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Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Public Comment on Proposed Amendments for 2013

Dear Judge Saris:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed guideline amendments and issues for comment that were published by the Commission on January 18, 2013. At the public hearing on March 13, 2013, we submitted written testimony on proposals related to pre-retail medical products, counterfeit and adulterated drugs, and *Setser* and acceptance of responsibility. Copies of that testimony are attached and incorporated as part of our public comment. Here, we address several issues raised at the hearing regarding acceptance of responsibility, and offer comment on the remaining proposals.

I. Issue for Comment: Trade Secrets

The Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. 112-269, amends the maximum fines that can be imposed for convictions under one part, 18 U.S.C. § 1831, of the Economic Espionage Act (EEA),¹ and contains a directive to the Commission to “review and, if appropriate, amend” the guidelines “applicable to persons convicted of offenses relating to the transmission or attempted transmission of a stolen trade secret outside of the United States or economic espionage.” The Commission seeks comment on what, if any, changes to the guidelines are appropriate to respond to that directive.

¹ The EEA created offenses that are codified at 18 U.S.C. §§ 1831 & 1832.

Defenders believe it would not be appropriate to amend the guidelines. The current guidelines “reflect the seriousness of these offenses, account for the potential and actual harm caused by these offenses, and provide adequate deterrence against such offenses.”

The primary focus of the recent economic espionage legislation,² the Administration’s new strategic plans,³ related press attention,⁴ and testimony before the Sentencing Commission,⁵ has been on the theft of trade secrets to benefit foreign governments, most specifically, China. Trade secret offenses, however, include a much broader range of conduct. Indeed, many prosecutions for trade secret violations involve much less culpable conduct, and allegations that the intended beneficiary of the stolen secret, if any exists at all, is a citizen or corporation of the United States. Many of the cases involve employees of U.S. companies who take information – sometimes trade secrets – with them when they leave a company to help them either in their new job with a U.S. competitor, or in starting their own U.S. company that they hope will become a competitor.

² See Statement of Representative Lamar Smith, urging passage of the Foreign and Economic Espionage Penalty Enhancement Act of 2012, H.R. 6029, 158 Cong. Rec. H7453-01, H7453 (daily ed. Dec. 30, 2012) (The Act “deters and punishes criminals who target U.S. economic and security interests on behalf of foreign interests.”); Statement of Representative Robert “Bobby” Scott, urging passage of the Foreign and Economic Espionage Penalty Enhancement Act of 2012, H.R. 6029, 158 Cong. Rec. H7453-01, H7455 (daily ed. Dec. 30, 2012) (The Act “will increase the maximum fines that may be imposed for engaging in the Federal offense of economic espionage. The crime of economic espionage consists of knowingly misappropriating trade secrets with the intent or knowledge that the offense will benefit a foreign government.... [E]conomic espionage is a serious threat to American businesses by foreign governments.”).

³ On February 20, 2013, the White House released the *Administration Strategy on Mitigating the Theft of U.S. Trade Secrets*, http://www.whitehouse.gov/sites/default/files/omb/IPEC/admin_strategy_on_mitigating_the_theft_of_u.s._trade_secrets.pdf. “Of the 19 cases that had resulted in charged and convictions detailed in the strategy document, 16 involve theft aimed to benefit entities in China.” Siobhan Gorman & Jared A. Favole, *U.S. Ups Ante for Spying on Firms – China, Others are Threatened with New Penalties*, Wall St. J., Feb. 21, 2013, at A1.

⁴ See, e.g., David E. Sanger, *In Cyberspace, New Cold War*, N.Y. Times, Feb. 24, 2013, <http://www.nytimes.com/2013/02/25/world/asia/us-confronts-cyber-cold-war-with-china.html>; Derek Klobucher, *Obama’s Five-Point Plan to Fight Cyber-Crime*, Forbes, Feb. 25, 2013, <http://www.forbes.com/sites/sap/2013/02/25/obamas-five-point-plan-to-fight-cyber-crime/>.

⁵ See Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington D.C. (Mar. 13, 2013) (not yet released); Statements of Stanford K. McCoy, John W. Powell & David Hirschmann Before the U.S. Sentencing Comm’n, Washington D.C. (Mar. 13, 2013); Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation for the U.S. Department of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 7-13 (Mar. 8, 2013) (hereinafter *DOJ March 2013 Letter*).

To convey the variety of federal trade secret cases prosecuted in the United States and the breadth of cases this directive implicates, we have included a table of cases created by a lawyer in Silicon Valley, Thomas J. Nolan, who has defended numerous individuals against criminal trade secret charges since the late 1980s.⁶ In the summer of 2012, his law firm searched PACER to collect every § 1831 and § 1832 case charged since the enactment of the EEA in 1996.⁷ The firm found 122 cases.⁸ Of those cases, almost half (48%) involved government allegations of trade secret theft related to conduct *within* the United States.⁹ Defenders urge the Commission to review the table of cases, which shows that a significant number of cases implicated by the directive do not involve theft of trade secrets to benefit foreign nations, and involve a wide variety of conduct and harm.¹⁰

We also ask that the Commission give very careful consideration to the full and broad range of conduct that falls under the directive. Defenders believe the current guidelines adequately address that full range of conduct. The upward ratcheting suggested by the government for simple misappropriation of trade secrets, and the transmission of trade secrets outside the United States even when the transmission might be incidental to the offense, rather than an intentional component of it, is unjustified. The government's proposed 4 to 6-level enhancement¹¹ for what is now a 2-level enhancement when the trade secret offense is for the benefit of a foreign country, is unwarranted.

Leaving the guidelines as they currently are finds further support from the fact that §2B1.1 is already unduly complicated and undergoing a multi-year review. In addition to being unnecessary, it would be cumbersome, and counter-productive to the Commission's long term goals to add yet another series of specific offense characteristics (SOCs) to §2B1.1.

Below, Defenders offer responses to the Commission's Request for Comment.

⁶ See Declaration of Thomas J. Nolan (hereinafter *Nolan Dec.*) & Exhibit A, appended hereto.

⁷ *Id.* at ¶¶8-15.

⁸ *Id.*, Ex. A.

⁹ *Id.* at ¶16 & Ex. A. Mr. Nolan notes in his declaration that this project was not conducted for purposes of academic publication, and he makes no representation that the information derived from it is flawless. *Id.* ¶15.

¹⁰ *Id.* at ¶16 & Ex. A.

¹¹ *DOJ March 2013 Letter*, at 9.

A. The Commission Does Not Need to Amend Any Guideline in Response to the Directive.

As detailed below, Defenders do not believe the Commission should amend §2B1.1, and also do not believe there are any other guidelines the Commission should consider amending in response to the directive.

