

Proposed Amendments 2(A) and 2(B):
§ 1B1.8 - Use of Certain Information

Two amendments have been proposed with respect to § 1B1.8, which relates to the use of incriminating information pursuant to an agreement with the government. The first amendment clarifies the operation of the Guideline and further details the Commission's policy that a cooperating defendant not be penalized as a result of having provided incriminating information pursuant to an agreement with the government. The second amendment would broaden § 1B1.8 to apply to information provided by a defendant concerning himself and would thus eliminate the requirement that to qualify for protection under § 1B1.8, the information provided relate to the activities of others. Both of these proposed amendments have the unqualified support of the NYCDL.

The provisions of § 1B1.8 first became effective on June 15, 1988, more than a year and a half following the effective date of the Guidelines. Essentially, § 1B1.8 seeks to preserve the ability of government attorneys and defense counsel to enter into agreements whereby a defendant who volunteers information to the government is appropriately assured that his truthful disclosures will not be detrimentally used against him, either to further prosecute him or to increase his sentence, provided that he has otherwise complied with the terms of his agreement with the government.

Although § 1B1.8(a) protects against the use of such information "in determining the applicable guideline range," the current version of Application Note 1 advocates much broader protection, and sets forth the policy of the Commission that a cooperating defendant "should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose." Proposed Amendment 2(A) clarifies this Application Note by making clear the Commission's policy that information provided under § 1B1.8 not be used by the court either in considering an upward departure or in selecting a sentence within the applicable guideline range. We believe that the proposed language is a thoughtful and necessary means of further ensuring that a defendant not be unfairly penalized for his or her truthful disclosures to the authorities.

Proposed Amendment 2(B) would remove the limitation in § 1B1.8 that now makes it applicable only to disclosures by a defendant concerning the activities of others. In our testimony and written statement to the Commission last year, as well as in our letter dated August 28, 1991, the NYCDL urged the Commission to expand the coverage of § 1B1.8 to encompass those few instances in which the defendant, in truth, can offer no evidence implicating anyone other than himself. As we previously stated:

To be sure, the government rarely enters into cooperation agreements except with defendants believed to possess

information concerning the unlawful activities of third parties. However, there are occasions on which the government may elect to enter into an agreement with a defendant to provide information about his own criminal activities -- either to enable the government to close out its investigative files or as part of an agreement by which the defendant will voluntarily make restitution to the victims of his various misdeeds. Where the parties thus agree that the information provided by the defendant should not be used against him in imposing sentence, we perceive no policy reason to exclude such agreements from the ambit of § 1B1.8. The government and the defense should be permitted to enter into such agreements with the knowledge that the Guidelines and the court will effectuate the parties' intent.

Accordingly, the NYCDL recommends that the Commission adopt both proposed amendments to § 1B1.8.²

² In last year's submission to the Commission, we noted that at least one prosecutor's office has refused across-the-board to afford any cooperating defendant the protection embodied in § 1B1.8. We recommended then -- and do so again -- that this issue be considered in connection with the next amendment cycle. We also again urge the Commission to consider amending Application Note 3 to § 1B1.8, to express the view that the Guideline applies to so-called "proffer agreements," by which many defendants provide self-incriminating information prior to entering into more formal cooperation agreements with the government.

Proposed Amendment 5:
§§ 2B1.1 and 2F1.1 - Larceny/Theft
and Fraud/Deceit Tables

We oppose any changes in the theft and fraud tables that would increase the base offense level for a particular defendant solely because of the amount of the alleged loss. We believe that no need has been shown to increase the sentences already mandated for loss-based offenses.

Moreover, we oppose proposed changes in the theft and fraud tables that would create a "cliff effect" as the amount of loss increases (e.g., table 3, which increases the base levels by 2 points at a time), and encourage the continuation of theft and fraud tables that provide for more graduated increases (for example, table 1).

We recognize that one of the reasons for increasing the base offense levels in the theft and fraud tables is the proposed elimination of the "more than minimal planning" offense characteristic. We believe that this factor should be retained.

