Testimony Before The United States Sentencing Commission

Public Hearing on
Proposed Amendments to the Federal Sentencing Guidelines
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Pre-Retail Medical Products

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I am pleased to have the chance to testify once again on behalf of the Sentencing Commission's Practitioners Advisory Group. As members of one of the Commission's three standing advisory groups, we at the PAG appreciate the opportunity to provide the perspective of those in the private sector who represent individuals and organizations investigated and charged under the federal criminal laws.

In the SAFE DOSES Act, Congress (i) created a new criminal offense covering, among other things, theft of pre-retail medical products (18 U.S.C. § 670), (ii) harmonized the penalties for pre-existing statutory offenses when a pre-retail medical product is involved in the offense, and (iii) gave the Commission a review-and-amend-if-appropriate directive. The PAG supports the Commission's proposal to reference this new offense to the Theft and Fraud Guideline (§2B1.1), but we strongly oppose creating another specific offense characteristic for a Guideline that is sorely in need of overhaul, in part because of the problem of "factor creep" from a multitude of specific offense characteristics. Particularly given the broad array of conduct that can be prosecuted under § 670, as well as the availability of sufficient penalties under the Guidelines as currently written, the Commission should resist calls for new enhancements that could have unintended negative consequences.

Section 2B1.1 is the appropriate Chapter Two Offense Guideline for the new offense. We agree with the proposal that convictions under § 670 be referred to USSG §2B1.1. The offense level increases dictated by the loss table alone will generate lengthy sentences for major thefts of medical products, even if those losses were to fall well below the average value of $3.7 million for affected shipments in 2010. See Katherine Eban, Drug Theft Goes Big, Fortune Magazine (March 29, 2011), available at http://features.blogs.fortune.cnn.com/2011/03/31/drug-theft-goes-big/.

The Commission has also "bracketed" a possible reference to the Involuntary Manslaughter Guideline at §2A1.4. Under §2A1.4, the Chapter Two offense level would be either 12 (for criminally negligent conduct) or 18 (for reckless conduct). Section 2B1.1 already has a specific offense characteristic for offenses involving the conscious or reckless risk of death or serious bodily injury; in such cases, there is a floor of 14 and an increase of two levels. *See* USSG §2B1.1(b)(14).

If the Department of Justice anticipates that this new statute will be needed to prosecute a significant number of cases where death has actually resulted, the contemplated reference to §2A1.4 may also be appropriate. But the PAG would support its inclusion in Appendix A only if the Commission does not *also* reference other offense guidelines that currently apply to tampering offenses, such as §2N1.1. The latter guideline currently exposes a defendant to much higher penalties (including a *base* offense level of 25), but the government must first prove the elements of 18 U.S.C. § 1365(a) or (e). Those elements include tampering with a consumer product while harboring the requisite mental state.

We have heard no suggestion that this existing statute—entitled "Tampering with consumer products," *see* 18 U.S.C. § 1365—is an inadequate tool for prosecuting those who tamper with pre-retail medical products. If the Department anticipates that it will be using § 670 to prosecute a broader swath of behavior under the guise of targeting product tampering

violations, then the Commission should first have a much clearer idea of the conduct that these new prosecutions would reach. Rather than blindly broaden the availability of §2N1.1 to a class of cases that has yet to be prosecuted, the Commission should wait to see what these § 670 prosecutions look like. Only then should it decide whether a reference to the much harsher base offense levels provided at §2N1.1 is appropriate.

The PAG opposes a new specific offense characteristic for pre-retail medical product cases. The PAG does not support either a minimum offense level or a specific offense characteristic enhancement that would be based on the pre-retail status of a medical product. The legislative history suggests that Congress intended for § 670 to target sophisticated criminal organizations that steal large quantities of medical products and traffic in them, potentially inserting them back into legitimate supply chains. *See, e.g.*, H.R. Rep. 112-549, *4-7 (June 25, 2012). As noted earlier, the loss enhancement will ensure lengthy sentences for appropriate cases.

Moreover, other specific offense characteristics under §2B1.1 will increase the sentence ranges even more when doing so would be consistent with the nature of the offense. These include a two-level increase for a defendant who receives stolen property while in the business of receiving and selling such property (§2B1.1(b)(4)), a two-level increase with a floor of 12 for offenses that involve sophisticated means (§2B1.1(b)(10)(C)), a two-level increase with a floor of 14 for offenses involving an organized scheme to steal or receive stolen goods that are part of a cargo shipment (§2B1.1(b)(13)), and—as already noted—another two-level increase and floor of 14 for offenses involving the conscious or reckless risk of death or serious bodily injury (§2B1.1(b)(14)).

