NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING 2013 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

The New York Council of Defense Lawyers (the "NYCDL") would like to thank the Sentencing Commission (the "Commission") for the opportunity to present our views on the 2013 Proposed Amendments to the Sentencing Guidelines (the "Guidelines"), policy statements, and official commentary. We are a professional association comprised of more than 240 experienced attorneys whose principal area of practice is the defense of criminal cases in federal court. Among our members is a former United States Attorney and former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York. Our membership also includes current and former attorneys from the Federal Defender offices in those districts.

Our members thus have gained familiarity with the Guidelines both as prosecutors and as defense lawyers. In the pages that follow, we address a number of proposed amendments of interest to our organization.

The contributors to these comments, including members of the NYCDL's Sentencing Guidelines Committee, are Marjorie J. Peerce, Chair, Richard Albert, Catherine M. Foti, Laura Grossfield Birger, Brian Maas, Michael Bachner, Sharon McCarthy, James Keneally and Christopher Conniff. We also want to acknowledge the contributions of Nathaniel I. Kolodny, Lauren Gerber Lee, Matthew Carrico, Sean Nutall and Brendan Hanifin.

I. PROPOSED AMENDMENT: TAX DEDUCTIONS

The Commission has asked for comment on a proposed amendment that would resolve a circuit conflict regarding whether, in calculating the tax loss in a criminal tax case, a sentencing court may consider unclaimed deductions that the defendant legitimately could have claimed if he had filed an accurate tax return. Specifically, the Commission has identified three options for resolving the circuit conflict: Option 1 provides that the determination of tax loss shall include credits, deductions, or exemptions to which the defendant was entitled, regardless of whether the defendant claimed them at the time the tax offense was committed; Option 2 provides that the determination of tax loss shall not include credits, deductions, or exemptions unless the defendant was entitled to them and claimed them at the time the tax offense was committed; and Option 3 provides that the determination of tax loss shall not include unclaimed credits, deductions, or exemptions unless the defendant demonstrates entitlement to the same through contemporaneous documentation. The Commission also seeks comment on potential additional requirements for determining that a potential unclaimed deduction is legitimate in the event that the Commission were to adopt Options 1 or 3.

The NYCDL commends the Commission for proposing an amendment to address the confusion that has arisen regarding the propriety of considering unclaimed deductions in determining tax loss. For the reasons stated below, the NYCDL recommends adopting Option 1. The other related issues upon which the Commission seeks comment are also addressed below.

A. §2T1.1 and the Concept of Tax Loss

§2T1.1 states that in cases of "tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (*i.e.*, the

loss that would have resulted had the offense been successfully completed)."[1] The notes further state that tax loss shall be calculated based on a set percentage of the underreported gross income or improperly claimed deductions, exemptions, or credits, "unless a more accurate determination of tax loss can be made."[2]

The concept of "tax loss" is fundamental to this section of the Guidelines. As the Background commentary to §2T1.1 states, "a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics."[3] The NYCDL generally opposes the Sentencing Guidelines' excessive reliance on mechanical calculations of loss amount in determining advisory sentencing ranges for economic crimes. Because, however, this Guidelines section relies upon the concept of "tax loss" to assess the gravity of the offense, then tax loss it should be. Categorically refusing to consider deductions that are legitimate and substantiated by relevant evidence, though unclaimed, is not endeavoring to accurately calculate tax loss.[4] Such a rule is fundamentally inconsistent with the practical application of tax laws. It is illogical, and undermines the credibility and usefulness of this section, and by extension, the Guidelines generally. It would also tend to result in unfair sentences, because it would treat fundamentally different cases as equivalent under the Guidelines.

A hypothetical example illustrates the issue. Defendant A is employed as a teacher, but he also owns and operates a hot dog stand as a side business. His hot dog stand of course has

[1] U.S. SENTENCING GUIDELINES MANUAL, §2T1.1(c)(1).
[2] *Id.*, Notes A-C.
[3] *Id.*§2T1.1, *Commentary*, *Background*
[4] Put another way, the concept of "tax loss" must be applied with reference to another concept fundamental to the application of tax law, namely, the concept of "taxable income." Taxes are paid on taxable income, not gross income. Taxable income cannot be calculated without the application of ordinary course deductions, expenses and credits. Categorically refusing to consider deductions that are legitimate and substantiated by relevant evidence, though unclaimed, cannot possibly produce an accurate calculation of tax loss, since a tax loss to the government can only be calculated by determining the amount of taxes that would be due on taxable income.

expenses such as the costs of hot dogs, buns, condiments, as well as wages for an employee who operates the hot dog stand when Defendant A is teaching. Such expenses total $60,000 annually, for which Defendant A keeps detailed records and receipts. Defendant A's hot dog stand brings in gross revenue of $100,000 annually. He files his tax returns, but reports only his income from his teaching job, omitting the income (and, of course, the expenses) from his hot dog stand.

Defendant B owns and operates a home construction contracting business, but he also does construction consulting on the side for one large company. His consulting business has no appreciable expenses apart from his contracting business. Defendant B's consulting business brings in gross fee revenue of $100,000.00 annually. He files his tax returns, but reports only the income (and expenses) from his contracting business, omitting his consulting income.

A rule that refuses to consider Defendant A's clearly applicable deductions for cost of goods sold and wages paid would unjustifiably treat Defendant A and Defendant B the same. Assuming a 30% tax rate, it would calculate the tax loss in both cases as $30,000, even though the actual tax loss in Defendant A's case is only $12,000. This is the difference in an offense level of 12 and an offense level of 10, which, assuming no criminal history, is the difference between an advisory Guidelines range (10-16 months, in Zone C) that requires imprisonment and one that does not (6-12 months, in Zone B).[5] There is simply no sound basis for treating these two cases the same way, nor is there a sound basis for considering $30,000 to be the tax loss in Defendant A's case. Doing so overstates the severity of his crime.