The stated reason for eliminating this offense characteristic is because it has "proven difficult to apply consistently in practice." However, rather than simply eliminating this characteristic and leaving the base offense levels where they currently are, the proposed amendments would increase the base offense levels in the theft and fraud tables across the board. This effectively removes from judges their ability to differentiate defendants who have

committed the same crime but with different levels of planning and sophistication. The current Application Notes to 1B1.1, in our view, appropriately contemplate that distinction ("more than minimal planning 'means more planning than is typical for commission of the offense in a simple form.'"). Although we recognize that the goal of the Sentencing Guidelines is to promote uniformity in sentencing, surely (for example) an unsophisticated fraud by a desperate defendant should not receive the same sentence as a pre-planned and sophisticated fraud of venality, which coincidentally resulted in the same amount of loss.

Proposed Amendment 6:
§ 2F1.1 - Fraud and Deceit

A proposed amendment of § 2F1.1 would increase the base offense level four levels "[i]f the offense affected a financial institution." We oppose this proposed amendment.

Section 2F1.1(b) already provides for a four-level increase if the offense "substantially prejudiced the safety and soundness of a financial institution." That provision allows substantial additional punishment for high-level banking crimes, and itself accomplishes the stated purposes of this proposed amendment, "to reflect the increase by Congress during the past several years in the maximum terms of imprisonment from 20 to 30 years for violation of Title 18 bank fraud and embezzlement offenses." Even without any increase in the fraud tables, the simplest false statement on

an application for a relatively modest loan would require a prison sentence. We are unable to see any law enforcement need for this.

Proposed Amendments 18(a) and (B):
§ 3B1.2 - Role in the Offense

We oppose eliminating the option currently available that permits a three-level reduction under § 3B1.2 if the court finds that a defendant's role in the offense falls somewhere between minimal and minor conduct. We believe that the court should continue to have the option to sentence defendants between the two levels, so that defendants who have different levels of culpability are sentenced to appropriately different sentences.

We endorse the proposed amendment to the Application Notes in § 3B1.2 that would allow the court to depart downward, below the applicable Guideline range, when a defendant's minimal participation exists to an extent not otherwise contemplated by the Guidelines.

Issue for Comment 28(A): Chapter
Five, Part A - Sentencing Table

The NYCDL opposes the proposed creation of Criminal History Category 0 as currently promulgated in the relevant Working Group Report. We agree that proposed Category 0 would appropriately recognize that there should be a beneficial effect in being a "first offender" and we thus endorse the concept of Category 0. As promulgated by the

- Working Group, however, Category 0 would have a disproportionate impact on racial minorities and should be viewed with extreme caution.

The Working Group's definition of a "true first offender" with zero points and with no known criminal history of any kind is, we believe, unfair. As undoubtedly demonstrated by empirical data, inner-city youth is more susceptible to arrest or charges later found to be without substance than are white defendants. Many of these charges are dismissed before they go to court. Others are dismissed after they go to court. Some of these are perfectly consistent with true innocence.

The notion that a dismissed charge should prevent the defendant from being considered a "true first offender" simply presumes that if he were truly innocent, he would not have been in harm's way and is therefore somehow less redeemable than someone who was never arrested at all. This concept does not account for the fact that there are areas subjected to increased police surveillances and to police action that is not racially balanced -- in contrast to white middle-class communities, where a stop or an arrest generally will not occur absent true probable cause.

While it is not clear that the disproportionate impact on racial minorities would, if unintended, be sufficient to set aside the Guideline under a strict scrutiny

test, it would certainly be subject to divisive and unnecessary litigation. See Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

Consequently, we believe that to be denied the benefit of Category 0, the defendant should have a prior arrest that, at a minimum, resulted in some accountability, even if less than a crime (e.g., a conviction of a violation, or an offense). Such a factor could then legitimately be considered in depriving a criminal defendant of the benefit of Category 0 without taxing that defendant with charges as to which he or she may well have been blameless.

This approach would be more consistent with the Working Group's theory that prior contact with the criminal justice system that has not resulted in a conviction within the meaning of the current Guidelines would nonetheless seem to indicate a propensity towards some criminal behavior that should deprive the defendant of the benefit of Category 0.

It should be noted that there is little, if any, authority nationally for consideration of an arrest in sentencing enhancement. While courts, on sentencing, have traditionally been permitted to consider acquittals, they have only been allowed to do so upon a finding (by a preponderance of the evidence) that the defendant in fact committed the crime. In contrast, the Working Group's proposal would penalize the defendant for an arrest that resulted in a dismissal, without any fact-finding requirement

as to the defendant's guilt or innocence.³ The dangers of racial disparity and violation of due process are too great to justify any perceived benefit that might be gained.

