# Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 19, 2013

Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

**RE: Response to Request for Comment on Proposed 2013 Amendments and Related Issues**

Dear Judge Saris:

On behalf of the Practitioners Advisory Group (PAG), we submit the following comments in response to the Commission's proposed amendments and issues for comment for the amendment cycle ending May 1, 2013. As you know, the PAG submitted written testimony on three topics in advance of the Commission's March 13, 2013 public hearing. For ease of reference we attach that testimony, which addressed the issues of **Economic Espionage**, **Pre-Retail Medical Products**, and **Tax Loss**.

In this letter, we address **Counterfeit Drugs**, **Counterfeit Military Equipment**, **Acceptance of Responsibility**, **Setser**, and **Miscellaneous Items**. We also start our comments with some additional thoughts on the Tax Loss issue, in light of arguments that both the Internal Revenue Service and the Tax Division of the Department of Justice advanced at the March 13 hearing.

## Tax Loss – The Role of Unclaimed Deductions

One of the Commission's many important roles is to harmonize the manner in which the United States Sentencing Guidelines are applied across the country. Courts are not treating unclaimed deductions uniformly. In some circuits a defendant is allowed to present evidence of the amount of tax he would have owed had he filed a correct return in the first place. Thus, in these courts a defendant is allowed to prove the amount of deductions that would have been available had the defendant reported undisclosed income. Other courts take the view that the defendant is stuck with the deductions actually claimed on the false return, even if the result exaggerates the amount of tax the defendant was trying to avoid. We continue to believe that the Commission should harmonize these differences. In our

view, the following new guidance should be included in the application notes to 2T1.1:

1. In determining whether "a more accurate determination of the tax loss can be made," *see* 2T1.1(c)(1)(A)-(C) & 2T1.1(c)(2)(A), the court should consider proof of deductions and other adjustments that were available at the time the false return was filed or, in the case of failure to file, at the time the return was due. In some cases this will include allowing proof of deductions that, although available to the taxpayer at the time, were not claimed. For example, a defendant who failed to report cash income from a business may have also failed to declare deductions for expenses associated with that unreported gross income. A court may need to consider such unclaimed deductions in order to reach a more accurate determination of the tax loss, which Section 2T1.1(c) defines as "the loss that would have resulted had the offense been successfully completed."

2. The court need not unduly complicate or prolong the sentencing proceeding when determining whether a more accurate determination of tax loss is possible. As with other sentencing determinations, the court need only consider evidence that is reliable under the totality of circumstances. Factors the court may wish to consider in deciding whether such evidence is reliable include whether the deduction is supported by contemporaneous documentation, whether the unclaimed deduction is related to the tax offense (for example, a deduction that is an expense associated with the undeclared gross income is more likely to have been claimed by a taxpayer filing an accurate return), and whether the government has a fair opportunity to challenge the reliability of the evidence.

3. If the court will be imposing restitution as part of the sentence in a tax case, the court should take care to be consistent in determining the respective tax loss and restitution amounts. For example, the restitution amount may be lower than the tax loss amount because the payment of past-due tax between the time the offense is discovered and the date of sentencing will decrease the restitution figure, but it will not reduce the tax loss amount. On the other hand, if the court's consideration of unclaimed deductions results in a lower restitution order, it would be appropriate to take those unclaimed deductions into account for tax loss purposes if doing so would result in a more accurate determination of the tax loss.

The PAG believes that this approach would address each of the government's arguments in opposition to allowing a court to consider unclaimed deductions. We summarize these arguments, followed by our responses:

*The government argues that considering unclaimed deductions "would send a message that those who are convicted of willfully underreporting their taxable income will be on the same footing as honest taxpayers when it comes to claiming deductions that are ordinarily only available to law-abiding filers." IRS Letter to Commission, March 11, 2013 at 1.*

Neither option 1 nor option 3 would put a criminal tax defendant on equal footing with an honest taxpayer. A court that considers previously unclaimed deductions is merely determining the seriousness of the defendant's offense. The Guidelines measure that seriousness by asking what amount of tax the defendant avoided paying. This is determined by comparing the tax that was paid as a result of the offense to the amount that a law-abiding taxpayer with the same income, expenses and other relevant adjustments would have paid. *See* USSG §2T1.1(c)(1) (defining tax loss as "the loss that would have resulted had the offense been successfully completed"); §2T1.1(c)(2) (in failure to file cases, "the tax loss is the amount of tax that the taxpayer owed and did not pay").

It is the government's proposed approach that would put on equal footing persons who are very differently situated. A defendant with $100,000 in undeclared income, but $80,000 in associated expenses, has avoided tax on $20,000. Yet the government's approach treats that defendant the same as one who had $100,000 in undeclared income but no associated expenses. The difference between these two defendants is purely a function of the Tax Code's definitions and treatment of income and expenses, which ensures arbitrariness in outcomes when the court is barred from looking at the expense side of the ledger. As we noted at the March 13 hearing, our proposal would promote consistent treatment across the full range of economic offenses, because the Guidelines for fraud and theft offenses in §2B1.1, as well as those for bribery offenses in §2C1.1, already provide "credits" against loss in order to account for value that a defendant provided, or legitimate expenses that the defendant incurred, in pursuing an otherwise unlawful gain.

*The government claims that options 1 and 3 would "reward a convicted defendant for his affirmative acts of concealing income from the IRS." IRS Memorandum to IRS Acting Commissioner, March 8, 2013 at 1.*

A defendant who concealed income is not "rewarded" if his unclaimed deductions get considered. He is penalized for the concealment because that is what makes him a convicted defendant. The defendant with undeclared income but no associated expenses is also usually guilty of affirmative acts of concealment. And to the extent a defendant's concealment is more serious

> than usual, he acts at his peril in asking for consideration of unclaimed deductions. He may end up with a sophisticated means enhancement, or a higher within- or above-guidelines sentence on account of the concealment that he brings to the court's attention. The PAG is not proposing a rule in which courts must ignore the ways in which proof of unclaimed deductions may reflect poorly on a defendant. Our proposal would allow a court to consider, for example, the ways in which a defendant's proof of unclaimed deductions lead to evidence of other tax offenses (such as assisting employees in hiding their own income). The government should support a rule that encourages this type of full disclosure at sentencing of the facts and circumstances surrounding an offense.

