no charge is necessary.

VI: PROPOSED AMENDMENT: CIRCUIT CONFLICT CONCERNING CERTAIN FRAUDULENT MISREPRESENTATIONS

We oppose any amendment of the guideline at this time because, as we noted when this issue was first raised in 1998, there is no true conflict among the circuits. The Fourth Circuit has held that the enhancement required by § 2F1.1(b)(3) for misrepresenting that one is acting for a charitable organization applied to a President of a charitable organization that collected money from the public for bingo games but kept 10% of the proceeds for himself and his cronies. United States v. Marcum, 16 F.3d 599 (4th Cir.) cert. denied, 513 U.S. 845 (1994). The decision of the Tenth Circuit in United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995), in which the Court held that the enhancement does not apply to an official of a public agency who steals money that the agency received as grants from the government, is not inconsistent with the Marcum decision because both decisions recognize that the enhancement is appropriately applied whenever the official of a charitable organization, for the purposes of enriching himself, dupes the public into making contributions that it otherwise would not. The proposed amendment is therefore unnecessary and may invite unintended sentence enhancements whenever an offense involves a charitable organization -- a result clearly not intended by the Commission.

VII: PROPOSED AMENDMENT: CIRCUIT CONFLICT CONCERNING DRUG DEFENDANTS AND MITIGATING ROLE

We agree that the Commission should make clear that a mitigating role adjustment may be applied to a defendant who is convicted of a drug trafficking offense whose role in the

offense was limited to transporting or storing drugs even if that defendant is only accountable under Guideline § 1B1.3 for the quantity of drugs personally transported or stored by the defendant. In that regard, and in response to the first issue for comment, we have taken the position in the past and still believe that such defendants should have available to them in the appropriate case a minimal role adjustment. It is clear that large drug organizations recruit very poor and very needy people to act as drug couriers for their organizations. Such individuals receive relatively minor amounts of the proceeds of the overall drug organization and their culpability relative to that of the other participants in the organization can in many circumstances be minimal regardless of the precise quantity of drugs attributed to them.

As to the second issue for comment, the NYCDL believes strongly that the adjustments available under § 3B1.2 should be available to any defendant who plays a limited role in a large conspiracy, whether it be a drug conspiracy or a conspiracy to commit a financial crime of some sort. For instance, organizations involved in fraud or theft often involve participants with strictly compartmentalized roles so that relevant conduct attributable to them is less than the entire scope of the conspiracy. See, e.g., United States v. Studley, 47 F.3d 569(2d Cir. 1995). However, such defendants are still in analogous positions to that of a drug courier and are potentially subject to sentences which exceed their actual culpability. Thus, we believe that the sentencing court should have the option, in all appropriate cases, as opposed to merely drug cases mitigate a defendant's sentence to § 3B1.2.

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January 8, 2001

The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
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RE: PAG's submission on proposed amendments

Dear Judge Murphy:

I am writing to provide the Commission with the PAG's submission on the pending amendments for which public comment was due on January 8, 2001.

For the most part, the PAG has already presented the Commission with written submissions regarding each of the specific proposals; however, for the convenience of the Commissioners and the Commission staff, we wanted to provide our position papers in a consolidated package. As always, the PAG appreciates the opportunity to provide the Commission with its perspective on these important issues.

With regard to the specific proposed amendments, the PAG recommends the following:

1. Unauthorized compensation. The PAG opposes passage of this proposed amendment. We have not submitted a separate position paper, but agree with the views expressed by the Defenders in its submission to the Commission.

2. Counterfeiting. The PAG, for the most part, opposes passage of this proposed amendment. A detailed submission is attached at tab 2.

3. Tax Privacy. The PAG does not oppose passage of this proposed amendment.

4. Stipulations. The PAG supports passage of this proposed amendment. A detailed submission is attached at tab 4.

5. Aggravated assault. The PAG opposes passage of this proposed amendment (either option). We agree with the Defender's position that the Commission should add commentary consistent with the reasoning set forth in United States v. Farrow, 198 F.3d 179 (6th Cir. 1999).

6. Fraudulent misrepresentations. The PAG does not oppose passage of this proposed amendment, but agrees that the Commission should revise application note 5 in the manner suggested by the Defenders.

7. Mitigating role. The PAG supports passage of this proposed amendment. A detailed submission is attached at tab 7.

As always, we appreciate the opportunity to provide the Commission with our input.

Sincerely,

Barry Boss

cc: Jim Felman, Esq.
Andy Purdy, Esq.

