PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

March 4, 2013

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

Dear Judge Saris,

The Probation Officers Advisory Group (POAG or the Group) met in Washington, D.C., on February 20 and 21, 2013, to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to issues published for comment dated January 18, 2013.

1. PROPOSED AMENDMENT: PRE-RETAIL MEDICAL PRODUCTS

The proposed amendment changes Appendix A to reference violations of 18 U.S.C. § 670 to U.S.S.G. § 2B1.1, with the possibility of providing additional reference to § 2A1.4. The Commission seeks comment on this proposal and asks if one or more guidelines should be referenced, such as § 2B5.3, § 2N1.1, or § 2N2.1, instead of, or in addition to, § 2A1.4 and § 2B1.1. POAG believes § 2B1.1 is the appropriate guideline to be referenced and offers the following observations.

POAG anticipates application inconsistencies as to whether the wholesale value, retail value, or street value of pre-retail drugs should be used. Because the offense deals with pre-retail items, a logical conclusion might be that wholesale cost is the guideline loss; however, U.S.S.G. § 2B1.1 specifies the use of the street value of drugs (See Application Note

3(F)(vi)). POAG requests that the Commission provide guidance in U.S.S.G. § 2B1.1.

POAG suggests that it might ease the application of U.S.S.G. § 2B1.1 if the definitions cited in 18 U.S.C. § 670 are incorporated into the guideline and clarification is added to help define entities listed as being part of the supply chain[1]. POAG also asks the Commission to clarify when a medical product has been made available for retail purchase by the consumer, and provide guidance in identifying the consumer in cases involving medical devices[2].

POAG discussed potential difficulties in determining whether the adjustment for Abuse of a Position of Trust or Use of a Specific Skill under U.S.S.G. § 3B1.3 is applicable when considering that the new offense applies to those specified in the "supply chain" which includes "manufacturer, wholesaler, repacker, own-labeled distributor, private-label distributor, jobber, broker, drug trader, transportation company, hospital, pharmacy, or security company." An argument might be made that since the offense includes, for example, a hospital and a pharmacy then adding a Chapter 3 enhancement for a doctor or nurse would be double counting. However, we also discussed whether other positions within the supply chain would be comparable to a bank teller as addressed in the § 3B1.3 commentary. This may ultimately need to be resolved in individual, fact-based situations; but the group felt that additional commentary could be helpful to illustrate which positions within the supply chain warrant consideration within a § 3B1.3 adjustment.

POAG discussed issues regarding possible duplicity with the interplay between the proposed specific offense characteristic at U.S.S.G. § 2B1.1(b)(14) and those at (b)(13) and (b)(15). POAG believes that the way these specific offense characteristics overlap will create confusion and potential inconsistencies when applied on a national level:

> U.S.S.G. § 2B1.1(b)(13)(B) currently provides for an enhancement for a scheme to steal "goods or chattels that are part of a cargo shipment." Proposed U.S.S.G. § 2B1.1(b)(14)(C) provides for an increase "if the defendant was employed by, or an agent of, an organization in the supply chain for the pre-retail medical product." If an offense involves the theft of pre-retail medical products from, say, a train car by the person in the supply chain for the medical product, an argument could be made that

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[1]We did not know, for example, what "own-label distributor," "private-label distributor," "jobber," or "drug trader" meant.

[2]We talked about medical devices such as x-ray machines and defibrillators, and wondered what difference it would make if such devices were stolen from a hospital versus an ambulance. We also grappled with who the consumer is, for example, regarding items in an ambulance - is the customer the ambulance company or the victim in transport?

both enhancements apply.

U.S.S.G. § 2B1.1(b)(15) currently provides for an enhancement if the offense involves "(A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense." Proposed U.S.S.G. § 2B1.1(14) provides an increase if the offense involved (A)(i) violence, force or a threat of violence or force; or (ii) a deadly weapon; (B) resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved." If an offense involves the theft of pre-retail medical products from a warehouse by the armed security guard who is in the supply chain for the medical product, an argument can be made that both enhancements apply.