*The government warns of cases where defendants might try to use 20/20 hindsight to reduce their tax loss amount. See March 8, 2013 IRS Memorandum at 2 (citing* United States v. Willingham*, 289 F.2d 283 (5th Cir. 1961) (rejecting argument for acquittal based on a loss carryback from 1955 that could have erased the loss from fictitious deductions claimed in 1953) & 5 (citing* United States v. Helmsley*, 941 F.2d 71, 85 (2d Cir. 1991) (rejecting* post hoc *effort to switch depreciation methods to avoid liability).*

> Our proposed amendment would not allow a defendant to invoke unforeseen changes in circumstances as ways to lower his tax loss. These are precisely the types of tactics that courts routinely reject when they consider whether there is reliable and credible evidence to support a party's assertions. The PAG would support language clarifying that the change is not meant to allow a defendant to take advantage of hindsight—such as offsetting losses that occur only after the offense or switching to a depreciation method that ends up being the better choice based on post-offense events. Our approach would put a premium on proof that the unclaimed adjustments are adjustments that an honest taxpayer likely would have used at the time of the offense.

*The government argues that tax loss is different from restitution, urging a contrast between tax loss determinations at sentencing and Congress's contemplation "that a restitution order might require a district court to resolve complex questions regarding the amount of loss." March 8, 2013 IRS Memorandum at 6 (citation omitted).*

> The government does not explain why the Commission would ever want to encourage courts to be more careful in determining how much money a person owes than they are in determining how long the same person should be deprived of their liberty. If anything, the latter is deserving of a more careful and deliberate process. Moreover, if the court is already going to be

> resolving complex questions regarding loss in order to set the amount of restitution, it makes no sense to ignore those same careful determinations when making a similar ruling in the very same proceeding.

For all of these reasons, we continue to support option 1 as the way for the Commission to resolve this circuit split.

**Counterfeit and Adulterated Drugs**

The Commission has requested comment on various options to address the Congressional directive in section 717 of the Food and Drug Administration Safety and Innovation Act ("the Act"), Pub. L. 112-144 (July 9, 2012), that the Commission "review and amend, if appropriate," the guidelines and policy statements applicable to persons convicted of offenses involving counterfeit drugs. The Commission has also requested comment on options related to the new penalty provisions within section 716 of the Act,[1] for knowing and intentional drug adulteration.

*Counterfeit Drugs*

Currently, the counterfeit goods or services trafficking statute, 18 U.S.C. § 2320, is referenced to USSG §2B5.3 ("Criminal Infringement of Copyright or Trademark"), which carries a base offense level of 8. The Commission has requested comment on three options, all of which would substantially increase the penalties for offenses involving counterfeit drugs. Option 1 would increase the base offense level for counterfeit drug offenses to a minimum offense level of 14. Option 2 would increase the base offense level for counterfeit drug offenses to a minimum offense level of 12 and increase the upward adjustment for "conscious or reckless risk of death or serious bodily injury" to 4 levels (instead of 2). Both Option 1 and Option 2 would also amend the Commentary to §2B5.3 by adding a definition of "counterfeit drug" and a reference to offenses that result in "death or serious bodily injury" to the Commentary's discussion of possible factors that might warrant a departure. Option 3 would refer counterfeit drug offenses under 18 U.S.C. § 2320(a)(4) to USSG §2N1.1, which would increase the base offense level for those offenses from 8 to 25.

It is important to bear in mind that Congress directed the Commission to amend the guidelines and policy statements applicable to counterfeit drug offenses only "if appropriate." The Act does not mandate the significant increases in punishment the Commission is considering.[2] The PAG is concerned that the three

---

[1] The new penalty provision is set forth in 21 U.S.C. § 333(b)(7). Congress did not give the Commission any directive for this new penalty provision.

[2] *See also* § 717(b)(2)(B) of the Act (directing that the Commission is to

Options the Commission is considering are not the result of sufficient analysis of the data related to counterfeit drug offenses, and instead constitute too hasty a conclusion that the current punishment is insufficient.

There is an absence of empirical data to support the notion that the current guidelines are inadequate or in need of amendment. The dearth of counterfeit drug prosecutions and sentences suggests that the counterfeit drug problem is not rampant and that additional deterrence is unnecessary. Moreover, to the extent we have data available, the evidence suggests that change is unnecessary. According to Table 17 of the 2011 Sourcebook, USSG §2B5.3 was referenced as "any" guideline 194 times.[3] The Commission's FY2011 datafile reveals, however, that there were only 64 defendants charged with violation 18 U.S.C. § 2320 across the United States during the entire 2011 period. These offenses constitute less than 0.2% of the sentences imposed by the district courts in fiscal year 2011. These numbers do not support the conclusion that change is necessary, nor that more severe punishment is warranted.

The three options being contemplated by the Commission seem to reflect an assumption that all counterfeit drug offenses should be punished as though they involve a risk of death or bodily injury.[4] But an examination of the cases reveals that this offense is primarily an economic offense that often involves drugs that are chemically identical to the brand names they purport to be. Most often, a counterfeit drug is an exact or substantially similar duplication of a drug, but sold under an authorized trademark.[5] Many of the prosecuted cases involve erectile dysfunction drugs, including counterfeit Viagra®, Cialis®, and Levitra®.[6]

---

"consider the extent to which the guidelines *may or may not* appropriately account for the potential and actual harm to the public resulting from the offense" (emphasis added)).

3 This number reflects any criminal infringement sentences imposed using §2B5.3, not just those involving counterfeit drugs.

4 Cases that involve counterfeit drugs that are not chemically-identical to their brand-named counterparts and therefore pose a risk of death or bodily injury can be prosecuted under the statutes that prohibit adulteration, *see, e.g.*, 21 U.S.C. §§ 331, 337(b)(7), in addition to those that prohibit trafficking in counterfeit drugs.

5 *See, e.g.*, *United States v. Milstein*, 401 F.3d 53, 62 (2d Cir. 2005) (defendant "bought genuine prescription drugs made for foreign markets and then repackaged them for sale in the United States without the consent of the drugs' manufacturers"), *aff'd*, 481 F.3d 132 (2d Cir.), *cert den.*, 525 U.S. 825 (2007).

6 *See, e.g.*, *United States v. Awni Shauaib Zayyad*, 3:10-cr-00243-RJC-DCK-1 (W.D.N.C. 2013); *United States v. Francis Ortiz Gonzalez*, No. CR-10-136-GW (C.D.

It has been the PAG's experience that when counterfeit drug offenses involve economic harm without substantial risk of death or bodily injury, the most common result is the imposition of a within-guideline or below-guideline sentence. In some of these cases, district judges impose substantial economic punishment in the form of fines and significant restitution payable to the drug company that manufactures the brand name drug.[7] The prevalence of within- or below-guideline sentences suggests that the district judges who are in the best position to assess the sufficiency of the Guidelines disagree with the proposition that additional incarceration is warranted.[8] The government's exercise of its plea and charging discretion lends additional support; in some cases the government allowed the defendant to plead to misdemeanor counterfeit offenses instead of the applicable felony charge.[9] This provides additional evidence that an increase in the punishment for counterfeit drug offenses is not warranted.