Another example that illustrates the absurdity of the rule that categorically refuses to consider unclaimed deductions arises in the recent rash of undisclosed offshore bank account cases that are being processed through the criminal justice system and the IRS, which have received a great deal of attention in the media and elsewhere. In those cases, the primary

[5] *See* §2T4.1 (Tax Table), and §5C1.1 (Imposition of a Term of Imprisonment).

evidence of income is typically bank or investment advisor statements for the offshore accounts for the tax years in question. The categorical rule against considering deductions would direct courts to accept the income figures on those bank or investment account statements, but require them to ignore losses, investment expenses and foreign tax credits that appear in the very same statements, often even on the very same page that shows the amount of income. No marginally competent first year accountant or IRS agent would ignore those patently valid offsets.[6]

Taking into account legitimate but unclaimed deductions furthers §2T1.1's basic goal of better approximating actual loss to the treasury, which is manifest elsewhere in the Notes to §2T1.1. For example, the Notes provide that unless a more accurate determination of tax loss can be made, a presumptive 28% tax rate is to be applied to gross income in underreporting cases, versus a presumptive 20% rate that is to be applied in failure to file cases. *Compare* §2T1.1 (c)(1) Note (A) *with* §2T1.1 (c)(2) Note (B).[7] Presumably, this differential in rate is designed as a rough substitute for the impact of common deductions, credits and exemptions – like the standard deduction -- in reducing the amount of tax due in the average non-filing case. That is, the difference in rate is an effort to better approximate the actual tax loss to the treasury.[8]

A review of the Court of Appeals decisions addressing the calculation of tax loss under §2T1.1 reveals that although some courts purport to apply a rule against considering unclaimed

[6] Perhaps even more absurd is that the rule's effect would mean that the amount of an offshore bank account defendant's tax loss for sentencing purposes would depend on the format of the statements generated by his foreign bank or investment advisor; i.e., do the statements actually individually break out gross investment income as well as investment losses, fees and tax credits, so that the latter would be considered "deductions," or do the statements just show an annual net investment income? Under Option 2, urged by the government here, huge differences in the "tax loss" for Guidelines purposes would depend upon this totally arbitrary distinction.

[7] The rates referenced are those applicable to individuals; the corresponding rates are 34% and 25% for corporations.

[8] We note that there is a split in the circuit court decisions regarding whether or not the history of the changes in §2T1.1 over the years supports the consideration of unclaimed deductions in computing tax loss. Because the Commission intends to eliminate any ambiguity through the proposed amendment, we do not address this debate in detail. Nevertheless, consistent with the views of the Second and Tenth Circuits, NYCDL believes that the evolution from the pre-1993 Guidelines' "rough and ready" computation that relies more heavily on the application of a standard taxation rate to gross income, to the current version that directs the court to substitute a "more accurate determination of the tax loss" when such determination can be made, is intended to permit consideration of legitimate, though unclaimed, deductions.

deductions, the results in many cases actually appear to turn upon the weakness of the evidentiary support for the deductions. That is, the real issue is the legitimacy of the deductions being asserted. Indeed, even Court of Appeals decisions applying the rule that unclaimed deductions are to be considered in calculating tax loss have found that, in the particular circumstances presented, the deductions were properly rejected because the supporting evidence was insufficient.[9]

We submit that Option 1, directing district courts calculating tax loss to consider legitimate unclaimed deductions, while leaving them the discretion to accept or reject such unclaimed deductions depending on the evidentiary support and other particular circumstances of the individual case, is the fairest approach, the approach most consistent with the fundamental thrust of this Guidelines section, and the approach most consistent with actual practice.

The Second and Tenth Circuit Approach

The first option contemplated by the Commission, and recommended by the NYCDL, is consistent with the approach adopted by both the Second and Tenth Circuits. As the Second Circuit has observed "[t]ax loss under §2T1.1 is intended to reflect the revenue loss to the government from the defendant's behavior."[10] To make the most accurate determination of the revenue loss to the government, as directed in the notes to §2T1.1, the defendant must necessarily be given "'the benefit of legitimate but unclaimed deductions.'"[11] The court has made clear, however, that the defendant "bears the full burden of proof in establishing the appropriateness of consideration of . . . unclaimed deductions[s]."[12] Thus, the Second Circuit in *United States v. Gordon*, while stating that the district court erred in failing to consider potential

[9] *United States v. Hoskins*, 654 F.3d 1086, 1096-99 (10th Cir. 2011); *United States v. Gordon*, 291 F.3d 181, 188 (2d Cir. 2002).
[10] *Gordon*, 291 F.3d at 187.
[11] *Id.* (quoting *United States v. Martinez-Rios*, 143 F.3d 662, 671 (2d Cir. 1998).
[12] *Id.* (holding that the defendant did not provide any evidence tending to prove his unclaimed deductions).

unclaimed deductions, found such error harmless because Gordon did not offer any proof that his corporation would have treated sums it transferred to Gordon as deductible salary expense rather than non-deductible dividends.[13]

Similarly, in *United States v. Hoskins*, the Tenth Circuit explained that "the Guidelines establish a simple-to-calculate presumptive tax loss linked to gross income and a set tax rate; this presumptive amount will be applied unless a more accurate determination can be made by the court."[14] This does not mean, however, that the Guidelines require "courts to base their sentencing analysis on unadjusted gross receipts figures untethered to actual taxes to which the government was entitled, but did not receive as a result of tax evasion."[15] Rather a defendant may present evidence to establish "that, given his tax-filing practices, he would have claimed deductions on the unreported income; and of course, the government could counter by raising doubts. But these are evidentiary inquiries, and nothing in the Guidelines prevents courts from entertaining arguments on both sides."[16] "[W]here a defendant offers convincing proof – where the court's exercise is neither nebulous nor complex—nothing in the Guidelines *prohibits* a sentencing court from considering evidence of unclaimed deductions in analyzing a defendant's estimate of the tax loss suffered by the government."[17] Ultimately, however, the *Hoskins* court credited evidence presented by the government resulting in an upward tax loss calculation, and declined to give the defendant the benefit of unclaimed deductions because the defendant "gave the court no good reason to retroactively credit other unclaimed deductions."[18]

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[13] *Id.* at 187-88.
[14] 654 F.3d at 1092.
[15] *Id.* at 1096-97.
[16] *Id.* at 1097.
[17] *Id.* at 1094.
[18] *Id.* at 1096-99 (defendant used a two month period from 2008 to project deductions she would have been permitted to take in 2002, but the court found that there was no relation between these two periods, there was no evidence the two month period was chosen at random, and there was no evidence specifically related to 2002 deductions that were unclaimed).

The Contrary Approach

The second option contemplated by the Commission reflects what appears to be the opposite position regarding unclaimed deductions taken by the Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits. A closer examination of the pertinent decisions reveals that in practice, however, the approach of these circuits often does not so starkly differ from the evidence-based analysis followed by the Second and Tenth Circuits. The primary rationale for the rule against considering unclaimed deductions is set forth in the Seventh Circuit's decision in *United States v. Chavin*.[19] There the court held that "[t]he guidelines state that 'tax loss is the total amount of loss that was the object of the offense.' [U.S.S.G.] at §2T1.1(c)(1). We take the phrase 'the object of the offense' to mean that the *attempted* or *intended* loss, rather than the actual loss to the government, is the proper basis of the tax-loss figure."[20] The court then held that "unclaimed deductions should not be taken into account because they have no relevance to the amount of loss that the scheme attempted to produce" as revealed by the statements the defendant made in the tax returns he actually filed.[21] This reasoning is flawed.