PROPOSED AMENDMENT: COUNTERFEITING

Like many of the past and present guideline amendment proposals that increase offense levels and thus result in increases in punishment, the Practitioners Advisory Group (PAG) is concerned that no actual or demonstrable basis exists to justify the changes being proposed. Put another way, while we appreciate the fact the changes are being put forward at the suggestion of the Department of the Treasury to address the alleged "additional harm" that these crimes present due to the "erosion of public confidence in the currency" and because of "the large expenditures required to craft and implement anti-counterfeiting safeguards," we believe that no data has been developed to demonstrate that either the current sanction levels are inadequate in those regards or that the proposed increases directly or proportionately address that so-called additional harm.[1]

Importantly, the proposal itself seeks to promote proportionality with other similar economic crimes. Yet, the existing offense level of 9 is already set above the otherwise typical starting point of 8 (base of 6 + 2 for more than minimal planning) for those matters with nothing being put on the table to concretely demonstrate why more punishment is required. Furthermore, while we appreciate the fact that part of the motivation here stems from the apparent ease of creating passable currency through the use of readily available digital equipment, there appears no reason to increase punishments for all counterfeiters just because technology has afforded a subset of these offenders with a better mousetrap.

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[1]The presentation of such data might serve to address/eliminate our belief that the harsher punishments being proposed amount to the use of a howitzer when a flyswatter is more appropriate. If the bulk of these offenses involve college kids printing up a few $20's for beer money, then the proposed sanction increase appears totally unjustified.

In that latter regard, the Commission might wish to consider a 1 level increase as a specific offense characteristic reserved for digital counterfeiting. Alternatively, the Commission might consider a 2 level increase for such offenses, but limit its imposition to situations where the currency produced (face value) is $5,000.00 or less. At that dollar point and higher, the fraud table will provide any necessary increment in harm/punishment.

While the PAG has no objection to replacing the existing level 15 floor for manufacturing/device possession crimes at §2B5.1(b)(2) with a 2 level increase for such offenders as proposed, it appears necessary that the application notes that accompany this change clearly express the Commission's intent that such SOC is meant to address the more sophisticated counterfeiting offense conduct like that associated with offset printing. Put another way, it is important for the Commission to make it clear that the mere possession of a personal computer and an inkjet printer is not sufficient in-and-of-itself to secure this (now) additional enhancement if such readily available items were the devices/materials used for the manufacturing/production/counterfeiting. If the Commission were to accept our proposal for a 1 or 2 level increase for digital offenses, then a second enhancement for possessing the means to do so would seemingly amount to impermissible double-counting.

Next, while the PAG understands the intent of the deletion of the phrase "merely photocopy notes or otherwise," we remain concerned that the use of digital equipment and fancy inkjet printers can still result in the production of obviously phony currency. Some language needs to be crafted to accompany the (our) proposed digital equipment SOC if the Commission chooses to include same. To avoid what we view as an unwarranted result, we suggest that Application Note 4. be amended to read: "Subsection (b)(2) does not apply to persons who, by

whatever means, produce items that are so obviously counterfeit . . . ."

Finally, the PAG agrees with the drafters of the proposal that a "sophisticated means" enhancement is not an appropriate way to address the digital counterfeiting problem. We believe that our above suggestions better address that issue.

PAG CIRCUIT CONFLICT POSITION PAPER:
THE BREADTH OF ORAL STIPULATIONS TO CONDUCT CONSTITUTING MORE SERIOUS OFFENSES UNDER USSG §1B1.2

DAVID F. AXELROD
TIMOTHY W. HOOVER[1]

I. Introduction

Plea bargaining is an essential part of the criminal justice system. It allows defendants to limit their exposure, and both parties to resolve criminal cases without the expense of a trial. It also permits the system to operate without the chaos that would ensue if every indicted case were to go to trial.

Most plea bargaining in the federal system results in written plea agreements. Such agreements usually include a statement of the factual basis for the plea, and agreements to resolve various guidelines issues. In entering these agreements, both parties – defendants especially – consider it essential to be able to make a reasonable prediction of the sentencing range. That essential value, predictability, is lost if the court can dramatically alter the parameters of the sentence through the simple expedient of the plea colloquy.

Under USSG §1B1.2(a),[2] the Court is to apply "the offense guideline section most applicable to the offense of conviction (i.e., the offense conduct charged in the

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1 Mr. Axelrod is a partner, and Mr. Hoover an associate, in the White Collar Defense Group of the Columbus, Ohio office of Vorys, Sater, Seymour and Pease LLP. Mr. Axelrod is a member of the United States Sentencing Commission Practitioners Advisory Group.