The PAG believes that in the absence of any data to support the notion that §2B5.3 in its current form provides inadequate punishment, the Commission should simply refer violations of 18 U.S.C. § 2320(a)(4) to §2B5.3. Unless and until study of the data causes the Commission to conclude that greater punishment for counterfeit drug offenses is warranted, it is better policy to allow courts to exercise their departure and variance discretion rather than create specific offense characteristics or commentary that could overstate the seriousness of the offense.

The PAG is especially concerned about Option 3, which would move counterfeit drug offenses from USSG §2B5.3 to §2N1.1. This move would increase the base offense level from 8 to 25, regardless of whether the counterfeit drug offense involved any risk of death or bodily injury – notwithstanding that §2N1.1 currently is addressed to "tampering or attempting to tamper *involving risk of death or bodily injury*" (emphasis added).

---

Cal. 2013); *United States v. Gregory Bochter*, No. 6:12-cr-60-orl-18KRS (M.D. Fla. 2012); *United States v. Sarah Knott*, No. 8:11-cr-001100-JFM-1 (D. Md. 2012); *United States v. Curtis Henry*, No. 6:11-cr-06165- CJS-1 (W.D.N.Y. 2012); *United States v. En Wang*, 4:10-cr-00087 (S.D. Tex. 2011); *United States v. Ali Jones*, 2:08-cr-00887-JWJ-1 (C.D. Cal. 2008); *United States v. David Srulevitch*, No. 2:04-cr-15559-R-1 (C.D. Cal. 2005).

[7] *See, e.g.*, *Zayyad*; *Gonzalez*; *see also, e.g.*, *United States v. Shengyang Zhou*, 1:10-cr-00226-PAB-1 (D. Colo. 2011).

[8] *See, e.g.*, *Bochter*; *Knott*; *Henry*.

[9] *See, e.g.*, *Jones*; *Srulevitch*; *see also, e.g.*, *United States v. Jun Huang*, 2:09-cr-01028-CT-1 (C.D. Cal. 2010).

An example illustrates the danger of moving all counterfeit drug cases to §2N1.1. For an offender who sells a chemically-identical black market therapeutic—*i.e.*, the exact same drug chemically as the brand name but in a different box with a different label—that offender (if at Criminal History Category I) currently starts with a base offense level of 8 for a range of 0 – 6 months. With Option 3, that same offender would start with a base offense level of 25 for a range of 57 – 71 months. Even if that offender's conduct did not risk injury and involved a chemically-identical drug, he or she would nevertheless start with a base offense level that carries potential punishment of almost 6 years of incarceration under a Guideline provision currently reserved for the most serious tampering—that involving a risk of death or serious bodily injury. This result would punish breach of intellectual property rights with a sentence more appropriately suited to crimes that cause risk physical harm or death. Such a result is grossly disproportionate.

Options 1 and 2 suffer from similar risks, albeit on a lesser scale than Option 3. With each, regardless of the risk of harm, offenders will begin with a base offense level in Zones C or D rather than the current starting point of Zone A. We are unaware of any support for the conclusion that such a leap in punishment is needed, especially for an economic offense that is infrequently prosecuted.

For counterfeit drug offenses that involve the risk of death or serious bodily injury, the current guidelines already account for this aggravating factor with increased punishment. *See, e.g.*, USSG §2B5.3(b)(5) (providing for a minimum offense level of 14 for counterfeit drug offenses involving the "conscious or reckless risk of death or serious bodily injury"). If the evidence shows that judges are unaware of their power to depart or vary upward when death or serious bodily injury results, the solution is to remind them of that authority, similar to the proposed amendment to Note 4 to §2B5.3 under Options 1 and 2. There is no reason to believe that an additional offense level increase is needed.

The PAG recommends that the Commission not adopt any of the three Options under consideration, especially in the absence of data to support any of them. In the event the Commission disagrees, the PAG urges the Commission not to make new specific offense characteristics cumulative with current provisions, and especially not to adopt the grossly disproportionate approach embodied in Option 3.

*Adulterated Drugs*

Currently, adulterated drug offenses under 21 U.S.C. § 333 are referenced to USSG §2N2.1 ("Violation of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product"), which carries a base offense level of 6. The Commission has requested comment on two options. Option 1 would increase the base offense level for

adulterated drug offenses that "have a reasonable probability of causing serious adverse health consequences or death to humans or animals" to a minimum offense level of 14. *See* 21 U.S.C. § 333(b)(7). Option 1 also would specify that an offense punishable using §2N2.1 that involved fraud would use the greater offense level (that is, the greater of the offense level in §2N2.1 or §2B1.1). Option 2 would move adulterated drug offenses that "have a reasonable probability of causing serious adverse health consequences or death to humans or animals" to USSG §2N1.1, which would increase the base offense level for those offenses from 6 to 25. Both Options would result in substantial increases to the punishment for these offenses.

As with the counterfeit drug Options the Commission is considering, the data suggest that neither adulterated drug Option is necessary or warranted. For fiscal year 2011, USSG §2N2.1 was referenced as "any" guideline 54 times – or in 0.1% of all the sentences imposed in district courts in the United States. Adulterated drug offenses are even rarer than counterfeit drug offenses,[10] and nothing in the data would support the notion that deterrence or some other penal objective would be better served by increasing the punishment for offenses involving adulterated drugs.

The PAG submits that adoption of Option 2 for adulterated drug offenses would implicate some of the same concerns as counterfeit drug Option 3. For example, an offender who alters a veterinary medication to reduce the dosage of the active ingredient to avoid buying more of it would, under Option 2, face a base offense level of 25—or a range of 57 – 71 months—regardless of whether any animal actually suffered harm. This would subject the offender to a base offense level higher than that applicable to an offender guilty of criminal sexual abuse of a minor under the age of sixteen years (*see* USSG §2A3.2) or involuntary manslaughter (*see* USSG §2A1.4). Starting at level 25 for adulterated drug offenses runs the risk that these offenders will face far worse punishment than their conduct deserves. Only those offenses that involve actual serious physical harm or death should start at so high a base offense level.

Option 1 lessens that risk, but does not eliminate it. That same offender who adulterated dosages of veterinary medication in a manner that risked serious adverse consequences to an animal would start at the same offense level (level 14) as an offender who committed criminal sexual abuse of a ward in his or her custody (*see* USSG §2A3.3). There is no basis to conclude that these rare adulterated drug offenses must be addressed with incarceration of the same severity as far more serious offenses.

---

[10] In the PAG's experience, the far more common scenario than criminal prosecution is the FDA's use of its regulatory recall authority to address adulterated drug problems that pose a risk of injury or death.

Rather than adoption of Option 1 or 2, the PAG recommends that the Commission reference 21 U.S.C. § 333(b)(7) to USSG §2X5.1 and continue to monitor the data. Once district courts have determined the most analogous offense guideline under §2X5.1 for this new statutory provision, the Commission will possess sufficient feedback for a possible new amendment. If the Commission is inclined to make a change now, the PAG urges the Commission to reject Option 2, which sets the base offense level at too high a starting point.