First, as the Tenth Circuit pointed out in *Hoskins*, "[e]ven if we accept that §2T1.1 is directed at intended tax loss, it does not follow that in proposing a more accurate determination, a defendant may never benefit from deductions that he could have claimed on the false return."[22] The court used a hypothetical to illustrate this point:

> Assume a restaurant owner is convicted of criminal tax evasion for failing to report or pay taxes on $100,000 income earned from his cash-only business. Let us also assume the restaurant paid $80,000 in tax-deductible business expenses, all in cash. And finally, let us assume the restaurant

[19] 316 F. 3d 666, 677 (7th Cir. 2002). Cited by *United States v. Delfino*, 510 F.3d 468, 472-73 (4th Cir. 2007); *United States v. Clarke*, 562 F.3d 1158, 1164-65 (11th Cir. 2009); *United States v. Blevins*, 542 F.3d 1200, 1202-03 (8th Cir. 2008); *United States v. Phelps*, 478 F.3d 680, 682 (5th Cir. 2007); *United States v. Sherman*, 372 Fed. Appx. 668 (8th Cir. 2010).
[20] *Chavin*, 316 F.3d at 677 (emphasis in original).
[21] *Id.*
[22] Hoskins, 654 F.3d at 1094.

> owner, despite evading his tax-filing responsibilities, maintained immaculate business records documenting every business expense. Assuming a 30% tax rate, if a court refused to consider the deductions under §2T1.1, the restaurant owner would have caused a $30,000 tax loss. If the court did consider the deductions, the government's tax loss would have been only $6,000. We then ask, which of these two tax losses did the defendant *intend*?
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> The most logical conclusion is that the defendant sought to avoid paying what he legally owed in taxes: $6,000. It would never have occurred to the hypothetical defendant or his accountant that he would be cheating the government out of $30,000.[23]

This point is bolstered by the observation that even courts that rely upon the rule announced in *Chavin* often look to the evidence of potential deductions presented to determine the losses a defendant intended. One such example comes from a more recent Seventh Circuit decision. In *United States v. Psihos*, the defendant was the owner of three restaurants. For one of those restaurants, as to which he underreported income on his tax returns, he maintained two sets of books. At sentencing, Psihos attacked the government's tax loss computation for ignoring "numerous deductible expenses" including amounts paid to DJ/promoters; amounts paid in cash wages; costs for complimentary drinks and food; and payments and transfers made to two other restaurants owned by the defendant.[24]

The court, relying on *Chavin* held that the defendant's claims of deductible expenses were "irrelevant in determining the tax loss caused by his fraudulent statements" on his tax returns.[25] However, the court also acknowledged that "[t]he district court gave [the defendant] credit for the cash payouts listed on envelopes – as had the government in its loss calculation – but rejected his remaining claimed deductions."[26] The court held that "even if we were to follow

[23] *Id.* at 1095.
[24] 683 F.3d 777, 780 (7th Cir. 2012).
[25] *Id.* at 781.
[26] *Id.* at 780.

the reasoning of *Hoskins*, [the defendant] would not benefit because, as the district court concluded, there was an utter lack of support for [the defendant's] claimed cash payments."[27]

Psihos thus illustrates that, in practice, even in circuits that purport to apply a categorical rule against considering unclaimed deductions, the logical pull of doing so when calculating "tax loss" is hard to resist. The rule that such courts often actually apply is to accept unclaimed deductions when they are legitimate and proven, and to reject such deductions when they are speculative and unproven. In the experience of NYCDL members, this fair and logical approach is consistent with the prevailing actual practice among government investigators, prosecutors, defense counsel and district courts in computing tax loss.

Thus in *United States v. Yip*, the Ninth Circuit also stated that it was following the *Chavin* rule against considering unclaimed deductions, but then likewise examined the facts to determine whether the unclaimed deduction at issue was legitimate.[28] In *Yip* the defendant challenged the district court's calculation of tax loss because it included unpaid state taxes in the calculation, but did not allow the defendant to reduce his federal tax loss by deducting the unpaid state taxes.[29] The court found that the defendant could not "even argue that the state taxes are legitimate, but unclaimed, deductions. The state taxes are not legitimate deductions because *he did not pay them.*"[30]

To the same effect, in *United States v. Clarke*, the Eleventh Circuit rejected a lower tax loss that would have resulted if the defendant used the filing status "married filing jointly" instead of "married filing separately"; there was no evidence cited that the defendant ever had or would have claimed "married filing jointly" status, and there are other obvious factors that would

[27] *Psihos*, 683 F.3d at 781.
[28] 592 F.3d 1035, 1041 (9th Cir. 2010).
[29] *Id.* at 1036-37, and 1040.
[30] *Id.* at 1041.

induce a taxpayer to choose one status or the other.[31] Similarly, in *United States v. Blevins*[32], the Eighth Circuit, while declining to decide whether unclaimed deductions can ever offset tax loss, rejected inclusion of asserted deductions that could only be claimed by the taxpayers, not the defendant tax preparer, might still be claimed by the taxpayers in the future (potentially resulting in further lost revenue to the government), and rested upon questionable assumptions not supported by the record.[33]

In sum, to categorically reject the consideration of unclaimed deductions substitutes expedience for fairness and is directly at odds with the determination that this section of the Guidelines requires be made – the amount of tax loss. Such a rule would create a windfall for the government and treat individuals who have caused disparate harm as equals under the Guidelines. Because categorically disallowing unclaimed deductions in calculating tax loss leads to unfair results, and because government investigators, prosecutors, defense counsel and most sentencing courts consider the underlying facts and evidence when a defendant has sought the benefit of unclaimed deductions, the Commission should clarify that courts should consider unclaimed deductions where they are legitimate and supported by the evidence. Accordingly, the NYCDL strongly urges the Commission to select Option 1.