Proposed Amendment 35(A):
§ 6B1.2 - Sentencing Procedures and Plea Agreements

We support the addition of Commentary to § 6B1.2 that would encourage the government to disclose to the defendant, prior to entry of a guilty plea, the government's analysis of the application of the Sentencing Guidelines. Such disclosure by the government would reduce the uncertainty that currently prevents some defendants from pleading guilty, and might also have the effect of reducing litigation over the application of the Guidelines. For this reason, courts have sought to persuade the government to make such disclosure, see United States v. Pimentel, 932 F.2d 1029, 1034 (2d Cir. 1991), and at least one prominent United States Attorney's Office (i.e., the Southern District of New York) has in the past year instituted a policy whereby prosecutors, if requested, will advise a defendant, in writing, of the government's analysis under the Guidelines. We believe that the Commission should endorse this approach by amending § 6B1.2 as proposed.

³ Moreover, in the event of an inaccuracy, police arrest records -- which might well be the only records reflecting a dropped charge -- would be extremely difficult for the defense to counter years later.

**Issues for Comment 35(B) and (C):
Chapter Six - Sentencing Procedures
and Plea Agreements**

In response to Issue for Comment 35(B), we oppose any amendment of the Guidelines that would allow consideration on sentence of conduct that is described in a count dismissed by plea agreement and does not fall within the scope of relevant conduct under § 1B1.3.

Prior to the Guidelines, a defendant's "relevant conduct" could be but was never required to be considered in imposing sentence. Section 1B1.3's relevant conduct provisions, and particularly those of § 1B1.3(a)(2) involving acts that were "part of the same course of conduct and common scheme or plan as the offense of conviction," already serve to increase sentences substantially, and thereby to increase the prosecution's power over sentences.

Those offenses that do not, under the present Guidelines, allow for the consideration on sentence of other uncharged or unconvicted conduct should not be changed, so as to permit upward departures on the basis of such conduct. Under the Guidelines structure, the very reason that sentencing levels for such offenses do not take into account non-offense conduct is that these offenses can "readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing." Background comment, § 1B1.3. For example, when one of a defendant's two robbery counts is dismissed, none of the factors that the Commission has

concluded warrant increasing the offense level for uncharged or dismissed "relevant conduct"⁴ supports a court's consideration on sentence of the facts involved in a "discrete," dismissed robbery count.

Allowing prosecutors to charge additional unprovable offenses and then seek upward departures on the basis of dismissed counts would substantially do away with this basic distinction and would result in further, unwarranted control by the prosecution over sentencing.

With respect to Issue 35(C), we oppose any Guideline provisions specifically addressing any of the enumerated possible uses of conduct for which the defendant has been acquitted. While we understand that pre-Guidelines courts sometimes took such conduct into consideration on sentence, they did so very rarely, and we believe that encouragement of this use by any specific Guideline provisions would be inappropriate.

**Proposed Amendment 36(T):
§ 3B1.3 - Abuse of Position
of Trust or Use of Special Skill**

We support this proposed amendment and agree that it provides a fairer and more workable definition of that conduct which justifies an adjustment on the basis of an abused position of trust.

⁴ E.g., additional quantities in a drug case, or additional loss amounts in a mail fraud case.

Proposed Amendments 33(A) - (D):
Chapter Five (Departures)

We support all of the proposed amendments that would expressly permit downward departures in those situations in which offender characteristics that are ordinarily not relevant to a departure either are present to an unusual degree or in combination present an unusual circumstance meriting a downward departure. Proposed Amendments 33(A) and (B) incorporate recommendations of the Judicial Conference, which noted that in particular cases, the present Guidelines have produced unduly harsh results that are inconsistent with the rehabilitative purposes of sentencing. We believe that the recommendations of the Judicial Conference, which reflect the combined experience of sentencing judges across the country, should be adopted.

In a similar vein, we believe that a court should be able to consider a defendant's lack of youthful guidance, history of family violence, or a similar factor as a ground for departure, where such factors are present to an unusual degree or are combined with other factors. We would also welcome an amendment that permits a downward departure, in appropriate circumstances, for a defendant of an advanced age.