POAG also discussed the unusual pairing of factors in the proposed U.S.S.G. § 2B1.1(b)(14). This specific offense characteristic put the concept of violence on the same level as a defendant's status of being part of the pre-retail medical product supply chain as either fact would trigger the same enhancement. Similarly, it seems somewhat unusual that the "use" of a deadly weapon in U.S.S.G. § 2B1.1(b)(14) would trigger the same enhancement as "possession" of a dangerous weapon in U.S.S.G. § 2B1.1(b)(15). Finally, the term "deadly weapon" (as opposed to "firearm" or "dangerous weapon" which are defined within the guidelines) is an undefined term within the sentencing guidelines which could result in litigation.

As a potential remedy, POAG discussed restructuring the specific offense characteristics as follows:

U.S.S.G. § 2B1.1(b)(13): If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, **or (C) the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product,** increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

U.S.S.G. § 2B1.1(b)(14): If the offense involved a pre-retail medical product, **increase by 2 levels**. If the resulting offense level is less than level 14, increase to level 14.

U.S.S.G. § 2B1.1(b)(15): If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense; **or (C) the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved**, increase by 2 levels. If the resulting

offense level is less than level 14, increase to level 14.

3. COUNTERFEIT & ADULTERATED DRUGS; COUNTERFEIT MILITARY PARTS

POAG discussed counterfeit military parts and counterfeit and adulterated drugs with respect to the intent of Congress that the guidelines and policy statements for such offenses compare with the higher penalties resulting from changes to 18 U.S.C. § 2320 and 21 U.S.C. § 333.

A. Counterfeit Military Goods and Services

POAG endorses Option 4 of Part A of the proposed amendment addressing the issue of counterfeit military goods and services but felt that referencing offenses under 18 U.S.C. § 2320(a)(3) to U.S.S.G. § 2M2.1 provides a Base Offense Level of 32 which, to POAG, seems consistent with the statutory changes to 18 U.S.C. § 2320(a)(3). POAG believes the use of U.S.S.G. § 2M2.1 promotes ease of application (as there are no specific offense characteristics) and supports the importance warranted by the potential danger of counterfeit military goods.

B. Counterfeit Drugs

POAG supports Option 1 of Part B of the proposed amendment to add a new specific offense characteristic to U.S.S.G. § 2B5.3. POAG suggests that the definition of "counterfeit drug" be added to Application Note 1 because the reference 18 U.S.C. § 2320(f)(6) is not a complete definition, but a reference to another regulation.

POAG believes that the proposed Application Note 4(D) provides flexibility to the Court. However, it is suggested that the Commission consider expanding subsection (D) to include the type of counterfeit drug, as well as language similar to that in U.S.S.G. §§ 5K2.1 (Death (Policy Statement)) and 5K2.2 (Physical Injury (Policy Statement)). POAG's discussion leading to this suggestion distinguished between the harm caused by, say, counterfeit drugs for weight reduction versus counterfeit drugs for cancer treatment. It might be appropriate to punish the latter more severely than the former.

POAG does not take a position on whether an enhancement of two or four levels is warranted.

POAG notes the following for consideration regarding Options 2 and 3 of the proposed amendment:

POAG believes Option 2 does not fully capture a defendant's behavior if the offense

involved a counterfeit drug and a dangerous weapon was possessed in connection with the offense. In this scenario, the defendant is only held accountable for the counterfeit drug or the firearm, but not both, as the instruction to "Apply the Greatest" is noted.

Option 3 referencing offenses under 18 U.S.C. § 2320(a)(4) to U.S.S.G. § 2N1.1 eliminates entirely any consideration of a dangerous weapon.

C. Adulterated Drugs

POAG believes Option 2 of Part C of the proposed amendment best captures the intent of recent statutory changes because referencing offenses under 18 U.S.C. § 333(b)(7) to U.S.S.G. § 2N1.1 provides a higher Base Offense Level. POAG notes, however, that both Options 1 and 2 are clear and do not appear to present any foreseeable application issues.

4. PROPOSED AMENDMENT: TAX DEDUCTION

Of all of the proposed amendments, this is the one that garnered the most feedback from the various probation districts within the appellate circuits.