In response to the argument that considering unclaimed deductions will unduly complicate sentencing proceedings, it is important to recognize that the substantive tax law, which requires the government to prove "the existence of a tax deficiency" as an element of tax

[31] 562 F.3d at 1164.
[32] 542 F.3d at 1203 & n. 3.
[33] *But compare United States v. Delfino*, 510 F.3d 468, 473 (4th Cir. 2007), where the Fourth Circuit applied a categorical approach rejecting consideration of deductions potentially applicable to defendants, owners of computer consulting businesses, who failed to file tax returns for eleven years. The court held that to allow otherwise would force the court "to speculate as to what deductions [the defendants] would have claimed and what deductions would have been allowed." The absence of any discussion of the evidence regarding any potential deductions prevents much further analysis, but the decision's language makes it appear to be one of the few true examples of the categorical, and we submit incorrect, approach to unclaimed deductions.

evasion, thereby requires prosecutors and IRS agents to consider and compute unclaimed deductions during their investigation. *See* Sansone v. United States, 380 U.S. 343, 351 (1965). Thus, the government should have gathered and reviewed much if not all of the relevant information regarding unclaimed deductions well before sentencing. To the extent that, as illustrated by *Psihos* and seen in practice, what happens in reality is that in making their own calculation of tax loss, the IRS and prosecutors include the unclaimed deductions they consider valid and proven and exclude those they do not, the practical effect of Option 2 would be to allow a court to consider unclaimed deductions when the government accepts them, but not when the government rejects them. It would be taking the decision away from district court judges and giving it to the IRS and prosecutors.

To the extent that the government and IRS are concerned about the burden imposed on them by the possibility that defendants will bring forward new evidence of deductible expenses at the time of sentencing, experience teaches that because sentencing is often the most critical phase of a criminal case (and indeed the only contest phase), dealing with new evidence at the time of sentencing is common in many different types of cases, not just tax cases. And if evidence adduced by a defendant for the first time at sentencing reveals other misconduct or a greater degree of misconduct than the government was aware of beforehand, nothing prohibits the government from bringing that to the attention to the judge at sentencing.

Further, prosecutors, IRS agents, and most importantly, district courts, are ordinarily required to go through the exercise of computing the amount of actual tax loss at the sentencing proceeding in the course of determining restitution. As the Tax Division of the Department of

Justice confirms in its written comments to the Commission, the amount of restitution must be based on actual tax loss, and must consider unclaimed deductions.[34]

The Firearms Excise Tax Act, which amended 26 U.S.C.§ 6201, provides that a final order of restitution may not be challenged in any proceeding including deficiency litigation in the U.S. Tax Court and further provides that the amount imposed may be collected and assessed at any time. *See* 26 U.S.C. §§6201(a)(4). Based upon this 2010 statutory amendment, an individual convicted of a tax offense must contest the amount of restitution in the district court, because he or she will thereafter be unable to contest it in any other forum. Thus, because unclaimed deductions must be considered by the district court in determining the actual loss to the treasury for restitution purposes, in most cases it will be no additional burden on the court to consider those same deductions in determining the tax loss for Guidelines purposes.

Potential Restrictions on Considering Unclaimed Deductions

While the Commission presents Option 3 as distinct from Option 1, Option 3 simply adds a particular evidentiary requirement that must be met for unclaimed deductions, specifically: the defendant must demonstrate "by contemporaneous documentation that the defendant was entitled to the credit, deduction, or exemption." In keeping with its past comments to the Sentencing Commission on proposed Guidelines amendments, the NYCDL believes that the sentencing court should be allowed to consider all relevant evidence and circumstances in determining the applicable loss amount. Because the sentencing judge is in a unique position to assess the evidence and calculate loss based on that evidence, and because every case is different, we recommend that Option 1 be adopted without any additional requirements on the court for accepting or denying a defendant's unclaimed deductions. Specifically with regard to Option 3, a bright-line, mechanical rule requiring contemporaneous documentation in order to consider

[34] See March 8, 2013 Letter of Assistant Attorney General Kathryn Keneally, at 9.

unclaimed deductions is an unnecessary restriction on fact-finding, a process in which district judges engage on a daily basis. It also poses a real risk of unfairness in cases where other evidence – such as a clear track record of claiming certain specific, identified deductions in other tax years -- might well convince the sentencing court that the unclaimed deductions are legitimate for the year or activity in question.

B. Issue for Comment 1(A): Requiring Proof that the Deduction Would Have Been Claimed; Objective or Subjective Standard

The Commission has asked for comment on whether a legitimate but unclaimed deduction should be counted only if the defendant establishes that the deduction would have been claimed if an accurate return had been filed, and if so, whether an objective or subjective standard should be used in determining whether a deduction would have been claimed. The NYCDL recommends that there should be no requirement that the defendant demonstrate that he would have claimed the deduction if an accurate return had been filed, but that if the Commission disagrees and imposes such requirement, courts should be permitted to apply either an objective or subjective standard in making that determination, depending on the specific circumstances presented.

We agree with the observation of the Tenth Circuit in *Hoskins* that "it is somewhat odd to frame the §2T1.1 analysis in terms of intended tax loss – when in reality, a tax-evading individual seeks only to avoid paying taxes, not cause any specific loss to the government."[35] Put another way, in the ordinary case, it seems a fiction to assume that the defendant sought to avoid paying anything other than the taxes he owed. Accordingly, it does not make sense to impose a requirement that the defendant demonstrate that he would have claimed the deduction in order for it to be taken into account.

[35] *See* 654 F.3d at 1095.

As pointed out in *Hoskins*, this conclusion is bolstered by §2T1.1 (c)(2), which states the general rule for computing tax loss in failure to file cases: "If the offense involved failure to file a tax return, the tax loss is the amount that the taxpayer owed but did not pay."[36] The notion of determining what the defendant "owed" without regard to legitimate deductions to which he was entitled makes little sense. To maintain consistency with §2T1.1's basic focus on the amount of tax loss as a measure of harm, and to avoid disparate treatment between underreporting cases and failure to file cases, the NYCDL believes that there should be no requirement that a defendant prove that he would have claimed the deduction for it to be taken into account. A sentencing court would retain discretion, of course, to find that in the specific circumstances of a particular case, a deduction that it finds the defendant would not have claimed is not legitimate and thus should not be included in the computation.