B. The Commission Should Consider Offenses Other Than Sections 1831 and 1832 in Responding to the Directive.

In addition to pursuing charges under 18 U.S.C. §§ 1831 and 1832, the government sometimes chooses to prosecute conduct that may involve trade secret theft under a variety of different statutes that do not include as an element that the information at issue was a trade secret as defined under 18 U.S.C. § 1839. These statutes include, for example, 18 U.S.C. § 1030(a) and (b) (unlawfully accessing or attempting to access a computer) and 18 U.S.C. §§ 1341, 1343 (mail or wire fraud).¹² When charges are brought under provisions that do not require proof of a trade secret, the sentencing court will have to resolve this difficult factual question before applying any specific offense characteristic that is based on the existence of a “trade secret.” It is troubling that in such cases, serious charges with serious consequences will be decided at a sentencing hearing under a preponderance of the evidence standard, rather than the more rigorous beyond a reasonable doubt standard required at trial. In addition, the “trade secret” fact is likely to be highly contested in most, if not all, sentencing proceedings where “trade secret” is not an element of the offense of conviction, and thus a lengthy and costly hearing will often be required. For example in one on-going case involving a conviction under 18 U.S.C. § 1030(a)(4), the sentencing is not yet complete, but so far there has been a 7-day hearing, focused largely on whether the information at issue was a “trade secret.”¹³ In that case, in addition to the costs associated with the court and attorney time, the government has retained two independent experts, as has the defense.

C. The Commission Should Consider the Wide Range of Seriousness and Associated Harm of Trade Secret Offenses Described in the Directive.

The seriousness of trade secret offenses and the harms associated with them vary widely. To be sure, economic espionage cases, where trade secrets are stolen to benefit a foreign government, are serious offenses with the potential for significant harm. But, as mentioned above, not all trade secret cases involve spies for foreign nation states. Some cases just involve

¹² See *Nolan Dec.*, Ex. A; U.S. Department of Justice, *Prosecuting Intellectual Property Crimes* 175-81 (3d ed. 2006), <http://www.justice.gov/criminal/cybercrime/docs/ipma2006.pdf> (hereinafter *DOJ IP Manual*).

¹³ *United States v. Mohapatra*, No. 11-cr-00132 (D. Utah 2011).

individuals seeking a leg up in their next job, a quick path to a big pay day, or a competitive advantage for their U.S. employer or their own new U.S. business. Indeed, as more employees use an increasing number of applications and cloud storage to manage their personal and professional lives on mobile devices,¹⁴ the risk of them committing a trade secret violation and facing prosecution increases. The EEA is so wide reaching that one law firm has informed its clients:

[T]he broad scope of the EEA applies to more than just intentional theft and, broadly applied, may become a significant hazard for companies that legitimately receive the confidential information of another.... Part of the confusion is attributable to the fact that a trade secret can be virtually any type of information, including combinations of public information. Furthermore, misappropriation can occur simply by exceeding authorization. Even for sophisticated parties, authorization can be difficult to determine.¹⁵

One reason for the wide range of cases is that the definition of trade secret is “very broad.”¹⁶ “A trade secret is really just a piece of information (such as a customer list, or a method of production, or a secret formula for a soft drink) that the holder tries to keep secret by executing confidentiality agreements with employees and others and by hiding the information from outsiders by means of fences, safes, encryption, and other means of concealment.”¹⁷ It is defined by statute as follows:

(3) the term “trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if –

(A) the owner thereof has taken reasonable measures to keep such information secret; and

¹⁴ See, e.g., Quentin Hardy, *Where Apps Meet Work, Secret Data Is at Risk*, N.Y. Times, Mar. 3, 2013, <http://www.nytimes.com/2013/03/04/technology/it-managers-struggle-to-contain-corporate-data-in-the-mobile-age.html>.

¹⁵ Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, *Recent Amendment to the Economic Espionage Act Extends Protection Against Misappropriation* 4 (Jan. 3, 2013), http://www.skadden.com/newsletters/Recent_Amendment_to_the_Economic_Espionage_Act.pdf.

¹⁶ *DOJ IP Manual*, at 143.

¹⁷ *ConFold Pac. v. Polaris Indus.*, 433 F.3d 952, 959 (7th Cir. 2006).

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public.

18 U.S.C. § 1839(3).

In addition to containing a very broad definition of trade secret, the “EEA can be applied to a wide variety of criminal conduct.”¹⁸ The language, of § 1832 in particular, displays the reach of the EEA and thus is worth reproducing here.

Whoever, with intent to convert a trade secret, that is related to a product or service used in or intended for use in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly –

(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;

(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;

(3) receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;

(4) attempts to commit any offense described in paragraphs (1) through (3); or

(5) conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy.

18 U.S.C. § 1832.

As if the EEA were not broad enough, the government maintains, and some circuit courts agree, that in cases alleging attempt and conspiracy, “the government need not prove that the information actually was a trade secret.”¹⁹

To provide the Commission with an idea of the range of trade secret cases, beyond the most egregious ones highlighted by the government, Defenders point to a few examples:

¹⁸ *DOJ IP Manual*, at 142.

¹⁹ *Id.* at 144, 161-63.

- *United States v. Mulhollen*, No. 10-cr-00013 (W.D. Ky. 2010). Mr. Mulhollen, an employee of Good Times Tobacco, pled guilty to a single count indictment charging him with the intent to convert a trade secret in violation of 18 U.S.C. § 1832, by attempting to steal starter tobacco from Swedish Match Tobacco for the production of moist snuff tobacco. It was alleged that Mr. Mulhollen approached an employee of Swedish Match Tobacco and offered her \$1000 for a starter tobacco product. The employee reported the contact, and the FBI set up a sting. No actual trade secret material was taken or received. Mr. Mulhollen was sentenced to 12 months and 1 day imprisonment, and 2 years of supervised release.
- *United States v. Zhang*, No. 5:05-cr-00812 (N.D. Cal. 2005). All of the alleged trade secrets at issue in this case belonged to Marvell Semiconductor, Inc., a U.S. company and a supplier of semiconductor chips to Netgear, Inc., another U.S. company. The government alleged that Mr. Zhang, “while still employed as a Project Engineer at Netgear but after he had accepted a job offer from Broadcom Corporation (‘Broadcom’)[, another U.S. company,] misappropriated Marvell trade secrets to which he had access in his position at Netgear.”²⁰ Before leaving Netgear, Mr. Zhang downloaded files that he later copied to his Broadcom laptop computer. He then forwarded via email one of the downloaded Marvell documents to his colleagues at Broadcom. Mr. Zhang was convicted of violating § 1832 by misappropriating and unlawfully downloading trade secrets, unauthorized copying of trade secrets, and unauthorized possession of stolen trade secrets. He was acquitted on other counts, including the one charging him with the transmission of a trade secret. He was not convicted of disseminating any trade secrets. Mr. Zhang was sentenced to 3 months imprisonment, 3 years of supervised release, and ordered to pay \$75,000 in restitution.
- *United States v. Murphy*, No. 11-cr-00029 (N.D. Cal. 2011). Mr. Murphy pled guilty to violating 18 U.S.C. § 1832. Mr. Murphy worked for more than ten years at KLA Tencor Corporation (“KT”), a California corporation. While still employed at KT, he started his own company, called Inspecstar, which competed with KT. After starting his own company, but before being terminated by KT, Mr. Murphy downloaded and subsequently copied files from KT’s computer network, some of which the government alleged included trade secret information that Mr. Murphy continued to possess even after KT fired him. Mr. Murphy was sentenced to 3 years of probation and ordered to pay \$40,000 in restitution.

