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United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

RE: Request for public comment, notice of proposed amendments

Dear Judge Saris and Members of the Commission,

I am pleased to respond to the Commission's request for public comment published in the January 18, 2013, edition of the Federal Register. My comments are only directed toward the fourth and fifth issues identified in the Commission's request for public comment.

Issue #4 Tax Deductions

My general comment on this issue is that defendants should be permitted to reduce the amount of the tax loss based on any credits, deductions, or exemptions to which the defendant was entitled. No nexus should be required between the offense and the credit, deduction, or exemption.

If a defendant purposely failed to file a tax return, he should be permitted to demonstrate that he was eligible for any applicable credits, deductions, or exemptions and thereby reduce the amount of the tax loss. Thus, options 1 and 3 are much preferable to option 2. The difference between options 1 and 3 appears to be the evidentiary requirement in option 3 that the defendant produce contemporaneous documentation of entitlement to the credit, deduction, or exemption. This evidentiary requirement is overly narrow and without a clear purpose – although the defendant should bear the burden of proving that he was entitled to the credit, deduction, or exemption, he may be able to do so conclusively even if he lacks contemporaneous documentation. To deny a defendant with such conclusive evidence the benefit of the credit, deduction, or exemption on the ground that the evidence is not of a certain type is simply arbitrary. Such an arbitrary exclusion cannot be squared with a desire to fix a just punishment for individual defendants.

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Issue #5 Acceptance of Responsibility

Issues for Comment:

(1) Whether the court has discretion to deny the third level of reduction

I agree with the Commission's viewpoint that the district court should possess the power to deny a motion for the third-level reduction. Even though the sentencing court may grant the third-level reduction only the government's motion, the court should have independent authority to deny the motion if the court finds that the requisite circumstances do not exist. *See, e.g.*, *United States v. Williamson*, 598 F.3d 227 (5th Cir. 2010) (finding that district court properly denied the government's motion for the third-level reduction). For example, under section 3E1.1(b) of the Guidelines, the defendant's offense level must have been at least sixteen prior to the operation of section 3E1.1(a) in order for the defendant to qualify for the third-level reduction. If the government moves for a third level reduction in a case where the defendant's offense level is fifteen or less, the court should be capable of denying that motion. If the court is powerless to deny the motion, the government is granted too much latitude – it would basically give the government a license to move for a third-level reduction based on any consideration or no consideration at all. A determination by the court that the requirements of section 3E1.1(b) have been met is necessary to guard against prosecutorial lawlessness.

However, upon finding that the requirements of section 3E1.1(b) are met, the court should have no further discretion to deny the motion. Here, I find the language of the proposed amendment to be problematic. The proposed language states that the court "may" grant the motion if it finds that the requirements are met. It would be better to require the court to grant the motion if it finds that the requirements are met – the court "must" grant the motion. The court needs the ability to deny the government's motion as a check against prosecutorial abuse. However, if the defendant has met the requisites for the third-level reduction and the government has moved for the reduction, the court should not be able to deny the motion. My expectation is that the court will usually defer to the judgment of the government as to whether the defendant has assisted authorities in such a way to fulfill the requirements of section 3E1.1(b). As application note 6 to the current commentary states, the government is in the best position to make that determination. The role of the district court should merely be to check abuse – if the requirements are clearly not met, the district court should have the ability to step in and deny the motion. But if the district court finds that the requirements are met, then it should be required to grant the motion.

(2) Whether the government has discretion to withhold making a motion

The Commission should resolve the circuit split in favor of the viewpoint espoused by the Fourth Circuit in *United States v. Divens*, 650 F.3d 343 (4th Cir. 2011). The Fourth Circuit properly interpreted the language of section 3E1.1(b) and its commentary to arrive at the conclusion that the government must bring the motion as long as it was relieved of the burden of preparing for trial.*

But, because the Commission is free to amend the language of section 3E1.1, the more pressing question is whether that result is sensible. To my mind, the answer is "yes, it is." The alternative is to grant the government "nearly unfettered" discretion over the third-level reduction. *See United States v. Beatty*, 538 F.3d 8, 15 (1st Cir. 2008). This level of discretion unfairly skews plea bargaining in favor of the government. The government would essentially receive a license to decline to move for the third-level reduction based on its own assessment of whether the defendant did everything to ensure that the prosecution moved forward at optimal efficiency. The government could undoubtedly always point to some act of the defendant that cause it to inefficiently expend resources (or potentially spend resources in the future, in the case of a defendant's refusal to agree to waive her appellate rights).

Permitting the government full discretion to decline third-level reductions based on any perceived inefficiencies would essentially devalue defendants' appellate waivers. If the government must move for the third-level reduction as long as the defendant pleads early enough, then a defendant retains the ability to exchange his appellate waiver for some concession in the plea agreement or elect not to waive appeal. But if the defendant must waive appeal to even have a shot at a motion for a third-level reduction, then the defendant is forced to forgo appeal without receiving anything in return (especially if the government refuses to move for the third-level reduction based on one of innumerable other reasons). Such a bargain requires defendants to forfeit too much in exchange for too little. Thus, defendants may decide that it is not worth it to even attempt to obtain the third-level reduction by pleading early in the process or may forgo plea bargaining at all.

Perhaps the Commission should consider setting a price on appellate waivers and collateral attack waivers in the form of an additional "appellate/collateral attack waiver acceptance of responsibility" reduction in order to standardize the benefit received for defendants' waivers of their appellate rights. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 259 (2005) (discussing the benefits of establishing a pricing norm for appellate waivers). But that is a separate question and should be considered as an additional reduction. The third-level reduction should not be that price – consistent with the language of the guideline and the commentary, the third-level reduction is intended to be earned by saving the government from the burden of preparing for trial. Permitting the government to decline to make the motion on the basis of any past or

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* For support of the *Divens* reading of the current version of section 3E1.1(b), see Laura Waters, Note, *A Power and a Duty: Prosecutorial Discretion and Obligation in United States Sentencing Guideline § 3E1.1(B)*, 34 CARDOZO L. REV. 813, 828-39 (2012); Tziporah Schwartz Tapp, Comment, *Refusing to Compare Apples and Oranges: Why the Fourth Circuit Got It Right in* United States v. Divens, 90 N.C. L. REV. 1267, 1279-87 (2012); *see also* Alexa Chu Clinton, Note, *Taming the Hydra: Prosecutorial Discretion under the Acceptance of Responsibility Provision of the US Sentencing Guidelines*, 79 U. CHI. L. REV. 1467, 1483-1511 (2012) (recommending a "modified and extended *Divens* approach" that requires the government to move for the third-level reduction if its finds that the defendant's notification of his intent to plead was sufficiently timely to alleviate trial preparation and conserve trial resources).

potential future inefficiency grants the government excessive discretion over the third-level reduction and gives defendants no notice of what is required of them to earn it.

The Commission should further consider amending the guideline to require the government to move for the third-level reduction if the defendant pleads guilty early enough for the government to *substantially* avoid the burden of preparing for trial. Under the current language, the government could practically always argue that some pre-plea act was in some way in preparation for trial. Again, this formulation grants the government too much discretion over the decision to move for the third-level reduction. As long as the defendant pleads early enough that the government substantially avoids the burden of preparing for trial, the government should be required to move for the third-level reduction.

I appreciate the opportunity to share my views with the Commission.

Respectfully,

Kevin Bennardo