This view also finds support in the substantive criminal tax law. In *Boulware v. United States*, 552 U.S. 421 (2008), the Supreme Court specifically addressed the question whether, in a criminal tax prosecution, a defendant is required to provide evidence of a contemporaneous intent to treat a distribution as a return of capital (which would not be taxable) rather than a dividend in order to defend a criminal tax prosecution by demonstrating that no tax was actually owed. Relying in part on the substantive tax law's focus on "'the objective economic realities of a transaction rather than . . . the particular form the parties employed,'"[37] the Court held that "a defendant in a criminal tax case does not need to show a contemporaneous intent to treat diversions as returns of capital" in order to rely on the tax code's treatment thereof "to demonstrate no taxes are owed."[38]

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[36] *See id.* (citing U.S. SENTENCING GUIDELINES MANUAL, §2T.1.1(Note 2))
[37] *Id*. at 429, *quoting Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978)
[38] *Id.* at 439. Further, as noted above, the substantive criminal tax law requires proof of '"the existence of a tax deficiency"' in order for there to be a tax evasion. *Id.* at 424, *quoting Sansone v. United States*, 380 U.S. 343, 351

If, contrary to our view, the Commission were to impose a requirement that the defendant establish that the deduction would have been claimed had he filed an accurate return, it is the view of the NYCDL that the sentencing court should be permitted to use either an objective or subjective standard, as the court determines to be appropriate in the circumstances of the case. For example, in the hypothetical set forth above, a court could properly determine that any reasonable person in the position of Defendant A would deduct obvious expenses such as cost of goods sold and wages from his hot dog stand business. Even if Defendant A did not have specific records of such expenses, the court could reasonably accept proffered evidence of the costs of such goods and the wages of his employee, without specific evidence regarding the particular defendant's history of claiming such deductions or inclination to claim them. In other instances a sentencing court might reasonably and properly choose to use a subjective standard in determining whether legitimate but unclaimed deductions should be allowed. For example, a court could find evidence that a defendant had a track record of claiming certain specific deductions on his tax returns in other tax years, combined with evidence that the defendant's economic activity during the tax year of conviction was sufficiently similar to such other tax years, as sufficient to support a finding that this defendant would have claimed such legitimate deductions and they should be included in the tax loss computation.

In short, if the Commission should choose to impose a requirement that the defendant prove that a deduction would have been claimed, we see no reason to tie the hands of district judges by restricting them to a particular standard in making that determination. The trial court should be free to consider all relevant circumstances.

(1965). It would be anomalous to permit a defendant to defend such a claim at trial by demonstrating the existence of a legitimate deduction without requiring proof of a contemporaneous intent to claim it, but then to disregard such deduction in determining tax loss for sentencing purposes.

C. Issue for Comment 1(B): Requiring that Deduction be Related to the Offense

For essentially the same reasons as those stated above regarding Issue for Comment 1(A), the NYCDL does not believe that the Commission should impose a requirement that a deduction be related to the offense in order for it to be considered. To give the sentencing court proper latitude to take all relevant circumstances into account, and to maintain consistency with §2T1.1's basic focus on the amount of tax loss as a measure of harm to the public fisc, the NYCDL believes that there should be no specific requirement that the unclaimed deduction be related to the offense. A sentencing court would retain discretion to find that in the specific circumstances of a particular case, an unrelated deduction is not legitimate and thus should not be included in the computation.

D. Issue for Comment 1(C): Are there Differences Among the Various Types of Tax Offenses that Would Make it Appropriate to Have Different Rules on the Use of Unclaimed Deductions?

The NYCDL believes that it would not be useful or appropriate to have different rules on the use of unclaimed deductions for different types of tax offenses. While the example referenced by the Commission, a restaurant owner who keeps two sets of books, is a circumstance where it may be likely that a court would find that unclaimed deductions are legitimate and proven, it is just one example. There are countless other potential circumstances where a sentencing court could make a similar finding. Consistent with our views regarding Option 3 and our general view that the sentencing judge is best situated to evaluate the specific circumstances of each case, the NYCDL believes that assessing the legitimacy of an unclaimed deduction is the only guidepost needed, and that courts should not be restricted to any specific category of cases in which they may take unclaimed deductions into account.

E. Issue for Comment 2: Does the reference to "Credits, Deductions or Exemptions" Provide Sufficient Clarity as to what Potential Offsets the Court May Consider?

The dispute in the *Psihos* case referenced by the Commission in Issue for Comment 2 regarding whether sums at issue constituted an above-the-line deduction or a below-the-line deduction arose because the defendant was trying to avoid the harsh categorical rule disallowing consideration of any unclaimed deductions. If the Commission adopts Option 1, as the NYCDL recommends, it appears that similar disputes are unlikely to occur in the future. Nevertheless, to provide further clarity on this issue, the NYCDL believes that there would be some benefit for the language of the amendment to be broadened to reference "credits, deductions, exemptions *or other legitimate offsets*." This would make clear that offsets such as losses, which are not technically considered credits, deductions or exemptions under the tax law, may be considered in computing tax loss.

II. ISSUE FOR COMMENT: TRADE SECRETS

The Commission has Requested Comment with respect to the Sentencing Guideline currently applicable to offenses prosecuted under 18 U.S.C. §§1831 and 1832. These sections prohibit "Economic Espionage" and "Theft of Trade Secrets" respectively. Economic Espionage is defined in Section 1831 as the theft, misappropriation or other unauthorized use of a trade secret with the intent of benefiting a foreign government and was amended last year to increase the financial penalty for individuals from a maximum fine of $500,000 to $10,000,000 and for organizations from $10,000,000 to the greater of $10,000,000 or 3 times the value of the stolen trade secret.

As part of the statute amending Section 1831, Congress directed the Commission to consider whether the current Guideline and policy statements governing Trade Secret offenses,

set out at §2B1.1(b)(5), adequately address both the crime of Economic Espionage in order to reflect the Congressional intent that penalties for this crime reflect the seriousness of this offense and the "simple" misappropriation of trade secrets crime set out at Section 1832. The directive also asked the Commission to consider whether there should be additional enhancements for the transmission of a stolen trade secret outside the United States both where the intent is to benefit a foreign government and where no such intent is alleged.

In response to this directive, the Commission has presented several Requests for Comment intended to inform the Commission both what it should consider in assessing the appropriate response to the Congressional directive and whether and how the current Guideline scheme should change. The NYCDL understands that Congress has expressed concern over the dangers of the crime of Economic Espionage and recognizes that the expressed concern could justify the increase in the enhancement at §2B1.1(b)(5) from 2 levels to 4 levels. The NYCDL is not familiar with the data, if any, on which Congress relied in deciding to enhance the penalty for Economic Espionage and takes no position on whether the increased enhancement is warranted.