²⁰ Findings of Fact, Analysis and Verdict, Dkt. No. 295.

- *United States v. West*, No. 08-cr-00709 (N.D. Cal. 2008). Mr. West was charged with a single count of possessing a stolen trade secret in violation of 18 U.S.C. § 1832. The night before quitting his job at Phillips Lumileds Lighting Company, a California company, Mr. West copied files to which he already had access. He retained those files for only a few months, and they sat unused for a portion of that time while he took a vacation before starting his new job at Bridgelux, Inc., a U.S.-based company that is a competitor of Phillips in the design and manufacture of LEDs. Mr. West paid his full restitution to Phillips in the amount of \$100,000 before pleading guilty, and was sentenced to 3 years of probation.
- *United States v. Grande*, No. 07-cr-00019 (D. Conn. 2007). Mr. Grande pled guilty to one count of theft of trade secrets in violation of 18 U.S.C. § 1832. While employed by Duracell Corporation (Bethel Connecticut), Mr. Grande copied and downloaded alleged trade secrets regarding AA batteries that he mailed to competitors. Mr. Grande did not act for personal gain, but rather to injure Duracell because he was upset by the size of the bonuses being paid to Duracell executives. The competitors returned the trade secret information to Duracell and the government admitted that there was no evidence the competitors used the trade secret information. The defendant was sentenced to 5 years probation, a departure below the guidelines based on §5K2.13 (Diminished Capacity) and §5H1.6 (Family Ties and Responsibilities).

More examples of the wide range of conduct and trade secrets at issue in these cases are appended to these comments.²¹ As mentioned above, the Appendix includes the Declaration of Thomas J. Nolan, regarding his law firm's efforts to collect information on EEA cases prosecuted since its enactment in 1996, and some of the conclusions the firm drew from that information regarding the types of offenses and sentence length.²² It also includes the product of those efforts: a table of 122 cases involving trade secret charges.²³ A review of that table confirms the breadth of conduct that is addressed in trade secret prosecutions.

D. Increasing Penalties Will Not Deter Future Offenders.

The commonly held belief that increasing sentence length will increase deterrence is simply not supported by research. At the Commission's hearing on trade secrets, many witnesses argued that increasing sentence length would increase deterrence, yet not one witness

²¹ *See Nolan Dec.*

²² *See Nolan Dec.*, at ¶¶8-16.

²³ *Id.*, Ex. A.

cited a single study that supports that theory.²⁴ What the research shows is that the certainty of getting caught is what deters.²⁵ Allocating limited federal government funds to increase incarceration will do nothing to solve the problem that the United States faces with the theft of trade secrets. From a deterrence perspective, according to the research, increasing the length of incarceration is just a waste of money.²⁶

E. The Current Guidelines Appropriately Account for the Simple Misappropriation of a Trade Secret.

The current guidelines appropriately account for the simple misappropriation of a trade secret. Defenders disagree with the government's assertion that it is necessary to add an enhancement for the simple misappropriation of trade secrets to achieve parity with the intellectual property crimes referenced to §2B5.3.²⁷ The government focuses on the 2-level difference between the base offense level of 6 at §2B1.1 and the base offense level of 8 at §2B5.3, ignoring both the history of why §2B5.3 is set at a base offense level 8, and the specific offense characteristic set forth in §2B1.1(b)(10), which, as the government has recognized elsewhere, will "often" apply to trade secret offenses,²⁸ thereby bringing the minimum offense level to 12.

In 2000, the Commission determined that the more than minimal planning enhancement under what was then §2F1.1 "would apply in the vast majority" of cases referenced to §2B5.3 and because of that "the infringement guideline should incorporate this type of conduct into the base offense level."²⁹ Accordingly, the Commission raised the base offense level for §2B5.3 from 6 to 8.³⁰ Section 2B1.1 handles more than minimal planning, or sophisticated means,

²⁴ See Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington D.C. (Mar. 13, 2013); Statements of Stanford K. McCoy, John W. Powell & David Hirschmann Before the U.S. Sentencing Comm'n, Washington D.C. (Mar. 13, 2013); *DOJ March 2013 Letter*, at 7-13.

²⁵ See Statement of Denise Barrett Before the U.S. Sentencing Comm'n, Washington, D.C., at 16 (Mar. 13, 2013) (not yet released); Statement of Kyle Welch Before the U.S. Sentencing Comm'n, Washington, D.C., at 5-6 (Mar. 17, 2011). See also Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* 1 (2010), <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>.

²⁶ The Bureau of Prisons recently released information that in Fiscal Year 2011, the average cost of incarceration for a Federal inmate was \$28,893.40. Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 16711 (March 18, 2013).

²⁷ *DOJ March 2013 Letter*, at 11.

²⁸ *DOJ March 2013 Letter*, at 11; *DOJ IP Manual*, at 277.

²⁹ USSG, App. C, Amend. 590, Reason for Amendment (May 1, 2000).

³⁰ *Id.*

differently.³¹ Rather than being incorporated into the base offense level, it is a specific offense characteristic, carrying a 2-level enhancement, and a minimum offense level of 12.³² Under the government's plan to add a 2-level enhancement for simple misappropriation of trade secrets if, as the government states, defendants will "often" get the sophisticated means enhancement, defendants would start at an offense level 10 before any consideration of the loss amount, and face a minimum offense level of 12 even if the loss amount was negligible. Thus, the government's plan would only increase disparity between the trade secret offenses referenced to §2B1.1 and the intellectual property offenses referenced to §2B5.3.³³

No evidence shows that the current guidelines are inadequate to address the simple misappropriation of trade secrets. In addition to the incremental increases based on the loss table³⁴ and the sophisticated means enhancement, defendants sentenced under §2B1.1 for trade secret offenses may also be subject to adjustments under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).³⁵

Feedback from the sentencing courts provides further evidence that the guidelines for simple misappropriation are not too low and are sufficient to address the seriousness of the conduct involved in these offenses. Convictions for theft of trade secrets pursuant to 18 U.S.C.

