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MEMORANDUM FOR ASSISTANT COMMISSIONER (CRIMINAL INVESTIGATION)

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Subject: 1998 Sentencing Guideline Amendments

The purpose of this memorandum is to apprise you of the 1998 amendments to the Sentencing Guidelines, to the extent they relate to offenses involving taxation, which the United States Sentencing Commission ("Commission") submitted to Congress on May 1, 1998. Unless Congress enacts legislation contrary to the amendments, the amendments will become effective on November 1, 1998.

Background

On January 6, 1998, the Commission set forth its proposed amendments for public comment. In response thereto, the Service submitted written comments and presented verbal comments at the public hearings in San Francisco and Washington,

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Discussion

U.S.S.G. §§ 2T1.1, 2T1.4 and 2T3.1 are amended to provide a two level enhancement for conduct related to sophisticated concealment. The primary purpose of this amendment is to conform the language of the current enhancement for "sophisticated means" in the tax guidelines to the equivalent language of the new sophisticated concealment enhancement provided in the fraud guideline. Unfortunately, a significant distinction between the tax guideline and the fraud guideline, which was not taken into consideration for purposes of conforming the two guidelines, is that the fraud guideline contains a "floor" offense level of 12 whereas the tax guidelines only provide for a two level enhancement. Additionally, the amendment resolves a circuit conflict in regard to whether this enhancement is to be applied based on the personal conduct of the defendant or the overall offense conduct for which the defendant is accountable. Consistent with the usual relevant conduct rules and following the Second Circuit's holdings in United States v. Lewis, 93 F.3d 1075 (2d Cir. 1996) and United States v. Richman, 93 F.3d 1085 (2d Cir. 1996), application of this new enhancement for sophisticated concealment is based on the overall offense conduct for which the defendant is accountable.

Prior to this amendment, subsection (b)(2) of §§ 2T1.1, 2T1.4 and 2T3.1 provided, "[i]f sophisticated means were used to impede discovery of the existence or extent of the offense, increase by two levels." Subsection (b)(2) will now provide, "[i]f the offense involved sophisticated concealment, increase by 2 levels." The amendment also adds commentary to §§ 2T1.1, 2T1.4 and 2T3.1 which provides:

[f]or the purposes of subsection (b)(2), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment. Emphasis added.

U.S.S.G. § 5K2.0 has been amended to reference in its general departure policy statement the United States Supreme Court's decision in United States v. Koon, 518 U.S. 81 (1996). The amendment (1) incorporates the principal holding and key analytical points of Koon into the general departure policy statement of § 5K2.0; (2) deletes language inconsistent with the holding in Koon; and, (3) makes minor, non-substantive changes that improve the language of § 5K2.0.

Specifically, commentary is added to § 5K2.0 which provides:

The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United States, 518 U.S. 81 (1996). Furthermore, "[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many ore Guidelines cases than appellate courts do." *Id.* at 98.

U.S.S.G § 3B1.3, Abuse of Position of Trust or Use of Special Skill, has been amended to resolve a circuit conflict by establishing that the two level increase for abuse of a position of trust applies to a defendant who is an imposter, as well as a person who legitimately holds and abuses a position of trust. Compare United States v. Gill, 99 F.3d 484 (1st Cir. 1996) (adjustment applied to a defendant who posed as

a licensed psychologist) and United States v. Queen 4 F.3d 925 (10th Cir. 1993) (adjustment applied to a defendant who posed as a financial broker), cert. denied, 510 U.S. 1182 (1994) with United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994) (defendant who posed as a physician did not occupy a position of trust). The amendment adopted the majority appellate view and provides that the abuse of a position of trust adjustment applies to an imposter who pretends to hold a position of trust when, in fact, he does not. The Commission determined that, particularly from a crime victim's point of view, an imposter who falsely assumes and takes advantage of a position of trust is as culpable and deserving of increased punishment as a defendant who actually holds a position of trust and abuses it.

Commentary to U.S.S.G. § 3B1.3 has been added and provides, in pertinent part:

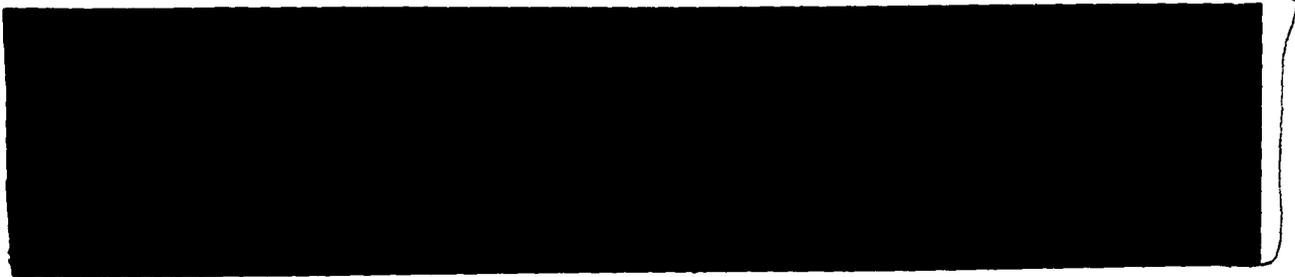
This enhancement also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not. For example, the enhancement applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker . . . In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the defendant would have if the position were held legitimately.

U.S.S.G. § 3C1.1, Obstructing or Impeding the Administration of Justice, has been amended to resolve a circuit conflict as to whether the adjustment applies to obstructions that occur only in regard to the defendant's offense of conviction or to a closely related case. Compare United States v. Powell, 113 F.3d 464 (3d Cir.) (adjustment applies if defendant attempts to impede the prosecution of a co-defendant who is charged with the same offense for which the defendant was convicted), cert. denied, 118 S. Ct. 454 (1997), United States v. Walker, 119 F. 3d 403 (6th Cir.) (same), cert. denied, 118 S. Ct. 643 (1997), United States v. Acuna, 9 F.3d 1442 (9th Cir. 1993) (adjustment applies if a defendant attempts to obstruct justice in a case closely related to his own) and United States v. Bernaugh, 969 F.2d 858 (10th Cir. 1992) (adjustment applies when a defendant testifies falsely at his own hearing about co-defendants' roles in the offense) with United States v. Perdomo, 927 F.2d 111 (2d Cir. 1991) (cannot apply adjustment based on obstructive conduct outside the scope of the charged offense) and United States v. Partee, 31 F.3d 529 (7th Cir. 1994) (same). The amendment adopts the majority view, holding that the obstruction must relate either to the defendant's offense of conviction, including any relevant conduct, or to a closely related case. The amendment also clarifies that the obstruction must occur during the investigation, prosecution or sentencing of the defendant's offense of conviction.

Application Note 1. has been added to § 3C1.1 which provides that:

This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution or sentencing of the defendant's instant offense of conviction and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.

Conclusion



Attachment

MFKlotz/pt 6/15/98
98-AMEND.SGL