However, as we note below, with respect to the Commission's questions concerning whether the Guidelines treat "simple misappropriation" seriously enough (Request 3) or whether to create a tiered enhancement that would provide a 2 level enhancement for "simple misappropriation," a 4 level enhancement if the defendant transmitted or attempted to transmit the trade secret outside the United States (presumably still "simple misappropriation"), and a 5 or 6 level enhancement for Economic Espionage, the NYCDL does not see any justification for creating new enhancements in this area. As to domestic "simple misappropriation," the Guidelines have never included an enhancement for this crime and there is nothing about Congress's concern over Economic Espionage that would translate into a concern that there is a

need or justification to increase the penalties for the domestic misappropriation of trade secrets. Absent strong statistical evidence providing a basis to increase this penalty, the NYCDL opposes the creation of an enhancement for domestic misappropriation.

As to creating any enhancement, let alone a 4 level enhancement, where the trade secret was transmitted outside the United States for a purely commercial purpose, the NYCDL believes that creating a differentiation between domestic and international misappropriation of a trade secret ignores the legitimate cross-border aspect of commerce and the proliferation of multi-national corporations. The NYCDL also believes that attempting to differentiate between domestic and international theft of a trade secret will create unnecessary issues for sentencing litigation as to whether a trade secret was stolen to harm or benefit the foreign or domestic aspect of either the victim or recipient company. As noted above, in order to avoid these complications at sentencing, and in light of the absence of any clear Congressional concern over this issue, the NYCDL takes no position on whether an enhancement is warranted for Economic Espionage, and does not believe that any other enhancements are warranted.

III. PROPOSED AMENDMENT: COUNTERFEIT MILITARY PARTS

On December 31, 2011, Congress passed the National Defense Authorization Act for the Fiscal Year 2012, Pub. L. 112-81, which provided for an amendment to 18 U.S.C. § 2320. The amendment specifically criminalized and enhanced the punishment for trafficking in "counterfeit military goods and services, the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or national security." 18 U.S.C. § 2320(a)(3). The Commission has proposed four different sentencing

guidelines options for this new offense. The NYCDL supports Option 1, the option that most closely adheres to the statutory language.

The text of the statute makes clear that the heightened criminal penalties in Section 2320 apply only to those counterfeit military goods that can cause significant harm to the military and its personnel. The Congressional record indicates that Congress sought this enhanced punishment for counterfeit military goods that are truly dangerous, like "counterfeit body armor that could fail in combat," 17 Cong. Rec. S7638-02 (Nov. 17, 2011), and the statute reflects this intent. "Counterfeit military good or service," is defined broadly in Section 2320(f)(4), but the offense restricts the enhanced penalties to those goods or services "the use, malfunction, or failure of which" are likely to cause enumerated types of "significant harm." 18 U.S.C. § 2320(a)(3).

Option 1 tracks this statutory language and adheres to the evident Congressional intent; for this reason, the NYCDL considers it to be the most appropriate option. The other three options either sweep too broadly or unnecessarily increase the sentence for the offense. Option 2 applies the enhancement to any offense that "involve[s] a counterfeit military good or service," which means that the penalties would be enhanced even for offenses beyond the statutory scope and contradicts the intent of Congress to "target[] only particularly malicious offenders . . . ." 157 Cong. Rec. S4173-01 (June 29, 2011). Thus, under Option 2, offenses involving counterfeit military goods would be subject to enhanced penalties beyond those otherwise applicable generally to counterfeit goods, without regard to whether the offense created the risk of significant harm that the enhanced penalties were designed to address. *See* Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations at 7 (March 2011), available at http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf

(recommending the Sentencing Commission ensure that the sale of counterfeit goods indirectly impacting the military like “a counterfeit toner cartridge for a computer printer used at military headquarters” would not result in an enhancement).

Similarly, Option 3 applies the enhanced penalty to goods or services related to critical infrastructure, or used by or for a government entity in furtherance of the administration of justice. Again, this formulation would apply the enhanced penalty to numerous activities that are beyond the statutory intent, which focused on the risk to our armed forces posed by counterfeit military goods. In addition, the term "used by or for a government entity in furtherance of the administration of justice," is vague and could mandate enhanced penalties for conduct completely unmoored from the statute, such as counterfeit office products used by the Department of Justice.

Option 4 takes a different tack and references the statute to the guideline applicable to destruction of national defense material as opposed to providing for an enhancement within 2B5.3. Although this approach does not expand the scope of the statute, it provides a base offense level of 26 (or 32). This baseline far exceeds the Obama Administration’s recommendation that the base level for an offense involving counterfeit military goods be set at 14, a recommendation reflected in the three other options. *See* Administration’s White Paper on Intellectual Property Enforcement at 6; 157 Cong. Rec. S8631-01 (Dec. 15, 2011)). Treating the penalty as an enhancement, with a base level of 14, rather than referencing a guideline designed for extremely serious offenses with a far higher base offense level, better reflects the statute’s purpose and the Administration’s proposal.

Finally, if the Commission adopts the specific enhancement approach reflected in Option 1, we believe it should not be cumulative with the last specific enhancement in Section 2B5.3

(relating to the conscious or reckless risk of death or serious bodily injury). Option 1 fully accounts for this characteristic, and so if Section 2B5.3(b)(5) applies, no enhancement should be applied under 2B5.3(b)(6).

IV. PROPOSED AMENDMENT: ACCEPTANCE OF RESPONSIBILITY

The Commission seeks comment on whether it should resolve two separate circuit conflicts involving the guideline for acceptance of responsibility, Section 3E1.1(b), specifically focused on the level of discretion that exists in connection with the application of the third "acceptance of responsibility" point. The first Issue for Comment deals with whether the sentencing court has the discretion to deny the third level of reduction, even if the government has moved for such a reduction, as Section 3E1.1(b) requires. The second Issue for Comment is whether the government has the discretion to withhold making a motion for a third level of reduction even if it was not required to prepare for trial. We will address these Issues in order.

A. The NYCDL Recommends a Modification of the Proposed Language to Application Note 6 To Include the Term "Shall" rather than "May," Because It Is More Consistent with the Language of Section 3E1.1(b).

The Commission's proposed addition to Application Note 6 of Section 3E1.1 is meant to address a circuit conflict that has arisen regarding the discretion of a sentencing court to apply the additional one-level departure following a motion from the government. As the Commission knows, the PROTECT Act amended Section 3E1.1(b) to require that the government file a motion with the court stating that the defendant has assisted the authorities by timely notifying them of his intention to plead guilty as a prerequisite to granting the defendant a third reduction in his offense level for acceptance of responsibility. In *United States v. Williamson*, 598 F.3d 227 (5th Cir. 2010), the Fifth Circuit upheld the district court's denial of the government's motion where the defendant was found guilty after trial, was granted a new trial, and notified the

government of his intention to plead guilty before the government prepared for his retrial. In *United States v. Mount*, 675 F.3d 1052 (7th Cir. 2012), the Seventh Circuit took the opposite approach, holding that where the government moves for a third level deduction, such deduction is mandatory. It thus reversed and vacated the district court's denial of a third level where the defendant violated his terms of release on his own recognizance and became a fugitive.