³¹ In 2001, the Commission recognized the "potential overlap between the more than minimal planning enhancement and the sophisticated means enhancement," and deleted the more than minimal planning enhancement previously at §2B1.1(b)(4)(A) and §2F1.1(b)(2)(A). USSG, App. C, Amend. 617, Reason for Amendment (Nov. 1, 2001).

³² See USSG §2B1.1(b)(10).

³³ It is also worth noting that both the government and the courts appear to find the guideline recommended sentences under §2B5.3 to be too high. From FY2006-FY2011, the rate of government sponsored downward departures and variances for reasons other than substantial assistance was 5.4%. USSC, FY 2006-2011 Monitoring Datasets. The rate of non-government sponsored downward departures and variances was 34.6%. *Id.* In that time period, only four defendants (.3%) received an above-guideline sentence. *Id.* Focusing on the most recent past, in FY2011, almost half (49.4%) of the people sentenced under §2B5.3 received a sentence below that recommended by the guidelines for reasons other than substantial assistance. USSC, FY 2011 Monitoring Dataset. By comparison, in 2011, the national rate of below-guideline sentences across all guidelines, for reasons other than government sponsored departures under Chapter Five, Part K, was 21.8%. USSC, *2011 Sourcebook of Federal Sentencing Statistics* tbl. N (2011).

³⁴ Defenders have repeatedly indicated that the loss table often overstates the seriousness of the offense and culpability of the offender, and does not serve the purpose of general or specific deterrence. See, e.g., Statement of Kathryn N. Nester Before the U.S. Sentencing Comm'n, Washington, D.C., at 1 (March 14, 2012). Over the years, amendments to the loss table in §2B1.1 have dramatically increased penalties, and can now increase the offense level by up to 30 levels. *Id.* at 3-4; USSG §2B1.1(b)(1).

³⁵ The government agrees that these adjustments may apply in trade secret cases. See *DOJ IP Manual*, at 278-79.

§ 1832 consistently receive within- and below- guideline sentences. Since 2008, there has been only 1 above-guideline sentence imposed in a case involving a conviction under § 1832.³⁶ Most recently, in 2011, there were 11 sentences in cases with convictions under § 1832, and in 63.6% of them, the court imposed a sentence that fell within the guidelines. All of the remaining cases were sentenced below the guidelines.³⁷ The year before that, in 2010, there were only 4 sentences in cases with convictions under § 1832, and in every one of those cases, the courts imposed sentences below what was recommended by the guidelines.³⁸

As discussed above, a wide-range of conduct is prosecuted for simple misappropriation of trade secrets, and keeping the current guideline best ensures that the less culpable are not punished too harshly, while still leaving room for those who are more culpable to receive more severe penalties.

F. The Current 2-Level Enhancement at §2B1.1(b)(5) is Sufficient to Address the Seriousness Of The Conduct Involved In The Offenses Described In The Directive.

Defenders believe the current 2-level enhancement is sufficient to address the seriousness of the conduct at issue and see no need to set a minimum offense level of [14] or [16] for this conduct.

Misappropriation of a trade secret with the knowledge or intent that the theft would benefit a foreign government, foreign instrumentality, or foreign agent, is an aggravated offense. Defenders did not oppose adding the enhancement for this conduct back in 1997 when it was proposed.³⁹ We have not seen any evidence, however, that would support the need to increase that enhancement further, or to set a base offense level, for that type of conduct.

As discussed above, between loss amounts and other enhancements, the guideline range already can climb to extremely high levels quite quickly. Absent evidence that the guidelines are not providing sufficiently severe penalties for a broad category of these cases – something that is not evident from the limited number of convictions under 18 U.S.C. § 1831 – the guideline range

³⁶ USSC, FY 2008-2011 Monitoring Datasets.

³⁷ USSC, FY 2011 Monitoring Dataset.

³⁸ USSC, FY 2010 Monitoring Dataset.

³⁹ See Statement of Thomas W. Hillier, II, concerning the Proposed Guideline Amendments, Part II, at 17 (Mar. 28, 1997). It is noteworthy that the addition of this SOC in 1997 brought the total number of SOCs under §2B1.1 up to seven. See USSG §2B1.1 (1997). There are now 18 SOCs, more than double the number that existed in 1997, many with multiple parts and lengthy application notes. See USSG §2B1.1 (2012).

for these offenses does not need to be increased. If, however, the Commission decides to increase the size of the enhancement for this conduct, or set a higher floor, Defenders urge the Commission to make clear in the commentary that for the increased enhancement to apply, the defendant must be convicted of the corresponding conduct set forth in § 1831. Particularly for significant enhancements, the government should not be able to avoid proving the elements of this offense, but then be able to enhance the defendant's sentence based on the same conduct proven only by a preponderance of the evidence and without the same evidentiary safeguards afforded at trial.

G. Transmission of a Trade Secret Outside of the United States is a Poor Measure of Culpability.

The Commission seeks comment on whether it should add enhancements for (A) the transmission or attempted transmission of a stolen trade secret outside of the United States; (B) the transmission or attempted transmission of a stolen trade secret outside of the United States that is committed or attempted to be committed for the benefit of a foreign government, foreign instrumentality, or foreign agent, and whether it should provide a minimum offense level of [14] [16] if the defendant transmitted or attempted to transmit stolen trade secrets outside of the United States.

Defenders believe the conduct of transmitting or attempting to transmit a trade secret for the benefit of a foreign government is adequately covered by USSG §2B1.1(b)(5), and no additional enhancement is necessary or appropriate.

Defenders strongly urge the Commission not to enhance a sentence or set a base offense level based on transmission or attempted transmission outside the United States because – particularly when combined with the broad term “trade secret” – it will capture too much conduct that does not coincide with increased seriousness or harm. Defenders fear transmission is a poor measure of culpability, particularly given the number of instances where transmission outside of the United States could be incidental to the offense.