2 The Commission has proposed an amendment to the Guidelines, effective November 1, 2000, that would clarify when a court may sentence under a guideline other than that for the statute of conviction. It would do so by replacing §1B1.1(a), modifying §1B1.2(a), replacing paragraph one of Application Note 1 to §1B1.2, and striking current Application Note 3 to §1B1.2. See Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary, at 1-3. The amendment:

count of the indictment or information of which the defendant was convicted)." A limited exception to this general rule is the source of controversy: "in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense." Id.; accord USSG §1B1.2(c).

A circuit split has arisen regarding what constitutes such a stipulation. The central question concerns whether the defendant's colloquy with the court at a plea hearing can constitute such a stipulation. The PAG's position is that commentary should be added to §1B1.2 to adopt the position of the majority of circuits, namely, that a defendant's responses to questions by the court constitute neither a stipulation to a more serious offense, nor any other part of a plea agreement, and therefore cannot authorize the court to shop for the guideline that it considers to be most applicable to the defendant's conduct. As noted above, if the rule becomes otherwise, predictability will be lost with the result that many cases will unfairly be forced to trial.

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clarifies that the courts must apply the offense guideline references for the statute of conviction listed in the Statutory Index unless the case involves a stipulation to a more serious offense or additional offenses set forth in §1B1.2(a). This amendment will make it clear that a court may not look to the defendant's relevant conduct in determining the offense guideline to be used.

United States Sentencing Commission, Office of Education & Sentencing Practice, 2000 Amendments to the Federal Sentencing Guidelines, at 4-5. Thus, while this amendment narrows consideration of the use of §1B1.2(a) stipulations, it does not resolve what constitutes a "stipulation to a more serious offense."

II. The Circuit Split

In Braxton v. United States, 500 U.S. 344 (1991), the United States Supreme Court declined to decide whether a stipulation for purposes of USSG §1B1.2(a) could be made orally at a plea hearing, or by a formal assent to a set of facts. Id. at 348-49. The Court demurred because the Sentencing Commission had requested comment on whether a stipulation under USSG §1B1.2(a) had to be part of a formal plea agreement. USSG §1B1.2(a) was subsequently amended to provide that a stipulation may be put on the record at an oral hearing. Significantly, the amendment also requires that such an oral stipulation occur "between the parties." USSG §1B1.2(a), Application Note 1, para. 2.

A circuit split nevertheless persists regarding whether a defendant's admissions in response to questions by the court can constitute a stipulation to a more serious offense. The approach of the majority of the courts of appeal that have considered the issue is consistent with the requirement in §1B1.2(a) that a stipulation be between the parties:

> A statement is a stipulation only if: (i) it is part of a defendant's written plea agreement; (ii) it is explicitly annexed thereto; or (iii) *both the government and the defendant explicitly agree* at a factual basis hearing that the facts being put on the record are stipulations that might subject a defendant to the provisions of section 1B1.2(a).

United States v. Nathan, 188 F.3d 190, 201 (3d Cir. 1999) (emphasis added); accord, e.g., United States v. Timley, No. 98-3226, 1999 U.S. App. LEXIS 9737 (10th Cir. May 20, 1999); United States v. Saaverda, 148 F.3d 1311 (11th Cir. 1998); United

States v. McCall, 915 F.2d 811 (2d Cir. 1990); United States v. Guerrero, 863 F.2d 245 (2d Cir. 1988). The Fifth and Seventh Circuits constitute the minority, holding that any admission by the defendant may be deemed a stipulation. See United States v. Loos, 165 F.3d 504 (7th Cir. 1998); United States v. Domino, 62 F.3d 716 (5th Cir. 1995).

The Tenth Circuit's decision in Timley illustrates the better view. There, the the defendant's sentence was increased because of his oral admission to the court that his offense occurred within 1000 feet of a school. The Tenth Circuit remanded the case for resentencing because it "[could not] conclude that Timley's admissions at the plea hearing ... were part of an agreement 'made between the parties.'" 1999 U.S. App. LEXIS 9737 at *17. The appeals court observed that "the parties treated the written agreement as encompassing their entire agreement", and that "[o]nly after the parties' agreement had been presented to the court did the court . . . elicit admissions from Timley that his offense occurred within 1000 feet of a school." Consequently, the court found "no indication that any of these admission were part of an agreement between the parties, as required by § 1B1.2(a)." Id. at *19.

The Timley court explicitly rejected the minority approach, that §1B1.2(a) is a grant of authority to the court that does not require the defendant's consent. Id. at *19 n.8 (disagreeing with Loos, 165 F.3d at 506-508). Reasoning that "§ 1B1.2(a) by its very terms requires 'a plea agreement . . . containing a stipulation'" (ellipsis in original), the court stated the obvious, namely, that "a stipulation ... requires a defendant's consent (or there would be no agreement)." Id.