Moving too quickly to amend the guidelines related to counterfeit and adulterated drugs without sufficient data would be a mistake. There is no basis or justification for the adoption of changes that would radically increase the punishment for these crimes, especially when the current provisions include appropriate enhancements for more serious conduct, such as a risk of death or bodily injury, and judges remain free to depart or vary to impose greater punishment for extreme offense conduct. The Commission would benefit from data collection and analysis before making changes to these guidelines.

**Counterfeit Military Parts**

The National Defense Authorization Act for Fiscal Year 2012 amended the Trademark Counterfeiting Act of 1984 by adding 18 U.S.C. § 2320(a)(3), which prohibits trafficking in "goods or services knowing that such good or service is a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security." The maximum penalties are 20 years in prison and a $5 million fine for a first offense.

In addition, a new subsection at § 2320(f)(4) defines "counterfeit military goods and services," as "a good or service that use a counterfeit mark on or in connection with such good or service and that (A) is falsely identified or labeled as meeting military specifications; or (B) is intended for use in a military or national security application."

The Commission has set forth four possible options in response to these statutory changes. Under the first three options, the Commission would add new specific offense characteristics to §2B5.3 for offenses involving counterfeit military goods and resultant harm. The fourth option would reference violations of § 2320(a)(3) to §2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises or Utilities) and possibly §2M2.1 (Destruction of, or Production of Defective, War Materials, Premises, or Utilities).

Congress passed its new legislation in the face of evidence that counterfeit military goods and services are rampant. *See, e.g., Inquiry Into Counterfeit*

*Electronic Parts in the Department of Defense Supply Chain*, published by the United States Senate, Committee on Armed Services, on May 21, 2012. The Committee's investigation tracked well over 100 of the 18,000 cases of counterfeit parts through the supply chain and found the vast majority of trails led to China, with more than 70% of the suspected parts traced to that country. It is noteworthy that, according to the Committee's Report, the overwhelming majority of the suspect parts originate outside the United States.

The nub of the problem appears to be a "compliance" issue. To date, there is a marked paucity of prosecutions for this conduct. As is evidenced by Table 17 of the Commission's 2011 Sourcebook, USSG, §2B5.3 was referenced as "any" Guideline 194 times. The Commission's data file for Fiscal Year 2011 discloses that only 64 defendants were sentenced for a violation of 18 U.S.C. § 2320, and counterfeit offenses of every kind constituted less than 0.2% of all offenses in fiscal year 2011.

In its written submission to the Commission, the Government cites to just two prosecutions as support for an amendment. But these cases instead illustrate why one is unnecessary. In *United States v. McCloskey,* No. 10-CR245 (D. D.C. 2010), the court imposed a sentence of 38 months. There is no indication that the Guidelines prevented or discouraged the court from imposing a higher sentence. Indeed, the defendant's offense level was 28, for a Guideline range of 78 – 97 months. In the other case, *United States v. Ashoor*, No. 1020354, 2011 WL 1659780 (5th Cir. Apr. 29, 2011), the court imposed an above-Guidelines sentence. Although the court again believed that the Guidelines did not produce the correct range of punishment—this time because the range was too low—there is no explanation for why an upward departure or variance based on unusual circumstances was the wrong solution. In short, with this paucity of cases, the Commission really has no heartland in this area from which to work.

Options One and Two rely on the term "counterfeit military good or service," which is defined in § 2320(f)(4). Given the breadth of that definition, there is a risk that the enhancement could apply to goods and services such as general office supplies. Option Three has a similar problem, but provides more specific language relating to "a good or service used to maintain or operate a critical infrastructure." However, there could be serious difficulty in determining the nature and extent of the harm that might appropriately trigger the enhancement. This Option would be overly broad, especially if there is no knowledge requirement.

Especially in light of the rare number of cases currently prosecuted based on trafficking in counterfeit military goods, and given the existing Guidelines under Chapter 2M, the PAG believes it is not appropriate to amend §2B5.3. Instead, the Commission should continue to monitor the data before making any changes.

## Acceptance of Responsibility

The Commission seeks comment on two related circuit splits under the Acceptance of Responsibility Guideline. The PAG believes that the Commission should resolve the first split by clarifying that the court may not deny the third level of acceptance credit if the three statutory requirements are met. We also believe that, with respect to the third requirement, the government should not be able to withhold its motion for reasons other than a failure to conserve resources needed to prepare for trial.

*Response to Issue 1 – Whether the Court Has Discretion To Deny the Third Level of Reduction*

The PAG opposes an amendment allowing district courts to deny the third level of reduction for acceptance of responsibility under §3E1.1(b) if the three statutorily based requirements have been met. While as a general proposition the PAG supports greater flexibility by judges to individualize sentencing, in our view Congress textually displaced such a role for the court in this limited instance. The language of the Guideline, directly amended by Congress in 2003, clearly sets forth only three conditions that must be satisfied for a defendant to be entitled to the one-level reduction of §3E1.1(b): (1) the defendant qualifies for a decrease under subsection (a); (2) the defendant's offense level prior to the operation of subsection (a) is level 16 or greater; and (3) the government files a motion "stating that the defendant has assisted authorities . . . by timely notifying authorities of his intention to enter a plea of guilty." In our view the language is clear that upon the satisfaction of those three conditions, the court must "decrease the offense level by 1 additional level." No independent inquiry is authorized regarding the timing of the defendant's plea or its effect on resources.

The court of course still plays a crucial role in applying §3E1.1 and assessing whether the defendant "clearly demonstrates acceptance of responsibility for the offense," as set forth in subsection (a). In making this determination, the court may consider the timeliness of the defendant's plea. *See* USSG §3E1.1 n.6 ("The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections . . . ."). However, once the court has awarded the two-level reduction provided for in subsection (a), we believe the court's determination as to the application of subsection (b) is limited to ensuring the three conditions listed above have been satisfied. *See, e.g., United States v. Mount*, 675 F.3d 1052, 1057 (7th Cir. 2012) ("The 2003 amendment left intact the language that . . . gives §3E1.1(b) its mandatory character, once the necessary conditions are satisfied. . . . In our view, that means that the correct interpretation of the current version of the guideline is that it retains its nondiscretionary character. If the conditions are satisfied, the one-level downward adjustment must be awarded.").