Options 1 and 3 allow for the tax loss to account for either all credits, deductions and exemptions to which the defendant was entitled, or to account for such things for which the defendant can demonstrate he was entitled. POAG feels these options are too broad and will be overly burdensome and cumbersome to the sentencing process. The Court and the probation officer are not tax experts, nor do we expect to become tax experts. These options have the potential of turning the sentencing hearing into a tax audit by considering evidence of unclaimed deductions. Moreover, many tax cases involve more than one tax return and cover over a multi-year period which further complicates matters by forcing the consideration of different tax laws and regulations.

POAG also believes that these two options are inherently unfair because they allow a defendant "a second bite of the apple," and are inconsistent with the principle of U.S.S.G. § 2B1.1, Application Note 3(E)(i), which states that a defendant should not receive credit against loss after the offense has been detected. This seems especially relevant in offenses involving the filing of false returns since, in many cases, the defendant may not have claimed various deductions specifically and intentionally to avoid detection (i.e., those unclaimed deductions or exemptions would have been considered a "red flag" by the I.R.S. and triggered an audit, potentially leading to discovery of the false return).

Option 2 specifies that the tax loss shall not account for any credit, deduction, or exemption, unless the defendant was entitled to the credit, deduction, or exemption and claimed the

credit, deduction, or exemption at the time the tax offense was committed. POAG believes this option was the best of the three proposed options as it limits tax litigation at the time of sentencing, establishes a bright line in determining loss, and reduces the need to incorporate tax expertise in determining a guideline range. It also does not allow the defendant to receive post-detection credit against loss, thus maintaining a consistent approach to determining loss throughout the guidelines.

Nevertheless, POAG notes that applying this option to cases involving the failure to file a tax return (as opposed to filing a false return) might be considered unfair as, by definition, the defendant did not claim any deductions, exemptions, or credits. POAG acknowledged that in these situations where the I.R.S. agent has been able to provide tax loss, it is generally calculated with the inclusion of deductions, exemptions, or credits that would have clearly been applicable. Therefore, Option 2 could potentially play out with two undesirable outcomes:

> First, the tax loss provided (if it is provided) would need to be recalculated to back out the deductions, exemptions, or credits. POAG is concerned that this recalculation may fall to the probation officers to perform.
>
> Second, the Courts may routinely consider the tax loss in these cases to be overstated and use either a departure or a variance to address it.

POAG suggests that, in addition to the application note proposed at Option 2, the Commission consider adding an application note authorizing a departure in failure-to-file cases, similar to the approach as is outlined in U.S.S.G. § 2B1.1, Application Note 19(C).

7. PROPOSED AMENDMENT: MISCELLANEOUS AND TECHNICAL

A. Recently Enacted Legislation; 4. 19 U.S.C. § 1590.

The proposed amendment refers violations of 19 U.S.C. § 1590, The Ultralight Aircraft Smuggling Prevention Act, to § 2D1.1 and § 2T3.1 in Appendix A. POAG believes that the statutes should be split and its subsections should be referred specifically to either § 2D1.1 or § 2T3 as follows:

> Violations of 19 U.S.C. § 1590(c)(2) should be referenced to § 2D1.1 because that subsection pertains to merchandise that involved a controlled substance.
>
> Violations of 19 U.S.C. § 1590(c)(1) should be referenced to § 2T3.1 because that subsection pertains to all other violations of the statute.

The distinction between these two offenses and the guideline citations is consistent with their respective statutory maximum terms of imprisonment. It also eliminates potential application problems[3] by providing only one choice.

One of the issues for comment is whether there are any other guideline changes necessary as a result of this new legislation. POAG also discussed whether any application note should be amended to specify whether the use of an ultralight aircraft constituted sophisticated means. However, POAG determined that the application of this specific offense characteristic would better be determined on a case-by-case basis and, ultimately, did not take a position on this issue.

In closing, POAG appreciates the opportunity to express its concerns and the willingness of the Commission to work with POAG to provide input into the issues the Commission has raised. Should you have any further questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Respectfully,

Probation Officers Advisory Group
March 2013

[3]Unless Appendix A is more specific, we discussed the possibility that a defendant might argue that the lower of the two guidelines should apply and the government might argue that the higher of the two guidelines should apply.