With current technology, a defendant may transmit information outside of the United States for temporary storage, even if the intent of the offense is to take information from one U.S. company to another U.S. Company. For example, in *United States v. Aleynikov*, Mr. Aleynikov sent computer code from his office at Goldman Sachs & Co. in New York, to a server in Germany.⁴⁰ “The entity that operates the German server offers free and paid services to

⁴⁰ See *United States v. Aleynikov*, 676 F.3d 71, 74 (2d Cir. 2012) (reversing trade secret conviction because “the source code was not ‘related to or included in a product that is produced for or placed in interstate or foreign commerce’ within the meaning of the EEA”). This decision, reversing Mr. Aleynikov’s conviction under 18 U.S.C. § 1832, led Congress to pass the Theft of Trade Secrets

computer programmers who wish to store their source code projects.”⁴¹ When “he returned to his home in New Jersey, Aleynikov downloaded the source code from the server in Germany to his home computer, and copied some of the files to other computer devices he owned.”⁴² Subsequently he “flew from New Jersey to Chicago” for meetings at his new employer, “Teza Technologies LLC, a Chicago-based startup.”⁴³ Mr. Aleynikov “brought with him a flash drive and a laptop containing portions of the Goldman source code.”⁴⁴

As the Commission is well aware from its review of the child pornography guideline, technology can make it so certain factors do not “adequately distinguish[] among offenders based on their degrees of culpability.”⁴⁵ A transmission enhancement and/or minimum offense level would have the same effect. This is best illustrated by considering the following scenarios.

- A defendant conspires with another engineer to steal information from a U.S. company with plans to start their own rival company, also in the U.S. The defendant emails the information to the co-conspirator and the co-conspirator emails the information outside the country, without the defendant’s knowledge. This could be because the co-conspirator has more nefarious purposes, or simply because the co-conspirator happens to open his email containing the information while on vacation in France.
- An employee, before quitting his job at one U.S. company, emails himself information that he considers his “tool kit,” but that includes one trade secret. Before starting his new job, he takes a vacation in Costa Rica. While in Costa Rica, he accesses the email he sent himself because he was looking for an email address contained in the information but also, unintentionally, opens a document that contained the trade secret.

Clarification Act of 2012, Pub. L. 112-236, amending § 1832 to expand its reach beyond just a “product” used in commerce to include either a “product or service.”

⁴¹ *United States v. Aleynikov*, 737 F. Supp. 2d 173, 175 (2010).

⁴² *Aleynikov*, 676 F.3d at 74.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ USSC, *Report to Congress: Federal Child Pornography Offenses* ii (2012). “[F]our of the six sentencing enhancements in §2G2.2 – those relating to computer usage and the type and volume of images possessed by offenders, which together account for 13 offense levels – now apply to most offenders and, thus, fail to differentiate among offenders in terms of their culpability.” *Id.* at iii.

While none of individuals in these examples are innocent, they demonstrate how transmission will not differentiate between those who are more or less culpable, and instead risks increasing punishment for some individuals in what may be less serious trade secret offenses.

In addition, the transmission enhancement and minimum offense level are deeply troubling in light of the number of legitimate business relationships that exist with foreign companies that may have U.S. subsidiaries or that are subsidiaries of U.S. owned companies.

Finally, Defenders agree with the Practitioners Advisory Group that additional punishment for transmission outside the U.S. may result in unwarranted disparity because “there are no doubt cases where transmission of a particular trade secret *within* the United States poses a greater economic risk than does transmission outside the country.”⁴⁶

H. The Commission Should Not Restructure the Existing 2-Level Enhancement in Subsection (b)(5) into a Tiered Enhancement.

As discussed above, Defenders oppose amending §2B1.1 in any way while the Commission is in the midst of a multi-year review of economic offenses. Moreover, there is simply no evidence that the guidelines need to be changed in response to the directive. The guidelines adequately address the seriousness and harms of the conduct at issue and contain sufficient enhancements to adequately punish the more culpable offenders. Increasing the guidelines would result in unnecessary punishment for less culpable offenders.

I. The Commission Should Not Provide a Minimum Offense Level of [14][16] if the Defendant Transmitted or Attempted to Transmit Stolen Trade Secrets Outside of the United States or Committed Economic Espionage.

For all of the reasons discussed above, Defenders oppose amending the guidelines to provide minimum offense levels for this conduct.

II. Proposed Amendment: Counterfeit Military Parts

In the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, Congress created a new criminal offense for intentionally trafficking in counterfeit military goods and services, “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 combat operations, a member of the Armed Forces, or to national security.” 18 U.S.C. § 2320(a)(3).

⁴⁶ Statement of David Debold Before the U.S. Sentencing Comm’n, Washington, D.C., at 4 (March 13, 2013).

The Commission proposes four options to address this new provision. Defenders support the Commission's proposal to reference 18 U.S.C. § 2320(a)(3) to the counterfeiting guideline at §2B5.3. Because § 2320(a)(3) is a relatively new offense and there are few prosecutions for counterfeit military goods, we think it premature for the Commission to craft specific offense characteristics for this offense. Rather than grapple with how the various SOCs might interact, and inject the danger of "factor creep" into a guideline that already has multiple SOCs, we think it better for the Commission to wait and obtain more information on how these prosecutions proceed and whether the existing guidelines are adequate to capture the seriousness of these offenses. If the Commission nonetheless wishes to proceed with an amendment, then we agree with the government that Option 1 is most tailored to meet the concerns that Congress expressed when it enacted 18 U.S.C. § 2320(a)(3).

Defenders believe it would be best to refrain from adding a new SOC to §2B5.3 at this time for at least three reasons. First, prosecutions for counterfeiting in military goods or services, or goods or services used to maintain or operate a critical infrastructure or used by a government entity, are rare.⁴⁷ The Department of Justice reported only one "significant" prosecution in FY2011 and 2012, which involved counterfeit military goods.⁴⁸ That case involved a defendant who conspired with the owner of VisionTech Components, LLC to traffic in counterfeit goods and to commit mail fraud. VisionTech advertised name-brand trademark integrated circuits, but actually provided counterfeit circuits from China and Hong Kong. The defendant's final offense level was 28, with a guideline range of 78-97 months.⁴⁹ She was eventually sentenced to 38 months imprisonment. In another case, the defendants were convicted of conspiring to sell counterfeit integrated circuits to the United States military, defense contractors, and others. The lead defendant was sentenced to 30 months imprisonment, ordered to pay \$177,862 in restitution to the semiconductor companies whose trademarks were

⁴⁷ Government and private industry use a wide-variety of tactics to keep counterfeit goods and services from entering the supply chain. *See, e.g.,* U.S. Chamber of Commerce, *Coalition Against Counterfeiting and Piracy, No Trade in Fakes: Supply Chain Tool Kit* (2006), http://www.fnal.gov/directorate/OQBP/sci/sci_reference_docs/SCI%20No%20Trade%20in%20Fakes%20CACCP.pdf.