We find unconvincing the Fifth Circuit's contrary interpretation, that the guideline's language does not "preclud[e] a role for the court in determining whether the plea 'thereby permitt[ed] the government to avoid preparing for trial and permitt[ed] the government and the court to allocate their resources efficiently.'" *United States v. Williamson*, 598 F.3d 227, 229 (5th Cir. 2010) (quoting USSG §3E1.1(b)). The 2003 statutory amendment to §3E1.1(b) very clearly outlined the conditions, with the third one satisfied by a government motion. *See* Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108–21, Title IV, § 401(g), 117 Stat. 650 (2003) (amending §3E1.1(b) "by inserting 'upon motion of the government stating that' immediately before 'the defendant has assisted authorities'"); *see also* USSG §3E1.1 n.5 ("Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing."). In fact, the guideline's "thereby" clause, quoted by the Fifth Circuit as putatively authorizing an independent evaluation by the court of the value of the resources conserved by the defendant's timely plea, is actually merely a continuation of the guideline's description of what the government's motion must "stat[e]". The court's job is limited to evaluating whether the government's motion satisfies the facial requirements of the guideline – that is, whether the motion in fact "stat[es]" that the defendant entered a timely plea which "thereby" permitted the government and court to allocate their resources efficiently.

The two cases cited by the Commission in discussing its proposed amendment serve only to reinforce the reasons for adhering to the guideline's text. In *Mount*, the defendant had fled the jurisdiction five months after notifying the court of his intention to plead guilty, and, after being apprehended three months later, pleaded guilty to the pending information a mere two weeks before his scheduled trial date. *See Mount*, 675 F.3d at 1053. In such a situation, the court is armed with sufficient tools to account for the defendant's flight in determining his sentence other than through contorting the requirements of §3E1.1(b) – including, *inter alia*, through denial of the two-level reduction for acceptance of responsibility in subsection (a), through application of the obstruction of justice enhancement in §3C1.1, or through imposing a non-guidelines sentence through consideration of the factors set forth in 18 U.S.C. § 3553(a). Subsection 3E1.1(b) is the wrong vehicle for punishing the defendant for his flight. In *Williamson*, the district court denied the subsection (b) reduction where the defendant had won reversal of his conviction on appeal through a successful *Batson* challenge, and then had timely pled guilty to save the government the trouble of a retrial. *See Williamson*, 598 F.3d at 228; *United States v. Williamson*, 533 F.3d 269, 277 (5th Cir. 2008). The court denied the third level reduction of subsection (b) on the ground that, having already gone to trial once, the defendant's post-remand plea only spared the government a retrial

that "would have required minimal work and/or preparation." *Williamson*, 598 F.3d at 230.

We believe this analysis is faulty on two grounds. First, a defendant's successful appeal based on a governmental infringement of his constitutional rights should have no bearing on how his subsequent timely plea is evaluated; the Fifth Circuit's ruling to the contrary is in our view bad policy that further burdens a defendant's exercise of his constitutional rights. Second, as there was no dispute that the defendant's plea on remand was timely, and because avoiding any federal jury trial—even a retrial—saves substantial government and court resources, the defendant in this case was entitled to the third level and awarding it would be consistent with §3B1.1(b)'s policy goal of encouraging timely dispositions.

In the alternative, the PAG recommends that the proposed amendment by the Sentencing Commission be clarified, as its current wording replicates the confusion that the second issue for comment highlights. By instructing the court to evaluate the timeliness of the defendant's guilty plea by using the same wording that guides the government under the current version, the proposed amendment would replicate the ambiguity regarding *which* government efficiencies may be rewarded through application of subsection (b). Thus, at minimum, the Commission should revise the proposed amendment relating to the court's discretion to make clear exactly *which* governmental resource-allocation gains warrant consideration under §3E1.1(b). In our view, any such amendment should make clear that the only efficiency gains to be considered vis-à-vis the third level reduction are (as we argue below) the government's efficiency gains in avoiding trial and the district court's efficiency gains in managing its own calendar. Gains in government resource-allocation unrelated to the timeliness of a plea, such as those stemming from a defendant's waiver of his appellate rights, are wholly outside the scope and purpose of the guideline.

*Response to Issue 2 – Whether Government Has Discretion To Withhold Making a Motion*

We agree with the interpretation advanced by the Second and Fourth Circuits that the government may withhold making a motion under §3E1.1(b) only if it has been required to prepare for trial as a result of the defendant's delay in pleading guilty, and urge the Commission to resolve the circuit split on this issue.

The guideline itself places the government's "avoid[ing] preparing for trial" and "allocat[ing] resources efficiently" in the conjunctive, not disjunctive – meaning that only resource allocation efficiencies gained *by avoiding trial preparation* are cognizable efficiency gains under the guideline. The guideline by its own terms does not seek to promote or reward government resource-allocation benefits attained

other than through the avoidance of trial preparation. Moreover, to the extent the text of the guideline itself is ambiguous, Application Note 6, which has equivalent force as the guideline itself, *see* USSG §1B1.7; *Stinson v. United States*, 508 U.S. 36, 38 (1993), clarifies that only two discrete areas of improved efficiency are targeted by §3E1.1(b): (1) the *government's* avoiding preparing for trial, and (2) the *court's* efficient scheduling of its calendar. USSG §3E1.1 n.6 (emphasis added); *see also United States v. Tello*, 9 F.3d 1119, 1125-26 (5th Cir. 1993) ("[T]he timeliness required for the defendant to be entitled to the extra 1-level decrease applies specifically to the governmental efficiency to be realized in two – but only two – discrete areas: 1) the *prosecution's* not having to prepare for trial, and 2) the *court's* ability to manage its own calendar and docket, without taking the defendant's trial into consideration. . . . [Subsection] (b)(2) does *not* implicate[] time efficiency for any other governmental function . . . .") (emphasis added). We believe the Sentencing Commission should address the circuit split by reaffirming the clear meaning of this guideline and rejecting the contrary reading by other circuits.

In the alternative, if the Commission chooses to broaden the scope of the government efficiency concerns that may justify the withholding of a §3E1.1(b) motion, we urge the Commission to limit the range of relevant efficiency gains to those realized by the *timeliness* of the defendant's plea. Since the inception of §3E1.1(b), its touchstone has been the timeliness of the defendant's plea. *See* USSG §3E1.1 n.6 ("The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific."). Before the 2003 amendment, if a court denied the third level for reasons unrelated to the timeliness of the defendant's plea or cooperation, the courts of appeals unanimously reversed, holding it was error for courts to broaden the scope of the inquiry to include considerations other than the timeliness of the plea, such as post-plea obstruction. *See, e.g., United States v. McPhee*, 108 F.3d 287, 289-90 (11th Cir. 1997) ("Our review of the decisions in other circuits, however, reveals that they have consistently held that once a defendant is awarded a two-level reduction for acceptance of responsibility, *whether or not to grant the additional one-level reduction is a matter of determining only whether the defendant timely provided information and notified authorities of his intention to enter a plea of guilty.*" (emphasis added)).[11]

