

**REVISED PROPOSED AMENDMENT: CIRCUIT CONFLICT CONCERNING CERTAIN FRAUDULENT MISREPRESENTATIONS
(Proposed Amendment 6 in User Friendly, Volume One)**

Synopsis of Proposed Amendment: *This proposed amendment resolves a circuit conflict regarding the scope of the enhancement in subsection (b)(4)(A) of §2F1.1 (Fraud and Deceit) for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency. Specifically, the conflict concerns whether the misrepresentation applies only in cases in which the defendant does not have any authority to act on behalf of the covered organization or government agency or if it applies more broadly (i.e., to cases in which the defendant, who has a legitimate connection to the covered organization or government agency, misrepresents that the defendant was acting solely on behalf of the organization or agency). Compare e.g., United States v. Marcum 16 F.3d 599 (4th Cir. 1994) (enhancement appropriate even though defendant did not misrepresent his authority to act on behalf of the organization but rather only misrepresented that he was conducting an activity wholly on behalf of the organization), with United States v. Frazier, 5 F.3d 1105 (10th Cir. 1995) (application of the enhancement is limited to cases in which the defendant exploits his victim by claiming to have authority which in fact does not exist).*

The proposed amendment provides for application of the enhancement if the defendant falsely represented that the defendant was acting to obtain a benefit for a covered organization or a government agency when, in fact, the defendant intended to divert all or part of that benefit (for example, for the defendant's personal gain), regardless of whether the defendant actually was associated with the organization or government agency. Under either scenario, it is the representation that the defendant was acting to obtain a benefit for the organization that enables the defendant to commit the offense. To avoid double counting in the case of an employee described in clause (B) who also holds a position of trust, the proposed amendment provides an application note instructing the court not to apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) if the same conduct forms the basis both for the enhancement in §2F1.1(b)(4)(A) and the adjustment in §3B1.3.

During FY 99, 104 of the 6,401 (1.6%) cases sentenced under §2F1.1 received an enhancement under subsection (b)(4) (staff was unable to determine which prong of this adjustment was relevant). Therefore, the additional number of defendants who could receive this enhancement is 6,297. Information necessary to apply this new enhancement is unavailable in the dataset. However, enhancements under subsection (b)(4) generally are rare. Even in the unlikely event that the number of offenders who receive this enhancement doubles to 208, the effect on the prison population would be minimal (approximately 46 additional beds).

Proposed Amendment:

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

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Commentary

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Application Notes:

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5. ~~Subsection (b)(4)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.~~ Certain Fraudulent Representations.—Subsection (b)(4)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant’s personal gain). Subsection (b)(4)(A) would apply, for example, to the following:

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

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

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