Similarly, the Third Circuit's decision in Nathan, 188 F.3d at 190, explains why a careful reading of the Guidelines supports the majority position:

> [S]ection 1B1.2(a)'s reference to a stipulation as something contained within the plea agreement strongly suggests that statements made in factual basis colloquies are not stipulations. Section 1B1.2(a) speaks of stipulations as part of a plea agreement. A scrupulous reading of section 1B1.2(a), which will require that all of the defendant's stipulations be either part of or annexed to his plea agreement, would provide notice to the defendant as to exactly what facts underlying his offense he is agreeing to and will ensure that the defendant receives the benefit of his bargain. In addition, though section 1B1.2 itself provides for oral plea agreements and, presumably, oral stipulations contained therein, the Guidelines favor written stipulations over oral ones. [Application Note 1] also suggests that we should give a common sense reading to "stipulation," such that it refers to situations in which both parties specifically and explicitly agree, on the record, to the truth of the relevant facts. We thus think the language of the Guidelines compels the conclusion that Nathan's and Lander's statements should not be construed as stipulations.

Id. at 200-201.

III. Position of the Practitioners Advisory Group

While we believe that the text of §1B1.2 is clear, the existence of the circuit split requires clarifying action. We therefore urge the Commission explicitly to adopt the majority view.

In addition to the cases cited above, that view finds support in the text of the Guidelines as presently written. For instance, the Guidelines state clearly the Commission's preference for written stipulations. The Commentary to §6B1.4 states that, "Because of the importance of the stipulations and the potential complexity of the factors that can affect the determination of sentences, stipulations ordinarily should be in writing." Additionally, the Guidelines strongly presume

that Appendix A identifies the guidelines applicable to the offense of conviction. See USSG App. A Introd. (Statutory Index "specifies the guideline section or sections ordinarily applicable to the offense of conviction"). Accord, United States v. Saaverda, 148 F.3d 1311 (11th Cir. 1998) and cases cited therein.

The majority view is also consistent with the practical realities of day-to-day practice in the district courts. Almost all plea agreements in the federal system are reduced to writing following careful negotiation. Adherence to the majority view allows both parties – prosecution and defendant – to receive the benefit of their bargain, and ensures that the defendant's waiver of his rights is knowing and intelligent. By contrast, allowing a court to alter the fundamental premises of a plea agreement based on the defendant's extemporaneous statements deprives the defendant of his negotiated consideration, and eliminates the predictability that is often essential to the decision to enter a plea agreement in the first place.

Finally, the majority view is consistent with the district court's role in the plea process. The court is to determine whether a factual basis exists for the plea, not to develop (purposefully or inadvertently) other facts so that a harsher sentence may be imposed. If the district judge is dissatisfied with a plea agreement or its factual basis, the proper recourse is to reject the agreement, not to steer a defendant toward a harsher sentence in finding a way to approve the agreement. See USSG §6B1.2 Commentary.

For the foregoing reasons, the Practitioners Advisory Group respectfully urges the Commission to add commentary to §1B1.2 limiting "stipulations" as used

in §1B1.2(a) to those that are negotiated and entered by the parties, and contained in a plea agreement.

PROPOSED AMENDMENT 7

Proposed Amendment 7 resolves a circuit conflict regarding the application of USSG §3B1.2 (Mitigating Role). The proposed language would permit a mitigating role adjustment for a drug offender whose sentence is based on the drugs he personally stored or transported. Accompanying this proposal are two issues for comment, seeking input on (1) whether the adjustment should be prohibited or limited under the stated circumstances or, on the other hand, (2) whether the language should be broadened to include non-drug offenses.

In our view, proposed application note 3(C), which directly addresses the circuit split, represents a modest step in the right direction. Stephen Breyer, Federal Sentencing Guidelines Revisited, 14-SPG Crim. Just. 28, 35 (1999) ("the scope of certain offense characteristics, such as 'role in the offense,' can be broadened"); Stephen J. Schulhofer, Excessive Uniformity — And How to Fix It, 5 Fed. Sent. Rep. 169 (1992) (advocating larger role adjustments at the higher offense levels). This issue arises frequently but not exclusively in the drug trafficking context; accordingly, PAG recommends additional language that would affirm the principle's applicability to non-drug cases (per Issue for Comment 2).

Finally, PAG opposes two collateral provisions, contained in proposed application notes 3(A) and (B), which might unintentionally discourage mitigating role adjustments in deserving cases.