The Commission has proposed to address this apparent conflict by adopting the Fifth Circuit's view and adding the following sentence to the end of Application Note 6:

> The court may grant the motion if the court determines that the defendant has assisted authorities . . . by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. In such a case, the 1-level decrease under subsection (b) applies.

The NYCDL disagrees with the Commission's proposal because it is inconsistent with the language of Section 3E1.1(b). In particular, the Commission's proposed language adds a level of discretion to the imposition of this third acceptance point that is not present in the Guideline. *See Mount*, 675 F.3d at 1057 ("The 2003 amendment left intact the language that . . . gives §3E1.1(b) its mandatory character, once the necessary conditions are satisfied."). Section 3E1.1(b) provides that the defendant's offense level should be decreased by an additional level if three conditions are met: (1) the defendant qualifies for a decrease under Section 3E1.1(a); (2) the defendant's offense level is greater than 16 before the operation of subsection (a); and (3) the government makes a motion as described in subsection (b). There is nothing in the language of the Guideline to suggest that the district court retains discretion to withhold the one-level deduction if all three conditions are met. Rather, if each requirement of Section 3E1.1(b) is met, the district court must grant a one-level reduction as part of its non-discretionary computation of the defendant's applicable Guidelines range. *Mount*, 675 F.3d at 1057 ("In our view, that means

that the correct interpretation of the current version of the guideline is that it retains its nondiscretionary character. If the conditions are satisfied, the one-level downward adjustment must be awarded."). This does not mean that the sentencing court ultimately must impose a sentence within the determined range, but rather that the guidelines calculation must include this reduction. *See United States v. Booker*, 543 U.S. 220, 264 (2005) ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."). As observed by the Seventh Circuit in *Mount*, this reading is consistent with the application of the Guidelines to other offense level adjustments. For example, a sentencing court could not deny a two-level increase to a defendant's offense level if the criteria for finding obstruction of justice are met. *See Mount*, 675 F.3d at 1058.

Although the 2003 amendment of Section 3E1.1 added the requirement of a government motion to trigger a third level of reduction under subsection (b), the amendment did not substitute permissive language for the Guideline's instruction to "decrease the offense level by 1 additional level" if the criteria set out in subsection (b) are met. Notably, every circuit to consider the pre-amendment version of subsection (b) concluded that this instruction was mandatory. *See id.* at 1057 (citing *United States v. Rood*, 281 F.3d 353, 357 (2d Cir. 2002); *United States v. Rice*, 184 F.3d 740, 742 (8th Cir. 1999); *United States v. Townsend*, 73 F.3d 747, 755 (7th Cir. 1996); *United States v. Tello*, 9 F.3d 1119, 1124 (5th Cir. 1993)).

Though Application Note 5 states that "the sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility," this Note, which does not mention subsection (b) and pre-dates the amendment, likely addresses the initial gating issue of whether the defendant has "clearly demonstrate[d]" acceptance of responsibility (thereby entitling him to the two-level reduction under Section 3E1.1(a)), rather than whether the government has been

spared the effort of preparing for trial. Indeed, the discretion accorded to the district court in determining the applicability of subsection (a) – which is a prerequisite to an additional reduction under subsection (b) – supports a reading of subsection (b) as mandatory, such that the Guideline establishes a two-pronged regime under which "both the court and the government must be satisfied that the acceptance of responsibility is genuine" before a third level reduction is awarded. *Id.* at 1058-59 (quoting *United States v. Sloley*, 464 F.3d 355, 359-60 (2d Cir. 2006)). Further, Application Note 6 makes clear that the government, as opposed to the court, "is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial."

The fact patterns in *Williamson* and *Mount*, the cases the Commission cites as forming the circuit conflict, illustrate the close determinations that arise on a case-by-case basis and which ought to be left to the government's reasoned judgment. In *Williamson*, although the defendant had been convicted at trial, and then successfully had that verdict reversed and vacated, warranting a new trial (and putting the government through considerable effort in that respect), the government determined that the expense and effort saved through the defendant's timely notification of his intention to plead guilty before his retrial was sufficient to warrant the third level reduction. Williamson's presentence report did not grant the third level reduction because "it would not have taken many resources to prepare for a retrial," 598 F.3d at 230, and the district court agreed. While it is a reasonable assumption that a retrial will require less preparation than the original trial, the individual circumstances of the case may still support the granting of a third level reduction, a determination that the government had made in this case.

Similarly, the facts of *Mount* presented a situation – the defendant's violation of his release on his own recognizance, necessitating the use of the U.S. Marshals Service in his

capture – in which the district court also denied the government's motion for the additional one-level reduction. The Seventh Circuit observed that, in denying the government's motion, the court "spoke only of the wasteful use of the Marshals Service, which is an agency within the Department of Justice whose interests ought to be addressed by the U.S. Attorney's Office." *Mount*, 675 F.3d at 1057. Although the district court was understandably agitated by the defendant's conduct, it was clear that the actions caused by the defendant's flight were not related to, and therefore had little to do with, the government's preparation for trial. The Seventh Circuit reversed the district court.

We propose that the Commission follow the language of the Guideline and the Seventh Circuit's decision in *Mount* and change the proposed language to include the term "shall" rather than "may," and deleting the phrase "the court determines that." With these changes, we believe that the Commission's proposed language reflects the mandatory nature of the Guideline:

> The court ***shall*** grant the motion if the defendant has assisted authorities . . . by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. In such a case, the 1-level decrease under subsection (b) applies. **[suggested new text in bold italics]**

B. The NYCDL Recommends that the Commission Follow the Lead of the Second and Fourth Circuits by Clarifying that the Government May Not Withhold a Motion under Section 3E1.1(b) on Grounds Unrelated to the Time Saved in Preparing for Trial

The Second Issue for Comment relating to §3E1.1 arises from an apparent circuit conflict as to whether the government may withhold moving for a third level reduction under Section 3E1.1(b) when there is no evidence that the government was required to prepare for trial, but the government argues that the government and the courts have not been permitted to "allocate their resources efficiently."