⁴⁸ U.S. Dep't of Justice, *PRO IP Act Annual Report FY2012* 16 (2012).

⁴⁹ Her base offense level under USSG §2B5.3 was 8. She then received a 16-level adjustment for the infringement amount, 2 levels for importation, 2 levels for conscious or reckless risk of serious bodily injury, and 3 levels for role in the offense. She then received a 3-level reduction for acceptance of responsibility and a downward departure for substantial assistance. *United States v. McCloskey*, No. 1:10-cr-00245-PLF (D.D.C. 2011).

infringed, and ordered to perform 250 hours of community service. The defendant also forfeited industrial machinery, computer equipment, and inventory.⁵⁰

Second, the evidence does not suggest that we can expect to see a dramatic rise in prosecutions for counterfeit military goods or services. Seizures of counterfeit goods that are considered “critical technology components,” i.e., networking equipment and semiconductor devices, represented only 9% of all seizures in FY2011 compared to 20% in FY2010.⁵¹

Third, because of the lack of prosecutions for counterfeit military goods or even goods that might affect critical infrastructure, no evidence shows that §2B5.3 does not provide for sufficient penalties. While the data we have available to us do not break out the specific nature of the counterfeit items involved in §2B5.3 offenses, the rate of below-guideline sentences for §2B5.3 shows that the current guideline produces sentences that are too high in many cases. From FY2006 though FY2011, the rate of government sponsored downward departures and variances for reasons other than substantial assistance was 5.4%.⁵² The rate of non-government sponsored downward departures and variances was 34.6%. In FY2011, almost one in two (49.4%) persons sentenced under §2B5.3 benefited from a below-guideline range sentence imposed for reasons other than substantial assistance. When substantial assistance is included, two out of three (65%) defendants received a below-guideline sentence. In the six year period from 2006 to 2011, only four defendants (.3%) received an above-guideline sentence.⁵³

If the Commission feels compelled to nonetheless add SOC's in the absence of solid and quantifiable empirical evidence about these offenses, then we encourage the Commission to narrowly tailor the SOC. Option 1 is the most limited of the proposed SOC's and carefully mirrors the offense set forth at § 2320(a)(4). Option 2 expands the increase to cover all counterfeit military goods or services, no matter what their use or whether they pose a safety risk. Option 3 provides a [2][4] level adjustment and minimum offense level of 14 for an untold number of cases involving virtually every aspect of the modern world. Option 3 would undoubtedly generate significant litigation. Option 4 would refer counterfeit military parts to

⁵⁰ U.S. Attorney's Office, District of Columbia, Press Release: *California Business Owner Sentenced to 30 Months in Prison for Conspiring to Sell Counterfeit Microelectronics to the U.S. Military* (Feb. 15, 2012), <http://www.justice.gov/usao/dc/news/2012/feb/12-051.html>. A co-defendant received a sentence of 20 months. U.S. Attorney's Office, District of Columbia, Press Release: *Operations Manager for MVP Micro Sentenced to 20 Months in Prison for Conspiring to Sell Counterfeit Microelectronics to the U.S. Military* (Feb. 22, 2012), <http://www.justice.gov/usao/dc/news/2012/feb/12-065.html>.

⁵¹ U.S. Customs and Border Protection, *Intellectual Property Rights: Fiscal Year 2011 Seizure Statistics* 34 (2011), <http://www.iprcenter.gov/reports/ipr-center-reports/2011-seizure-statistics/view>.

⁵² USSC, FY 2006-2011 Monitoring Datasets.

⁵³ *Id.*

guideline provisions for sabotage that have a base offense level substantially higher than the minimum offense level even the government seeks for counterfeit military good or services. In addition, the Commission has little to no information about the operation of §2M2.1 and §2M2.3. In the past nine years (FY2002 to FY2011), §2M2.1 has been used in only two cases⁵⁴ and §2M2.3 in three cases.⁵⁵ With so little data about the operation of those guidelines, we think it would be a mistake to treat the new offense at § 2320(a)(4) like any of the offenses referenced to §2M2.1 or §2M2.3.

Section 2320(a)(3) is directed at a very specific problem with counterfeit military goods or services. The offense does not cover counterfeit goods or services intended for use in any other application. Yet, with Option 3, the Commission proposes to add enhancements to cover a wide variety of business operations, including gas, oil, electricity, finance, transportation, as well as government operations, be they foreign or national, state or local. *See* 18 U.S.C. § 1030(e)(9). Option 3's attempt to limit application of the enhancement to those items "important in furthering the administration of justice, national defense, national security, economic security, or public health or safety" is vague and ambiguous. What is "important" may be in the eye of the beholder, and the language will permit disparate application. This is particularly true since "[a]nything that can be made can be counterfeited,"⁵⁶ such that the list of counterfeit items that might fall within this provision is endless:

- a counterfeit Square D® circuit breaker installed in a bank
- a counterfeit wind turbine used to generate electricity for a township
- a counterfeit cell phone purchased by the local volunteer fire department for the station Fire Chief
- a counterfeit tablet computer purchased for use by a judge
- a counterfeit automotive part used on a police fleet
- a counterfeit bolt that holds down the seat on a train
- a bracket on a crane used by local utility repair personnel
- a counterfeit o-ring used at a hydroelectric plant.

⁵⁴ USSC, *Guideline Application Frequencies for Fiscal Year 2009* (2010).

⁵⁵ USSC, *Guideline Application Frequencies for Fiscal Year 2003* (2004).

⁵⁶ International Trademark Association, *Fact Sheet: Counterfeiting*, <http://www.inta.org/TrademarkBasics/FactSheets/Pages/Counterfeiting.aspx>.

- counterfeit batteries used in flashlights of a local sheriff's department
- a counterfeit ground rod used by a local electricity supplier
- counterfeit smoke detectors distributed by the local fire department
- a counterfeit all-terrain vehicle (ATV) used by park service employees
- counterfeit medical imaging software used to store and transmit digital x-rays
- a counterfeit filter used at a waste water treatment plant⁵⁷

Of course, not all these products will be substandard. Some aftermarket parts are only “counterfeit” because they are in fake packages with fake brand names, not because they are defective.⁵⁸ Indeed, the Canadian government, upon learning of counterfeit parts placed in Hercules military transport planes, decided against replacing the parts, concluding that they were functioning properly and not affecting performance.”⁵⁹

Options 2, 3, and 4 also fail to acknowledge that persons who engage in counterfeit activities do so for different reasons, some of which create a greater threat to national security than others. Most counterfeit offenses are done for profit. Whatever potential malfunctions or security risks associated with the products are unintended.⁶⁰ A smaller number of offenses may be committed deliberately with the intent of jeopardizing national security or obtaining sensitive information. The latter are the kinds of cases worthy of enhancement. Even those, however, are speculative at this point. Nor does any hard evidence show that counterfeit parts have caused injury or death. The most that can be said is that the “*potential* consequences from counterfeit parts critical to United States infrastructure, such as power plants and dams, as defense readiness via United States military systems and other elements of national security *could be* immense.”⁶¹ (emphasis added). If the feared consequences are real in any particular case, the guidelines

⁵⁷ For additional examples of common counterfeit goods, see U.S. Dep't of Energy, Office of Health, Safety and Security, *Suspect/Counterfeit Items Awareness Training* (2007), http://www.jlab.org/div_dept/train/Knowledge_Docs/KD0005.pdf.