Chapter Three contains additional enhancements, most notably an increase in the offense level for abuse of a position of trust or use of a special skill. That increase may very well apply to various persons employed in the medical products supply chain.

The Issues for Comment recognize this potential for serious overlap. For example, the first of the three proposed categories for triggering a 2-level increase would encompass all pre-retail medical product offenses involving violence, force, the threat of either, or a deadly weapon. In appropriate cases, §2B1.1(b)(14) will capture these aggravating factors. The same is true for the second category—where the offense actually resulted in serious bodily injury or death.

The final enhancement category targets agents or employees of organizations in the supply chain. The PAG does not understand why those employed in the supply chain for this one category of consumer products should be singled out for an enhancement among all of the various federal defendants prosecuted for fraud and theft offenses. The Commission has already considered this type of circumstance and drawn the line between (i) those who abuse a position of public or private trust, or who abuse a special skill, to carry out their offense; and (ii) those who do neither. A truck driver for CVS is no more deserving of extra punishment due to committing his crime while on the clock than would be a hotel clerk or a bank teller. *Cf.* USSG §3B1.3, cmt., n.1 (stating that abuse of trust enhancement does not apply to embezzlement or theft by an ordinary bank teller or hotel clerk). While we acknowledge that the statute sweeps more broadly than the abuse of trust Guideline—giving courts a clearer line for purposes of

applying the statutory maximum—the Commission has received no information suggesting that *its* line for *sentencing guidelines* purposes (found in §3B1.3) is anything but the right place to draw one.

Given that this is a new statute, it is very hard to predict what the typical (or "heartland") § 670 prosecution will look like. We do not know, for example, which aggravating or mitigating facts, if any, will be *both* peculiar to this statute *and* common enough to warrant adjustments to the guideline range (as opposed to being grounds for a variance or departure). Thus, we recommend that the Commission hold off on creating new specific offense characteristics at this early juncture. Rather, the Commission should study sentences under the new statute to see whether the guidelines already adequately punish and deter these offenses or whether adjustments need to be made, for example by examining whether courts are varying upwards or downwards to account for factors that are not already covered in the guidelines and policy statements, yet frequently appear in § 670 cases.

For these same reasons, the PAG does not believe the Commission should add any new *mitigating* circumstances at this time for cases prosecuted under § 670. Rather, by the time data from early prosecutions under the statute become available, the Commission should be well along in its consideration of potential overarching changes to the operation of §2B1.1. The Commission has stated that a multi-year comprehensive review of that Guideline is in order. Any new aggravating or mitigating circumstances ultimately deemed appropriate in the sentencing of pre-retail medical product offenses could then be incorporated into the new framework.

<u>The broad statutory definitions of "pre-retail medical product" and "supply chain" also counsel for a measured approach</u>. The third Issue for Comment asks whether the meaning of "pre-retail medical product" is sufficiently clear. The Commission asks a similar question about the "supply chain" definition, focusing on whether there is a sufficiently informed line between pre-retail and retail. The PAG is quite concerned that these terms lack the precision needed for fair notice in criminal statutes. While that is more of a concern at the liability phase, the statute's imprecision reinforces the wisdom of waiting for experience under it before deciding on cross-references, enhancements and definitions that could unintentionally reach further than is either necessary or appropriate, and that will undoubtedly increase litigation at the sentencing phase.

<u>No changes should be made to the Guidelines for other offenses mentioned in the directive</u>. The Commission seeks comment on whether any changes should be made to other offense guidelines given language raising the statutory maximum when violations of specified statutes involve a pre-retail medical product. Some of these offenses (18 U.S.C. §§ 659, 2314 & 2315) are already referenced to §2B1.1. Others carry substantial penalties without any need for further amendment. These include 18 U.S.C. § 1952, which has an offense guideline (§2E1.2) that refers to an underlying crime of violence or other unlawful activity (which would include § 670). In our experience, money laundering in aid of racketeering and breaking and entering facilities of interstate or foreign commerce carriers generally end up being punished more seriously than pure fraud or theft cases. Without data to the contrary, we recommend against amendments that may create unintended outcomes or foster needless litigation.

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As always, I speak both individually and for the PAG as a whole when I say thank you for soliciting and considering our views on opportunities to improve federal sentencing.