THE CIRCUIT CONFLICT

At the lowest level of many drug trafficking enterprises are couriers and individuals who merely store drugs. These defendants frequently "lack knowledge or understanding of the scope and structure of the enterprise and of the activities of others" and are "substantially less culpable" than the other participants in the offense. USSG §3B1.2, comment. (n.1 & backg'd). *See generally* Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability,* 3 Fed. Sent. R. 63 (1990). This is true irrespective of the drug quantity used to calculate the base offense level. The contrary holding of some circuits is inconsistent with the language and purpose of the mitigating role guideline. *See* §3B1.2, comment. (n.2) (minimal participant adjustment "would be appropriate . . .where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs).

Proponents of the narrow view say the mitigating role guideline "appears to contemplate a defendant who, because of his role in concerted activity, is held accountable for the acts of others." *United States v. Isienyi*, 207 F.3d 390, 393 (7th Cir. 2000). *See also United States v. Burnett*, 66 F.3d 137, 141 (7th Cir. 1995) (mitigating role guideline's "principal office is to give the district judge a means to mitigate unduly harsh punishment that mechanical application of the relevant-conduct rules might yield."). The introductory commentary to Chapter 3, Part B, instructs that role in the offense is determined based on "all the conduct within the scope of §1B1.3 (Relevant Conduct)" — that is, acts "committed, aided, [or] abetted" by the defendant, §1B1.3(a)(1)(A), and the "reasonably foreseeable acts" of others. §1B1.3(a)(1)(B). However, there is no sound reason — and, notwithstanding the courts' assumption, no basis in the Guidelines — for confining the mitigating role guideline to cases where the defendant receives

additional punishment based on the "reasonably foreseeable acts" of others.

Indeed, the scope of relevant conduct on which an adjustment may be based is not limited to the relevant conduct that is included in the defendant's base offense level. For example, the offense of drug importation involves a number of tasks beyond the courier's actions — purchasing the drugs, recruiting participants, arranging delivery, etc. "All of these activities . . constitute 'relevant conduct,' *United States v. Rodriguez De Varon*, 175 F.3d 930, 951 (11th Cir. 1999) (Barkett, J., dissenting), and must be considered in determining the defendant's role in the offense. It makes no difference that the other participants' activities, unlike drug quantity, have no effect on the defendants' base offense level. Thus, a defendant whose base offense level corresponds to the acts "committed, aided, [or] abetted" by that defendant may still be deemed to play a mitigating role in "concerted activity." §3B1.2, comment. (n.1).

Another specious reason for denying the adjustment to drug couriers is that they play "an important or essential role" in the offense. *United States v. Rodriguez De Varon*, 175 F.3d 930, 942-43 (11th Cir. 1999). *See also United States v. Burnett*, 66 F.3d 137, 140 (7th Cir. 1995). ("When a courier is held accountable for only the amounts he carries, he plays a significant rather than a minor role in that offense."). This reasoning, if applied consistently, would eviscerate the mitigating role guideline. Concerted-activity offenses, by their very nature, involve several different tasks, each of which is "essential" to the objective.

OTHER PROPOSED CHANGES

Current commentary states that a mitigating role adjustment is "ordinarily not warranted" in cases where the defendant "has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct." §3B1.2, comment. (n.4). Expanding this commentary, proposed application note 1 discourages an adjustment if the defendant receives an "offense level lower than warranted by the defendant's actual conduct" because the defendant "was held accountable for a quantity of drugs less than what the defendant otherwise would have been accountable under §1B1.3 (Relevant Conduct)." This language undermines the amendment's purpose and, more significantly, appears to legitimize guideline subversion.

The current commentary — which the proposed amendment would greatly expand — weighs heavily in decisions denying any mitigating role adjustment to the very drug couriers granted relief by the amendment. *See, e.g., United States v. Isienyi*, 207 F.3d 390, 393 (7th Cir. 2000). This proposed change, according to the synopsis, is intended to address situations where the defendant receives a reduced offense level pursuant to a plea agreement. But the Sentencing Guidelines advise judges to reject guideline-evading plea agreements (absent grounds for a downward departure), §6B1.2, p.s., and prohibit judges from imposing a sentence "lower than warranted by the defendant's actual conduct." The Commission embarks on a dangerous course when it begins barring certain adjustments in order to compensate for guideline evasion. *See, e.g., United States v. Holley*, 82 F.3d 1010, 1011 (11th Cir. 1996) (no mitigating role adjustment where district court excluded relevant conduct that should have increased defendant's sentence); *United States v. Lampkins*, 47 F.3d 175, 47 F.3d 175, 181 (7th Cir. 1995) (same).