---

[11] *See also United States v. Rood*, 281 F.3d 353, 357 (2d Cir. 2002) ("[G]ranting the additional one-level decrease in Section 3E1.1(b) is not discretionary where defendant satisfies the guideline's criteria. . . . In declining to grant Rood the additional decrease, the district court stated that it had discretion in this area and that Rood was not entitled to the credit based on his violation of the conditions of his pre-trial release. The basis for the district court's decision was erroneous because it did not concern the criteria in subsection (b). On remand, the district court must apply the criteria of subsection (b) and grant Rood the additional one-

The language of the guideline is clear: §3E1.1(b) looks only to whether the defendant has "assisted authorities . . . *by* timely notifying [them] of his intention to enter a plea of guilty." USSG §3E1.1(b) (emphasis added). On its face, then, the only conduct of the defendant that is pertinent to the defendant's entitlement to the §3E1.1(b) reduction is the *timeliness* of the notice to plead guilty. This phrase is then followed by the "thereby" clause, a non-restrictive modifier set off by commas, which sets forth the benefits that the guideline seeks to promote that necessarily follow from a defendant's timely notice of an intention to plead guilty. Thus, only efficiency gains to the government or the court that are realized *as a result of* the timeliness of the defendant's plea may be rewarded or extracted through application of §3E1.1(b). Avoiding preparing for trial is the archetypal efficiency gain realized by the government through a defendant's timely plea. But other efficiency gains tied to the timeliness of the plea may also be accounted for under this interpretation, including, depending on the circumstances, the avoidance of preparing for suppression hearings.

In contrast, gains in government resource-allocation unrelated to the timeliness of a plea are outside the scope and purpose of the guideline and may not provide a basis for the government's withholding of a motion. Thus, for example,

---

level decrease."); *United States v. Rice*, 184 F.3d 740, 742 (8th Cir. 1999) ("If the sentencing court finds that the defendant accepted responsibility for his or her offense and entered a timely guilty plea, then the defendant is automatically entitled to the full three-level reduction available under §3E1.1. The language of §3E1.1(b)(2) is mandatory; when all of its conditions are met, the court has no discretion to deny the extra one-level reduction."); *United States v. Talladino*, 38 F.3d 1255, 1263-64 (1st Cir. 1994) ("As a matter of common sense, the district court's determination that, having obstructed justice, appellant deserved something less than the maximum three-level reduction for acceptance of responsibility is attractive. As a matter of law, however, the court's decision is more vulnerable, because nothing in the language of USSG §3E1.1(b) makes any reference, veiled or otherwise, to judicial power to withhold the one-level reduction due to obstruction of justice. The language of subsection (b) is absolute on its face. It simply does not confer any discretion on the sentencing judge to deny the extra one-level reduction so long as the subsection's stated requirements are satisfied."); *Tello*, 9 F.3d at 1128-29 ("[T]he final clause of subsection (b) eschews any court discretion to deny the reduction. That imperative clause *directs* the sentencing court to 'decrease the offense level by 1 additional level,' once all the essential elements and steps and facets of the tripartite test of subparagraph (b) are found to exist. We conclude, therefore, that the district court erred in denying that additional 1-level decrease in Tello's offense level for the reason given [i.e., for obstructing sentencing by lying to probation] . . . .").

whether a defendant does or does not agree to waive his right to appeal has absolutely nothing to do with the timing of his plea—even where the defendant pleads guilty on day one of the case, the government is not "thereby" relieved of the resource expenditure of defending its conviction or sentence on appeal. Although the government is free to negotiate for an appellate waiver in its plea bargaining through usual negotiation procedures, its ability to extract an appellate waiver is unrelated to the defendant's timely entry of a plea, and thus the government's success or failure on this score should not provide a basis for the government's withholding of a motion under §3E1.1(b). Nor should §3E1.1 be deployed as a blank check to the government to extract any and all desired resource efficiency gains from the defendant, whether or not such gains are related to the timeliness of the defendant's plea.

## *Setser* and §5G1.3

The PAG believes it appropriate to amend USSG §5G1.3 in light of the Supreme Court's decision in *Setser v. United States*, --U.S.--, 132 S. Ct. 1463 (2012). We agree with the Commission's general approach. We write to suggest that the Commission use this opportunity to modify other aspects of §5G1.3 in a manner that is consistent with the proposed amendment. As drafted, §5G1.3 is inconsistent with other Guidelines provisions and impermissibly constrains courts' statutory authority to impose sentences concurrent with, partially concurrent with or consecutive to anticipated or undischarged terms of imprisonment, thereby causing needless confusion between sentencing courts and the Bureau of Prisons (BOP). *See* 18 U.S.C. §§ 3584, 3585. *Setser* affirms courts' ability to structure and implement sanctions to produce a result that is sufficient, but not greater than necessary, to satisfy 18 U.S.C. § 3553(a)'s purposes. Accordingly, §5G1.3 should be amended to ensure that courts have maximum flexibility to take into account other sentences when crafting a sentence for the instant offense.

Preliminarily, for simplicity's sake, rather than "**Imposition of a Sentence on a Defendant Subject to an Undischarged or Anticipated Term of Imprisonment**," §5G1.3 should be titled "**Imposition of a Sentence on a Defendant Subject to Another Term of Imprisonment**."

The main purpose of the proposed amendment is to extend §5G1.3 to cases involving anticipated terms of imprisonment. But to make sure that the amended guideline treats defendants with undischarged and anticipated state sentences equally, the PAG believes that the phrase "or anticipated" should also be inserted after "undischarged" in subsection (b)(1). In our experience, the most common *Setser* scenario is a defendant in primary state custody (i.e. arrested and detained by state law enforcement agents pending resolution of state criminal charges) who

is then subject to federal prosecution.[12] Unless "or anticipated" is included in (b)(1), those defendants will not receive a downward adjustment for any time in custody that the BOP does not credit toward his or her federal sentence. *See* 18 U.S.C. § 3585(b). The current guideline encourages such an adjustment for defendants who are already sentenced state prisoners. This additional change makes clear that defendants awaiting sentence on state charges that encompass relevant conduct should be treated similarly.

Given the scope of courts' sentencing authority post-*Setser*, §5G1.3 should be amended in two other important respects. First, the Commission should eliminate §5G1.3(b)'s requirement that the other offense was a "basis for an increase in the offense level for the instant offense[.]" Second, §5G1.3(c)'s departure provision should be amended to apply equally to cases involving discharged terms of imprisonment.

