

2012 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

**Submitted by Chief United States Probation Officer Philip R. Miller
Eastern District of Michigan**

On January 15 , 2013, the United States Sentencing Commission published its proposed amendments for the 2013 sentencing guidelines. The Sentencing Commission has set a deadline of March 19, 2013, for public comment on the proposed guidelines.

On January 31, 2013, Chief United States Probation Officer Philip R. Miller, Supervising United States Probation Officer Anthony Merolla, Senior United States Probation Officers Joan Pigott, Richard Rogala and Charmarie Green met with United States Probation Officer Chad Woycehoski and together, came to a consensus on the proposed amendments. This year, our office only offered comment on the proposed amendments that directly affect our district and/or those that our department has developed substantial experience with.

3. Counterfeit and Adulterated Drugs: Counterfeit Military Parts

Synopsis of the Proposed Amendment: The proposed amendment responds to two recent Acts that made changes to 18 U.S.C. § 2320 (Trafficking in Counterfeit Goods and Services). One Act provided higher penalties for offenses involving counterfeit military goods and services; the other Act provided higher penalties for offenses involving counterfeit drugs, and also included a directive to the Commission. The proposed amendment also responds to recent statutory changes to 21 U.S.C. § 333 (Penalties for violations of the Federal Food, Drug and Cosmetics Act) that provide higher penalties for offenses involving intentionally adulterated drugs. The probation department is only offering commentary on Part B. Counterfeit Drugs.

B. Counterfeit Drugs

Part B addresses the issue of counterfeit drugs and contains three options:

Option 1 adds a new specific offense characteristic to § 2B5.3. It provides an enhancement of either 2 or 4 levels and a minimum offense level of level 14 if the offense involves a counterfeit drug.

Option 2 revises the specific offense characteristic currently at § 2B5.3(b)(5), which provides an enhancement of two levels and a minimum offense level of 14, if the offense involved (A), the conscious or reckless risk of death or serious bodily injury, or (B) the possession of a dangerous weapon (including a firearm) in connection with the offense. As revised, this specific offense characteristic would have three tiers and an instruction to apply the greatest. The first tier would provide an enhancement of two levels, and a minimum offense level of

12, if the offense involved counterfeit drug. The second tier would provide an enhancement of two levels and a minimum offense level of 14, if the offense involved possession of a dangerous weapon in connection with the offense. The third tier would provide an enhancement of four levels, and a minimum offense level of 14, if the offense involved the conscious or reckless risk of death or serious bodily injury. Both Option one and two would amend the Commentary at § 2B5.3, to indicate that a departure may be warranted if the offense resulted in death or serious bodily injury.

Option 3 takes a different approach than the first two options. It references offenses under section 2320(a)(4) to § 2N1.1(Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

Probation Department's Comment:

The probation department takes the position that Option 1, which adds a new specific offense characteristic to § 2B5.3, is the best option. It provides an enhancement of either 2 or 4 levels and a minimum offense level of level 14 if the offense involves a counterfeit drug. Furthermore, the Commission requests comment as to if Option 1 were adopted, how should this new specific offense characteristic interact with other specific offense characteristics in § 2B5.3? Specifically, how should it interact with the specific offense characteristics currently at § 2B5.3(b)(5), which provides a two-level enhancement and a minimum offense level 14 if the offense involved a risk of death or serious bodily injury or possession of a dangerous weapon? Should the new specific offense characteristic be fully cumulative with the current one, or should they be less than fully cumulative in cases where both apply? The probation department believes that the specific offense characteristic should be fully cumulative with the current one and add an additional two-levels. Furthermore, if death or serious bodily injury occurs from the offense, that circumstance should be addressed by a cross-reference, as it is with other guidelines. The new specific offense characteristic in Option 1 appears to adequately respond to the directive and remains consistent with both guidelines.

4. Proposed Amendment: Tax Deductions

Synopsis of the Proposed Amendment: This proposed amendment addresses a circuit conflict over whether a sentencing court, in calculating the tax loss in a tax case, may subtract the unclaimed deductions that the defendant could legitimately have claimed if he or she had filed an accurate tax return. The Commission presents three options for discussion. The first option follows the approach of the Second and Tenth Circuits and specifies that a determination of tax loss shall account for any credit, deduction or exemption to which the defendant was entitled, whether or not the defendant claimed the

deduction at the time the tax offense was committed. The second option follows the approach of the Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits and specifies that the determination of 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. The third option provides that the determination of tax loss shall not account for any credit, deduction or exemption, unless the defendant demonstrates by contemporaneous documentation that the defendant was entitled to the credit, deduction or exemption.