⁵⁸ Bertel Schmitt, *Inside the Industry: Busts of Counterfeit Parts Rings are Part of A Much Bigger Sham* (2013), <http://www.thetruthaboutcars.com/2013/02/inside-the-industry-busts-of-counterfeit-parts-rings-are-part-of-a-much-bigger-sham>.

⁵⁹ UPI.com, *Canada Not Replacing Counterfeit Parts* (2013), http://www.upi.com/Top_News/World-News/2013/01/10/Canada-not-replacing-counterfeit-parts/UPI-20361357865132.

⁶⁰ National Intellectual Property Rights Coordination Center, *Intellectual Property Rights Violations: A Report on Threats to United States Interests at Home and Abroad* 22 (2011).

⁶¹ *Id.* at 33.

already have provisions to account for them. *See* USSG §5K2.14 (“If national security, public health, or safety was significantly endangered, the court may depart upward to reflect the nature and circumstances of the offense.”)⁶²; USSG §5K2.7 (disruption of governmental function).⁶³

Criminal prosecution is also only one tool that the government has in seeking to deal with the problem of counterfeit goods. The government has stepped up efforts to guide federal agencies and others on how to manage the risk of counterfeit goods in the supply chain.⁶⁴ Those efforts, more than criminal prosecution, are far more likely to deter counterfeiting than increased penalties, which have proven time and again to be ineffective as a general deterrent.⁶⁵

III. Proposed Amendment: Tax Deductions

The Commission seeks comment on a proposed amendment to the commentary in §2T1.1 to resolve a circuit conflict regarding whether a sentencing court may consider legitimate but unclaimed deductions when calculating tax loss.

The Commission has proposed three different options. Defenders agree with the Practitioners Advisor Group (PAG) and the New York Council of Defense Lawyers (NYCDL),

⁶² Courts have used §5K2.14 even in situations where the risks were not yet realized. *See United States v. Vargas*, 73 Fed. Appx. 746, 747 (5th Cir. 2003) (court departed under USSG §5K2.14 upon finding that “the selling of false social security cards to illegal aliens who hail from nations that are known to support terrorism place the nation in ‘great peril’”).

⁶³ Option 3 is substantially broader than USSG §2B1.1(b)(17), which contains enhancements for defendants convicted under 18 U.S.C. § 1030 and the offense involved a computer system used to maintain or operate a critical infrastructure or used by a government entity. Section 2B1.1(b)(17) was added in response to a congressional directive set forth in the Cyber Security Enhancement Act of 2002, which focused on fraud and related activity in connection with computers, not any other good or service that might be delivered to a government entity or other private or public organization involved in critical infrastructure.

⁶⁴ *See* Molly Walker, *NIST Issues IT Supply Chain Risk Management Guide* (2012), <http://www.fiercegovernmentit.com/story/nist-issues-it-supply-chain-risk-management-guide/2012-11-13>; Henry Livingston, *Compliance Programs for Counterfeit Parts Avoidance and Detection* (2013), <http://counterfeitparts.wordpress.com/2013/02/22/compliance-programs-for-counterfeit-parts-avoidance-and-detection> (describing Dep’t of Defense guide on counterfeit prevention); Frank Kendall, Acting Under Secretary of Defense, *Memorandum for Secretaries of the Military Departments, Directors of the Defense Agencies* (March 2012), <http://counterfeitparts.files.wordpress.com/2012/03/pdf.pdf>.

⁶⁵ *See generally* Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* 1 (2010), <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>. Certainty refers to the increased likelihood of being caught and apprehended, not the certainty of a specified punishment. *Id.* at 4.

that Option 1 is the best approach.⁶⁶ As the NYCDL stated: “directing district courts calculating tax loss to consider legitimate unclaimed deductions, while leaving them the discretion to accept or reject such unclaimed deductions depending on the evidentiary support and other particular circumstances of the individual case, is the fairest approach, the approach most consistent with the fundamental thrust of this Guideline section, and the approach most consistent with actual practice.”⁶⁷

Defenders also join the PAG and the NYCDL in responding to Issue for Comment 1(A).⁶⁸ We oppose a requirement that the defendant demonstrate he would have claimed the deduction if an accurate return had been filed. Defenders agree with the NYCDL that if the Commission decides to impose such a requirement, the court be given the discretion to apply either an objective or subjective standard, as circumstances warrant, when making that determination.⁶⁹

On Issue for Comment 1(B), Defenders again agree with the PAG and the NYCDL that the Commission should not impose a requirement that the deduction be related to the offense in order for a sentencing court to consider it.⁷⁰ As the PAG points out this would only add unnecessary complexity to the guideline determination.⁷¹

On Issue for Comment 1(C), Defenders join the NYCDL in the position that “it would not be useful or appropriate to have different rules on the use of unclaimed deductions for different types of tax offenses.”⁷²

Finally, on Issue for Comment 2, Defenders agree with both the PAG and the NYCDL that broader language, such as that proposed by the NYCDL, would provide clarity.⁷³

⁶⁶ See Debold, *supra* note 46, at 1-3; Statement of Richard F. Albert Before the U.S. Sentencing Comm’n, Washington, D.C., at 3-13 (Mar. 13, 2013).

⁶⁷ See Albert, *supra* note 66, at 7.

⁶⁸ See Debold, *supra* note 46, at 3; Albert, *supra* note 66, at 14-16.

⁶⁹ See Albert, *supra* note 66, at 14.

⁷⁰ See Debold, *supra* note 46, at 4; Albert, *supra* note 66, at 17.

⁷¹ See Debold, *supra* note 46, at 4.

⁷² See Albert, *supra* note 66, at 17.

⁷³ See Debold, *supra* note 46, at 4; Albert, *supra* note 66, at 18.