*a. Subsection (b) should be amended to recommend concurrent sentences whenever the other offense overlaps with the instant offense*

Section 5G1.3 directs concurrent sentences only if the anticipated or undischarged term of imprisonment results from another offense that is both relevant conduct for the instant offense *and* "was the basis for an *increase* in the offense level for the instant offense under Chapter Two." USSG §5G1.3(b) (emphasis added). The PAG believes that this approach is overly restrictive and inconsistent with §4A1.2. Unnecessarily long sentences are wrong, especially in today's budgetary climate and, in any event, are prohibited under §3553(a)'s "sufficient, but not greater than necessary," mandate.[13] By directing concurrent sentences only when the other offense is relevant conduct *and* has actually increased the offense level for the instant offense, subsection (b) wrongly suggests that *consecutive* sentences are the presumption in all other cases, even if the other offense was already accounted for in a different way in the sentence for the instant

---

12 BOP Program Statement 5880.28, *Sentence Computation Manual (CCCA 1984)*, more fully addresses the various ways federal and state sentences may intersect when multiple terms of imprisonment will be served, many of which do not involve anticipated sentences.

13 The DOJ itself has recognized that prison overcrowding and the ever increasing cost of mass incarceration has led to "imbalances in the deployment of justice resources," and put "correctional officers and inmates alike at greater risk of harm[.]" Letter from Lanny A. Breuer Assistant Attorney General & Jonathan J. Wroblewski, Director, Office of Policy and Legislation, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n 5-6, (July 23, 2012). *See generally United States v. Diaz,* 2013 WL 322243 at *10-12, 11 CR 821 (E.D.N.Y. Jan. 28, 2013).

offense.[14]

The PAG believes that the Guidelines should encourage concurrent sentences whenever the undischarged or anticipated term of imprisonment results from an offense that was accounted for in *any way* in the sentence for the instant offense. Accordingly, the Commission should amend §5G1.3(b) to remove the "struck out" text:

> If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) ~~and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments))~~, the sentence for the instant offense shall be imposed as follows: [...].

Deleting this phrase in subsection (b) would make §5G1.3 consistent with Chapter Four of the Guidelines. Section 4A1.2(a) expressly precludes enhanced penalties from increased criminal history scores where a "prior sentence" involves conduct that is part of the instant offense." *See* §4A1.2(a), cmt., n.1. In this regard, "[p]art of the instant offense" means "conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct)." *Id.* Unlike §5G1.3, §4A1.2(a) does not precondition its protection against double counting on the relevant conduct actually increasing the offense level for the instant offense. Eliminating that requirement from §5G1.3(b) would therefore reconcile Chapter Five with Chapter Four and prevent unjustified, cumulative punishments for the same and related offense conduct.

Finally, Application Note 3 (*see* Note 14, *supra*) should be amended to remove its "extraordinary circumstances" requirement for concurrent sentences. There are myriad ways a sentencing court can and should account for a term of imprisonment to which a defendant is subject as the result of another offense, regardless of whether that offense alters the defendant's Guideline range. *Cf.* BOP Program Statement 5880.28, p. 1-32 (addressing "allow[ing] the court flexibility when multiple terms of imprisonment are imprisonment"). Courts are obliged to consider and weigh all relevant information in fashioning a sentence. *See*, *e.g.*, 18 U.S.C.

---

[14] Despite the "catch-all" policy statement in subsection (c), directing courts to fashion concurrent sentences to achieve a "reasonable punishment for the instant offense," a court's authority to credit a defendant for time already served on a related state sentence (when the preconditions of subsection (b) are not satisfied) is limited to "extraordinary" cases. *See* USSG §5G1.3, cmt., n.3(c). In other words, the presumption is that if §5G1.3(b) is not satisfied, the federal sentence should, in most cases, be ordered to run consecutive to the state sentence.

§ 3661; USSG §§1B1.3, 1B1.4. There is no reason to tell courts that their authority to impose a concurrent, or partially concurrent, sentence is somehow constrained in cases where the §5G1.3(b) requirements have not been met.

*b. Sections 5K2.23 and 5G1.3 should be amended to authorize departures to account for a defendant's prior discharged terms of imprisonment*

Under §5K2.23 (Policy Statement), downward departures to credit a defendant for a previously discharged term of imprisonment are currently limited to situations where "subsection (b)" of §5G1.3 would have "provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense." Departures thus are not permitted when the provisions of §5G1.3(c) would have applied, namely, when concurrent sentences would have been necessary to "achieve a reasonable punishment for the instant offense." USSG §5G1.3, cmt., n.3.

The PAG believes there is no reason to discourage district courts from departing where the prior discharged term of imprisonment that did not qualify under §5G1.3(b), either in its current form or in the amended form that the PAG proposes above. Indeed, *Setser*'s broader implication is that sentencing courts should have full power to consider the impact of other sentences, whether imposed or anticipated, discharged or undischarged. Accordingly, Application Note 4 should be deleted in its entirety, and §5K2.23's reference to §5G1.3(b) should be struck.

**Miscellaneous And Technical Amendments**

*Recently Enacted Legislation*

The PAG agrees with the Commission's proposals to refer violations of 18 U.S.C. § 39A to USSG §2A5.2; violations of 18 U.S.C. § 1514(c) to USSG §2J1.2; violations of 18 U.S.C. § 1752 to USSG §§2A2.4 and 2B2.3; and violations of 19 U.S.C. § 1590 to USSG §§2D1.1 and 2T3.1.

We also agree with the Commission that no further changes to the Guidelines are needed at this time to account for these offenses. 18 U.S.C. §§ 39A and 1514(c) are both new offenses and, as such, should be studied before the Commission can know whether the Guidelines need to be amended to capture aggravating or mitigating circumstances common to those offenses, yet not otherwise adequately addressed by existing Guideline provisions. The amendments to 18 U.S.C. § 1752 and 19 U.S.C. § 1590 were definitional and do not reflect any intent by Congress to change the existing sentencing structure for these offenses; accordingly, the PAG sees no empirical or policy based reason to amend the guidelines to which those offenses are referred at this time.

We disagree with the Department of Justice's suggestion that the Commission should attempt at this preliminary stage to catalogue potential aggravating (and, presumably, mitigating) circumstances under which a § 39A violation might occur. At least some of the scenarios postulated—for example, that a person on the ground pointing a laser at a moving aircraft would be able to maintain contact with an individual's retina for 60 seconds—are at best implausible, and likely impossible. The Commission should decline the invitation to amend the guidelines to address hypothetical situations that experience has yet to test.