The Commission seeks comment on whether it should resolve this circuit conflict, and if so, how it should do so. The NYCDL encourages the Commission to address the circuit conflict by adopting the rule applied by the Second and Fourth Circuits, which have held that the government may withhold the motion only if it determines that it has been required to prepare for trial. As detailed below, this position is not only consistent with the plain text meaning of §3E1.1(b), but also ensures a process in which defendants are allowed to better assess the government's case against themselves and preserve their constitutionally protected rights, while still encouraging defendants to plead guilty in a timely and efficient manner.

The apparent circuit conflict involves the interpretation of the plain language of §3E1.1(b), which states in relevant part: "upon motion of the government stating that the defendant has assisted authorities . . . by timely notifying authorities of his intention to enter a plea of guilty, *thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate resources efficiently*." (emphasis added). Clearly, the italicized section asks if the defendant's timely notification of his/her intent to plead permitted the government to avoid preparing for trial. The second half of the clause, which contains the words "permitting the government and the court to allocate their resources efficiently" is a modifier describing the benefits to the government (and the court) of avoiding trial. This position was endorsed by the Second and Fourth Circuits, when they held, respectively, that the government may not refuse to make a 3E1.1(b) motion because a *Fatico* hearing was necessary, or because the defendant refused to waive his right to appeal. *See United States v. Lee*, 653 F.3d 170 (2d Cir. 2011); *United States v. Divens*, 650 F.3d 343 (4th Cir. 2011). By contrast, the Fifth and Ninth Circuits have held that the government may refuse to make a motion for a third level reduction when the defendant refuses to waive his appellate rights. *See United States v. Johnson*,

581 F.3d 994 (9th Cir. 2009); *United States v. Newson*, 515 F.3d 374 (5th Cir. 2008). Likewise, the Sixth Circuit has held that the government may refuse to make a motion under Section 3E1.1(b) when the defendant puts the government to the time and expense of litigating a motion to suppress. *See United States v. Collins*, 683 F.3d 697 (6th Cir. 2012).

While the circuit conflict was created, in part, by competing legal interpretations of Section 3E1.1(b), all courts seem to agree that the government does not have unfettered discretion to refrain from moving for a third level reduction. If the government's refusal is based on an unconstitutional motive, or if the government acts in bad faith, courts will grant the third level reduction. *See Lee*, 653 F.3d at 173; *Collins*, 683 F.3d at 705. The NYCDL proposes that the Commission go one step further by clarifying that the government may not withhold a motion under Section 3E1.1(b) on grounds unrelated to the time or resources spared in preparing for trial. In so doing, the Commission would promote Section 3E1.1(b)'s purpose of encouraging cooperation with prosecutors in avoiding the preparation for trial, while according protection to the numerous rights of a defendant, including, for instance, a defendant's right to challenge the government's proposed sentencing calculation and to preserve one's right to appeal the district court's sentencing findings.

The Application Notes for Section 3E1.1 further clarify the scope of the government's discretion under subsection (b). As the Fourth Circuit discussed in *Divens*, Application Note 6, and the subsequent background commentary, limits the government's inquiry to "*whether* the defendant's assistance has relieved it of preparing for trial." 650 F.3d at 346. Specifically, Application Note 6 posits that "the Government is in the best position to determine whether the defendant has assisted authorities *in a manner that avoids preparing for trial . . . .*" (emphasis added). Once the government has determined that the defendant's assistance has alleviated it of

this burden, and assuming that the other requirements of subsection (b) are met, the background commentary that follows Application Note 6 contemplates, in non-permissive language, that the third level reduction will be awarded:

> Subsection (b) provides an additional 1-level decrease for a defendant . . . who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility . . . thereby meriting an additional reduction.

As observed by the Second Circuit, the Application Notes for Section 3E1.1 "refer only to the government's ability 'to determine whether the defendant has assisted authorities in a manner that avoids preparing *for trial*.' The Notes do not refer to resources saved by avoiding preparation for . . . any other proceeding." *Lee*, 653 F.3d at 174 (internal citation omitted).

In addition to the language of Section 3E1.1(b) and its accompanying Application Notes, there are compelling policy reasons for limiting the government's discretion under subsection (b) to determining whether the defendant's assistance has avoided the need to prepare for trial. For example, in *Collins*, the defendant sought to assert his constitutional right to challenge the search of a car and the introduction of his statements; the government apparently took the position that any defendant who moved to suppress evidence would not be entitled to the third level reduction and the Circuit found that the government acted within its rights. *See Collins*, 683 F.3d at 705. Although the *Collins* court rationalized this ruling by stating that a defendant can trade away constitutional rights for a lower sentence, their logic violates the obvious intent of §3E1.1(b)—to deny a point only if the government needed to prepare for trial. There should be a meaningful opportunity for a defendant to evaluate and test the government's case before pleading guilty, and so long as the government is not forced to prepare for trial, the Guideline clearly states that defendants should receive the benefit of the three level reduction.

In *Lee*, the Second Circuit noted that a defendant who pleads guilty has a due process right to challenge errors in the presentence report that might impact his sentence. 653 F.3d at 174. The Court observed that a defendant should not be punished with the loss of a third level reduction for electing to exercise this right. *Id.*

Second, and closely related, it is not clear that the government's negotiation of an appellate waiver from a defendant, in exchange for making a motion under Section 3E1.1(b), significantly reduces the resources that the government must expend in post-judgment proceedings. As the Fourth Circuit noted in *Divens*, "a defendant's unconditional guilty plea in and of itself limits his grounds for appeal, restricting subsequent attacks on a conviction to the question of whether the plea 'was both counseled and voluntary,'" which would typically "fall outside the scope of any appellate waiver." 650 F.3d at 350 (quoting *United States v. Broce*, 488 U.S. 563, 569 (1989)). Further, to the extent that resources expended on appeals would otherwise be contributed to separate prosecutions, the Fourth Circuit observed that Section 3E1.1(b) "addresses only the prosecution of a defendant's 'own misconduct,' not the defendant's assistance in prosecuting other cases." *Id.* at 349 n.4.

The language of Section 3E1.1(b), as well as the policy considerations addressed in *Lee* and *Divens*, compel the conclusion that the government should not be permitted to withhold a motion under Section 3E1.1(b) for reasons unrelated to the preparation for trial. We ask that the Commission resolve this circuit conflict by adopting the holdings of the Second and Fourth Circuits.

CONCLUSION

The NYCDL once again wants to thank the Commission for offering us the opportunity to comment on the proposed amendments. We look forward to continuing dialogue with the Commission as it continues in its efforts to modify the Guidelines as more experience dictates change.

New York, New York
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Respectfully submitted,

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