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Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW - 14th Floor
Washington, D.C. 20004

Re: Proposed Amendments to Federal Sentencing Guidelines

Dear Chairman Wilkins:

I write first to thank you for your kind letter of March 6, 1991, and for having given our organization the opportunity to express its views on proposed amendments to the sentencing guidelines. As I mentioned at the public hearing, the New York Council of Defense Lawyers has not previously participated in dialogue with the Commission, but we would very much like to do so in the future. Our members pride themselves as being among the "leaders" of the defense bar in New York and elsewhere. We hope that our collective, daily experience in practicing under the sentencing guidelines might be of use to you and to other Commissioners and staff members.

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With respect to specific proposed guideline changes, we would like to amplify briefly on the views expressed in our previous written submission and oral presentation.

First, with respect to downward departures based on substantial assistance to authorities (Guideline § 5K1.1), we hope that the Commission will entertain our view that a government motion should not be required in all cases as a precondition to a departure. We recognize that the government typically does act in good faith, and that individual prosecutors generally do make a departure motion where the circumstances so warrant. However, in a small but significant number of cases, prosecutors have unreasonably failed to make departure motions. I mentioned at the public hearing an example from my own practice, in which the "Departure Committee" of a particular U.S. Attorney's Office simply failed to convene prior to sentence, and therefore failed to make the motion contemplated by § 5K1.1. There was no "bad faith" involved in this case, but the sentencing judge felt compelled to distort the application of the guidelines in other respects in order to reach the sentence that would have been appropriate had the Government made the departure motion to which my client was entitled.

Other Council members likewise have had matters in which individual prosecutors, for a variety of reasons, have refused to make departure motions despite significant cooperation from the defendant. Frequently, disputes arise in the context of defendants who are not the first ones "through the door," but are the second or the third defendants to commit to cooperation, whose assistance may not have been as important as that rendered by the first cooperator. A government decision not to make a departure motion in such cases may leave the cooperator with nothing to show for his assistance, since frequently a sentence at the bottom of a guideline range is already indicated, and the only meaningful reward for cooperation is a departure.

We recognize that the government's evaluation of a defendant's cooperation must be of prime importance. Judges, however, have always relied heavily on what a prosecutor has to say about a defendant's cooperation, and there is no reason to think that courts will routinely grant departures where the government has a well-founded objection. At the very least, we believe that courts should have the power to grant a departure in those rare circumstances in which the government's failure to make a 5K1.1

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motion is objectively unreasonable. The "bad faith" standard, articulated in the current proposed application note 1 to § 5K1.1, is far too restrictive.

Finally on this score, we wish to call the Commission's attention to the Second Circuit's recent decision in United States v. Garcia, Dkt. No. 90-1274 (February 8, 1991). The court there affirmed a downward departure for a defendant whose early cooperation and willingness to testify led his co-defendants to plead guilty and broke the "log jam" in the case. For reasons not articulated in the opinion, the Government failed to make a motion for a downward departure under § 5K1.1. The court nevertheless granted a departure based on "activities facilitating the proper administration of justice." We believe that this case is an illustration of a situation in which the sentencing judge correctly believed the defendant to be entitled to a departure despite the Government's failure to file a departure motion. Judges should have the ability to grant such departures without engaging in the kind of strained logic and intellectual gymnastics to which the trial judge and the Second Circuit had to resort in the Garcia case.

In our previous written submission, we also addressed a proposed amendment to § 1B1.8, which is the guideline that permits a cooperating defendant to agree with the government that self-incriminating information that the defendant provides to the prosecutors will not, under certain circumstances, be used against the defendant in the calculation of his sentence. One proposed application note would restrict the availability of such agreements to those that relate "to the provision of information about the unlawful activities of others." Thus, under the proposed application note, § 1B1.8 would not apply to a defendant's agreement to supply information about his own unlawful activities.

As we pointed out in our written submission, and as I emphasized in my oral remarks, there are certain cases in which the government may have a strong interest in obtaining information from a defendant that does not relate to illegal acts of others. The paradigm case involves espionage. The government may have a strong interest -- indeed, an overwhelming interest -- in finding out the full extent of the defendant's own crimes in order to determine the amount of damage done to national security. In such cases, the government and the defendant should be able to agree that a defendant may provide information about his own crimes without fear

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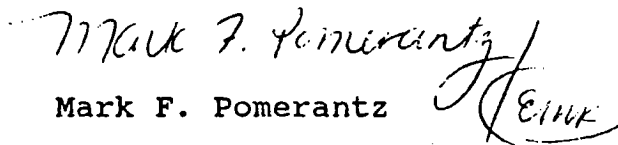
of thereby enhancing his sentence. We therefore think that the proposed application note should not be adopted, and that the existing language of § 1B1.8 should be changed to delete the phrase "concerning unlawful activities of others" from § 1B1.8(a).

At an appropriate time, we would like to express our views on other important guideline issues. For instance, we share the views of many others that substantial injustice occurs in cases involving defendants who play minimal roles in larger criminal enterprises, particularly in drug and fraud cases. As the guidelines are now written, for instance, a minimal actor in an offense involving 10 kg. of marihuana will be sentenced at a base offense level 12 (level 16 less a 4 level reduction for minimal role). The main defendant in a case involving 2 kg. of marihuana, however, will be sentenced at a base offense level 10. In our view, this is an unjust result.

We are aware that the Commission members and their staff will be studying these and other important guideline issues in the upcoming weeks and months. We would like to contribute our expertise and analysis whenever and wherever we may be helpful. We believe that our members share a strong interest with the Commission in achieving a fair, just, and intelligent set of sentencing guidelines.

Sincerely yours,

Mark F. Pomerantz

A handwritten signature in dark ink, appearing to read "Mark F. Pomerantz", with a stylized flourish or initial at the end.