We also disagree with the Department's suggestion to increase exponentially the sentencing range for trespass offenses committed at the White House complex or the Vice President's residence. As the Department itself acknowledges, these trespass offenses have traditionally been the stuff of local prosecutions, which typically carry a statutory maximum of six months to a year. Given this, we question the suggestion in the Department's comments that the existing guideline sentences for trespass are somehow insufficient—particularly since, here too, the Department relies upon extreme rhetoric rather than empirical data to make its case.[15]

*Interaction Between Offense Guidelines in Chapter Two, Part J and Certain Adjustments in Chapter Three, Part C.*

The PAG recognizes that there is some tension between USSG §2J1.6, cmt., n.2, which states that "[f]or offenses covered under this section, Chapter Three, Part C (Obstruction and Related Adjustments) does not apply, unless the defendant obstructed the investigation or trial of the failure to appear count," and §3C1.3, which states that "[i]f a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by 3 levels." We disagree, however, with the Commission's suggestion to simply eliminate Application Note 2 to §2J1.6 and three other Chapter Two, Part J guidelines. The better approach—which is more consistent with the development of the guidelines and the particular problem the Commission seeks to address—is to amend the Application Note to make clear that §3C1.3 may apply to offenses in which the sentence is enhanced under 18 U.S.C. § 3147.[16]

---

[15] The Department's suggestion, for example, that an armed gunman who scales a perimeter fence and runs toward the White House with a loaded gun can only be charged with simple trespass and thus only subjected to a guidelines recommendation of 0 to 6 months is simply not supportable. *See, e.g.,* USSG §2A2.4 (permitting offense levels of up to 15, a cross-reference to §2A2.2 and suggested enhancements under §§3C1.2 and 5K2.7).

[16] Enhancements under Chapter Three, Part C have been excluded from

*Appendix A (Statutory Index) References for Offenses Under 18 U.S.C. § 554*

The PAG disagrees with the Commission's suggestion to refer violations of 18 U.S.C. § 554 to §2M5.1 in addition to §2M5.2. Currently, § 554 violations receive a base offense level of 26 only when they involve the exportation of arms, munitions or military equipment or services. *See* USSG §2M5.2(a)(1). As the Commission itself has recognized, cases sentenced under §2M5.2 involve essentially the stuff of war. *See* USSG §2M5.2 (n. 1) (items subject to control under the United States Munitions List include "military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, vessels of war, explosives, military and space electronics, and certain firearms"). The Commission selected a high base offense level of 26 for these offenses precisely because it "assume[d] that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States," and further assumed that cases involving no such risk would be "unusual." *Id.*

In contrast, §2M5.1 permits a base offense level of 26 whenever a defendant's offense conduct involved evading national security controls or controls relating to the proliferation of nuclear, biological or chemical weapons or material, even if the offense itself involved material that is not inherently dangerous and was intended for an entirely innocent use.[17] This makes some sense at present because the statutes currently referenced to §2M5.1 require the government to prove beyond a reasonable doubt that the defendant knew or should have known that the exportation at issue potentially threatened a national security interest.[18] Thus, although the language of §2M5.1(a)(1) is broad enough to permit its application regardless of the material at issue, the legislative history is clear that the higher

---

offenses sentenced under Chapter Two, Part J for over twenty years. *See* USSG, App. C, Amend. 347 (Nov. 1, 1990). We recognize the case law giving rise to the Commission's desire to clarify the interaction between some of the Application Notes in Chapter Two, Part J and USSG §3C1.3. We are not aware, however, of any reason for the Commission to go further and "fix" additional guideline provisions in the absence of any recognized application problem.

[17] *See, e.g., United States v. McKeeve*, 131 F.3d 1, 14 (1st Cir. 1997).

[18] *See, e.g.,* 18 U.S.C. § 2332d (defendant must know or have reasonable cause to know that country at issue has been designated "as a country supporting international terrorism"); 22 USC § 8512 (specifically addressing exports to Iran and excluding a number of categories of material from prosecution); 50 U.S.C. § 1705 (permitting criminal prosecution only against defendants who "willfully" violate orders issued under the Emergency Economic Powers Act, which are issued to address "unusual and extraordinary threats" to the national security, foreign policy or economy of the United States under 50 U.S.C. § 1701).

base offense level available under §2M5.1(a)(1), like the higher base offense level in §2M5.2(a)(1), was designed to reach offenses that are inherently dangerous and thus more culpable.[19]

In contrast to the crimes currently sentenced under §2M5.1, prosecutions under § 554 apply broadly to all exportation offenses regardless of whether the exportation at issue was highly culpable, either because it involved inherently dangerous material or because it could conceivably threaten a national security interest. For the standard non-munitions type of export violation case, a base offense level of 26 is inappropriate because it is based on an inapplicable assumption—that the conduct at issue necessarily had the potential to be harmful to a security or foreign policy interest of the United States. Indeed, even a base offense level of 14 would increase sentences for run-of-the-mill § 554 offenses without any empirical justification or identified need.[20]

The PAG urges the Commission not to amend the guidelines in a manner that gives the government access to higher base offense levels with a lower quantum of proof, at least not absent some substantial reason. Here, given that the government and the courts already support sentences below §2M5.1's recommended range in the vast majority of cases, there is no empirical reason for the Commission to refer the even less culpable offenses available under § 554 to that guideline.[21]

---

[19] *See, e.g., United States v. Groos*, 2008 WL 5387852, *5 (N.D. Ill. Dec. 16, 2008) (Commission increased §2M5.1's base offense level to 26 "because of congressional concerns over insufficient sentences for certain offenses involving the importation and exportation of nuclear, chemical and biological weapons, materials or technologies" and "the history of §2M5.1 suggests that the higher base offense level is intended for acts that seriously threaten the security of the United States").

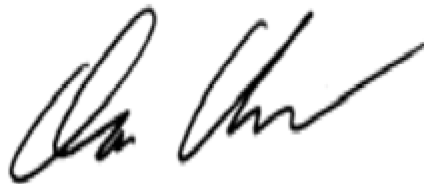
[20] *See, e.g., United States v. Xu*, 2012 WL 955366, *2-3 (E.D. N.Y. March 13, 2012) (where defendant was convicted under § 554 of attempting to export elephant ivory, total offense level would have been level 12, not level 14).

[21] *See* USSC, *Sourcebook of Federal Sentencing Statistics* at Table 28 (reflecting below guideline sentences in 2M5.1 cases 100% of the time in 2011, 80% of the time in 2010, 90% of the time in 2009, and over 90% of the time in 2008).

## Conclusion

On behalf of our members, who work with the Guidelines on a daily basis, we appreciate the opportunity to offer the PAG's input for the 2013 amendment cycle. We look forward to an opportunity for further discussion as the proposed changes are finalized.

Sincerely,



David Debold, Chair
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave, N.W.
Washington, DC 20036
(202) 955-8551 telephone
(202) 530-9682 facsimile
ddebold@gibsondunn.com

Eric A. Tirschwell, Vice Chair
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-8404 telephone
(212) 715-8394 facsimile
etirschwell@kramerlevin.com

cc: Hon. Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa
Hon. Dabney Friedrich
Commissioner Isaac Fulwood, Jr.
Commissioner Jonathan J. Wroblewski
Judith Sheon, Chief of Staff
Kenneth Cohen, General Counsel