



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF THE
U.S. INTELLECTUAL PROPERTY
ENFORCEMENT COORDINATOR

March 18, 2013

The Honorable Patti B. Saris
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002
ATTN: Public Affairs – Jeanne Doherty

Dear Judge Saris,

I hereby submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 18, 2013. For the purposes of the U.S. Sentencing Commission's current review, I write to express the Administration support for enhancements to the U.S. Sentencing Guidelines in three areas: (1) Trade secret theft under the Foreign Economic Espionage Act of 2012; (2) Counterfeit drug offenses under the Food and Drug Administration Safety and Innovation Act; and, (3) Counterfeits sold to the military under the National Defense Authorization Act for Fiscal Year 2012. Thank you for your consideration of the Administration's recommended amendments to the Guidelines; I look forward to continuing to work with the members and staff of the Commission in the future.

Trade Secret Theft under the Foreign Economic Espionage Penalty Enhancement Act of 2012

Combating the threat posed by trade secret theft and economic espionage is a significant Administration priority as reflected in the Administration's recently released *Strategy to Mitigate the Theft of U.S. Trade Secrets*. Trade secrets play a crucial role in America's global competitiveness. Trade secret theft can cripple a company's competitive advantage in foreign markets, diminish export prospects around the globe, and put American jobs in jeopardy.

Emerging trends indicate that the pace of economic espionage and trade secret theft against U.S. corporations is accelerating and presents a sustained and serious threat to our status as the world's leader for innovation and creativity. The Administration is committed to continuing to be vigilant in addressing the threat posed by trade secret offences, including those presented by corporate and state sponsored actors.

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As set out in the Administration's March 2011 *White Paper on Legislative Recommendations* and in the *Foreign Economic Espionage Penalty Enhancement Act of 2012*, we support enhancements to the U.S. Sentencing Guidelines range for the theft of trade secrets and economic espionage, including trade secrets transferred or attempted to be transferred outside of the United States. Those recommendations were the result of an extensive interagency process involving, among others, the Department of Commerce (including the U.S. Patent and Trademark Office), the Department of Homeland Security, the Department of Justice (including the Federal Bureau of Investigation), the Department of State, and the Office of United States Trade Representative.

Increasing the offense levels will bring the sentencing guidelines applicable to trade secrets in line with the guidelines applicable to other forms of intellectual property crime and better reflect the serious economic and national security threat to the United States and its businesses presented by trade secret offenses. Enhancements to USSG § 2B1.1 will ensure that the penalties under the Economic Espionage Act correctly take into account the harm inflicted on U.S. companies that are the target of trade secret theft by individuals on behalf of a foreign government.¹

The Administration is committed to preventing the theft of trade secrets through any means, including insider theft or cyber hacking. We will continue to act vigorously to combat the theft of U.S. trade secrets that could be used by foreign companies or foreign governments to gain an unfair advantage in the marketplace.

Counterfeit Drug Offenses Under the Food and Drug Administration Safety and Innovation Act

The manufacture and sale of counterfeit drugs pose a significant and growing threat to the health and safety of the American public, as well as reducing confidence in the integrity of the pharmaceutical supply chain. The Administration identified a variety of important enforcement and legislative measures directed at ensuring the integrity of the pharmaceutical supply chain in the Administration's *Counterfeit Pharmaceutical Report to the Vice President* as well as the Administration's *White Paper on Legislative Recommendations*. The recent *Food and Drug Administration Safety and Innovation Act* codified a number of the Administration's recommendations, including important new provisions governing counterfeit drug offenses and,

¹ In enacting the Foreign Economic Espionage Penalty Enhancement Act, Congress adopted each of the Administration's recommendations regarding the sentencing enhancements. *See, e.g.*, Statement of Rep. Bobby Scott, Cong. Rec., p. H7453, 12/30/2012 ("Foreign hackers constantly target U.S. companies in such ways in order to get every piece of competitive intelligence information they can. We simply cannot allow this to continue to happen. In response to this growing threat, in her 2011 annual report, the U.S. Intellectual Property Coordinator called upon Congress to increase the penalties for economic espionage, and this bill is consistent with that recommendation.")

an enhancement for offenses involving counterfeit drugs, and provide for an additional enhancement for counterfeit drug offenses involving the conscious or reckless risk of death or serious bodily injury.

Counterfeits sold to the Military under the National Defense Authorization Act for Fiscal Year 2012

Counterfeits entering the U.S. Government's supply chain pose a particularly serious problem due to the adverse impact on the Federal government's ability to accomplish its mission, potential national security implications, and the substantial waste of resources and tax-payer money. This threat is especially high for goods and services provided to our military and national security components, and in the Administration's 2010 *Joint Strategic Plan on Intellectual Property Enforcement* and the Administration's *White Paper on Legislative Recommendations* the Administration called for increased criminal penalties for such offenses. The *National Defense Authorization Act for Fiscal Year 2012* included important provisions to cover counterfeit military goods and services and, pursuant to these new provisions, the Administration recommends that the Sentencing Commission amend the Sentencing Guidelines to provide enhanced penalties for offenses involving military counterfeits that pose a heightened risk to members of the Armed Forces, military readiness, national security, or other vital national interests.

Please let me know if I may be of further assistance.

With best regards,



Victoria A. Espinel
U.S. Intellectual Property Enforcement Coordinator

CC: Ken Cohen, General Counsel, United States Sentencing Commission
CC: Jeanne Doherty, Public Affairs Officer, United States Sentencing Commission