

- (b) The provisions of subsection (a) shall not be applied to restrict the use of information:
- (1) known to the government prior to entering into the cooperation agreement;
  - (2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);
  - (3) in a prosecution for perjury or giving a false statement;
  - (4) in the event there is a breach of the cooperation agreement by the defendant; or
  - (5) in determining whether, or to what extent, to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities).

#### **Commentary**

#### **Application Notes:**

1. This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, or to what extent, to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities). For example, a court may refuse to impose a sentence that is below the otherwise applicable guideline range on the basis of such information.
2. Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender). The probation office generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.
3. On occasion the defendant will provide incriminating information to the government during plea negotiation sessions before a cooperation agreement has been reached. In the event no agreement is reached, use of such information in a sentencing proceeding is restricted by Rule 11(f) (Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements) of the Federal Rules of Criminal Procedure and Rule 410 (Pleas, Plea Discussions, and Related Statements) of the Rules of Evidence.