Issues for Comment:

1. (A). Should a legitimate but unclaimed deduction be counted only if the defendant establishes that the deduction would have been claimed had an accurate return be filed? If so, should this determination be a subjective one (eg: this particular defendant would have claimed the deduction) or an objective one (eg. A reasonable taxpayer in the defendant's position would have claimed the deduction)?
1. (B). Should a legitimate but unclaimed deduction be counted only if it is related to the offense? The Ninth and Tenth Circuits have previously ruled not to permit the deductions.
1. (C). Are there differences among the various types of tax offenses that would have it be appropriate to have different rules on the use of unclaimed deductions? If so what types of tax offenses, and what rules. Are there cases in which the legitimacy of the deductions , credits or exemptions and the likelihood that the defendant would have claimed them had an accurate return been filed is evident by the nature of the crime.
2. The Commission also requests comment regarding whether this list of potential offsets provides sufficient clarity as to what the court may or may not consider depending on which option is chosen.

Probation Department's Comment:

The probation department believes that if a defendant is legitimately entitled to a credit, deduction or exemption, it should be granted to the defendant, whether or not the defendant claimed the deduction at the time the tax offense was committed. Option 3, which requires that the defendant demonstrate by contemporaneous documentation that the defendant was entitled to the credit, deduction or exemption, is recommended. The probation department also believes that if a defendant is legitimately entitled to a credit, deduction or exemption, it should be granted to the defendant, regardless if it is related to the offense, and that it should apply to all tax

offenses. The probation department believes that if a credit, deduction and/or exemption has been granted by the IRS, and a defendant is legitimately entitled to it, it should be given in all cases. This would also provide clarity to the courts.

5. Proposed Amendment: Acceptance of Responsibility

A). Circuits have disagreed over whether the court has discretion to deny the third level of reduction for acceptance of responsibility when the government has filed a motion under Section §3E1.1(b) and the defendant is otherwise eligible.

The 7th Circuit recently held that if the government makes the motion (and the other two requirements of subsection (b) are met, *i.e.*, the defendant qualifies for the 2-level decrease and the offense level is level 16 or greater), the third level of reduction MUST be awarded.

The 5th Circuit has held to the contrary, that the decision whether to grant the third level of reduction “is the district court’s – not the government’s – even though the court may only do so on the government’s motion.”

The proposed amendment adopts the approach of the 5th Circuit by recognizing that the court has discretion to deny the third level of reduction.

Issue for comment:

The Commission seeks comment on whether it should resolve this circuit conflict in a manner other than that provided in the proposed amendment. If so, how should the conflict be resolved and how should the Commission amend the guidelines to do so?

Probation Department’s Comment:

The probation department for the Eastern District of Michigan agrees with the proposed amendment to adopt the approach of the 5th Circuit by recognizing that the court has discretion to deny the third level of reduction for acceptance of responsibility. Consistent with Application Note 5, the sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility. While it is necessary for the government to make a motion for the defendant to receive the third level and may believe that the defendant is entitled to the reduction, the court may consider other factors in its determination including, but not limited to, examples provided in Application Notes 1 and 2 of Section §3E1.1. The court is responsible for determining the correctly calculated advisory guideline range by ruling on the appropriate Specific Offense Characteristics, criminal history category, role in the offense, etc., and should maintain discretion for acceptance of responsibility for consistency purposes based on all information received

by not only the government, but the defendant, the pretrial services agency, the probation department, and any other sources necessary to make the appropriate determination. The proposal to add a sentence to Application Note 6 is sufficient to address this issue.

B). Circuits have also disagreed over whether the government has discretion to withhold making a motion under subsection (b) when there is no evidence that the government was required to prepare for trial.

The 2nd and 4th Circuits have held that the government may withhold the motion only if it determines that it has been required to prepare for trial.

The majority of circuits, in contrast, have held that Section §3E1.1 recognizes that the government has an interest both in being permitted to avoid preparing for trial and in being permitted to allocate its resources efficiently, and that both are legitimate government interests that justify the withholding of the motion.

Issue for comment:

The Commission seeks comment on whether it should resolve this circuit conflict and, if so, how it should do so.

Probation Department's Comment:

The probation department for the Eastern District of Michigan agrees with the majority of the circuits. The government is in the best position to determine if the defendant has assisted authorities in the investigation and prosecution of his/her own misconduct, to advise the court that it was able to allocate its resources efficiently, and provide to what extent, if any, it prepared for trial in each individual case.