IV. Proposed Amendment: Acceptance of Responsibility

The government's positions on the proposed amendment and the issues for comment cannot be squared with the structure and syntax of §3E1.1 as it was universally construed before the 2003 amendment, or its current terms.

In support of the proposed amendment, the government claims that the district court has the discretion to decide whether "to grant or deny" the government's motion based on the court's "independent authority to determine whether the section's requirements have been satisfied." *DOJ March 2013 Letter*, at 26. But that is not what the guideline says, as every court of appeals recognized, including the Fifth Circuit, before the 2003 amendment. Subsection (b) unambiguously instructs district courts, in imperative terms, to "decrease the offense level by 1 additional level" when the court has determined that the defendant qualifies for the two-level reduction under subsection (a), the defendant has an offense level of 16 or greater, and the government has filed a motion "stating" that the conditions regarding timeliness have been met. USSG §3E1.1(b).

To be sure, the term "may," as used in Application Note 6, indicates that the court has "permission" to grant the adjustment, but that permission is expressly limited by the very next term, "only." In this context, Congress's instruction that the "adjustment *may only* be granted upon a formal motion by the Government" merely describes the condition that must be met before the court may *grant* the adjustment. It says nothing about authority to *deny* the adjustment. And once the motion is filed, the court's authority is controlled by the imperative operation of the guideline, which mandates that the court "decrease the offense level by 1 additional level." If the court had authority to deny the reduction when the motion is made, the guideline would say that the court "*may* decrease the offense level by 1 additional level," as in other guidelines authorizing but not requiring the court to reduce a sentence. *See* USSG §1B1.10(a)(1) ("the court may reduce"), §1B1.13 ("the court may reduce"), or §5K2.10, p.s. ("the court may reduce). But the guideline does not say that, and the commentary cannot be interpreted in a manner that conflicts with the clear terms of the guideline. *See Stinson v. United States*, 508 U.S. 36, 38, 45, 47 (1993). By the government's logic, if the imperative nature of §3E1.1 is in reality only discretionary, then *every* guideline that instructs the court to "apply" a certain base offense level, or "increase the offense level" by a specified number of levels, is also entirely discretionary for purposes of calculating the guideline range.⁷⁴

⁷⁴ Notably, in a different context, the government argues that a statutory instruction that a state "may only require" certain specified conditions for purposes of voter registration limits the state's authority to require additional conditions, and that a linguistic structure mandating a specified action once specified conditions are met does not permit it to refuse to take that action once the condition is met. Gov't Br. at 14-16, *Arizona v. Inter-Tribal Council of Arizona, Inc.*, No. 12-71 (U.S. Jan. 22, 2013).

In support of its proposed language regarding the extent of its own discretion, the government claims that its discretion under §3E1.1(b) is as broad as its discretion under §5K1.1, relying on its assertion that the language Congress inserted in §3E1.1(b) is identical to the language used in §5K1.1. Because that isolated language is the same, the government argues, Congress intended for its discretion under §3E1.1 to be the same as its discretion under §5K1.1 as interpreted by the Supreme Court in *Wade v. United States*, 504 U.S. 181 (1992). The government ignores the crucial differences between §3E1.1 and §5K1.1, and the pre-existing textual and legal context into which that language was inserted.

Under §5K1.1, upon the government's motion, "the court may depart," the "appropriate reduction shall be determined by the court," and the court has "[l]atitude." USSG §5K1.1(a) & comment. (backg'd). In contrast, under §3E1.1, upon the government's motion, "[the court must] decrease the offense level by 1 additional offense level." As interpreted by the courts of appeals before 2003, this meant that the court did not have latitude to deny the reduction when the defendant timely notified authorities of his intention to plead guilty but litigated a suppression motion or sentencing issue. Furthermore, in background commentary to §3E1.1, which has no analogue under §5K1.1, the Commission provides that a defendant who has "tak[en] the steps specified in subsection (b) . . . has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, [] appropriately *merit[s]* an additional reduction." USSG §3E1.1 comment. (backg'd) (emphasis added).

While Congress is presumed to have known about the Supreme Court's interpretation in *Wade* of the government's discretion under §5K1.1, it is also presumed to have known about the prevailing law regarding the legal and functional difference between that discretionary departure policy statement and the imperative operation of guideline §3E1.1(b) in calculating the guideline range. Congress did not alter the nature of the inquiry under §3E1.1(b); it simply transferred to the government the responsibility to determine whether the defendant had notified authorities of his intention to plead guilty thereby allowing the government to avoid preparing for trial. Congress did no more.

In support of its argument that Congress did more, and expanded the timeliness inquiry to include a freestanding inquiry into whether the defendant's notice permitted the government to avoid spending any conceivable resource, not just trial resources, the government omits a key word from its description of Congress's amendment: "thereby." *DOJ March 2013 Letter*, at 28-29. The question was, and still is, whether the defendant's notice was timely, "thereby" permitting the government to avoid preparing for trial and "thereby" allocate its resources efficiently. "Thereby" is defined as "by that means." *See Webster's Third New International Dictionary (Unabridged) (2002)*. When the defendant has timely pled guilty, he has "by that means" assisted authorities by permitting the government to re-allocate the resources saved by avoiding trial. This is precisely (and solely) what Congress referred to when it explained that

“the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial.” USSG §3E1.1 comment. (n.6).

By adding that a defendant’s timely plea of guilty also “thereby” permits the government to allocate its resources efficiently, Congress did not create ambiguity regarding the connection required between trial preparation and preservation of resources. Congress is presumed to know that before 2003, courts uniformly interpreted the term “resources” in the phrase “thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources effectively” to refer to trial-related resources. This was and is logical, because the predicate act required of the defendant—a timely notice of intent to plead guilty—will result in conservation of resources that otherwise would have been expended preparing for trial. In contrast, there is no logical link between the timeliness of a defendant’s plea and, for example, the costs of an appeal or the costs of litigating a sentencing issue. Congress simply added consideration of the government’s trial-related resources to the existing consideration of the court’s trial-related resources.

Moreover, by the government’s logic, it could legitimately refuse to file a motion for the third level because a defendant did not timely give notice of an intent to plead guilty to an information, thus requiring the government to prepare for and present evidence to the grand jury to obtain an indictment. It would certainly be “efficient” to create a mechanism that, by virtually guaranteeing a predictable benefit that a defendant often cannot refuse, relieves the government of the need to obtain an indictment. But Congress could not have meant to transform the government’s simple reporting responsibility under §3E1.1(b) into an offensive weapon to be used to coerce defendants into waiving fundamental rights other than the right to trial.

Finally, there is no textual support for the suggestion that pre-trial motions, such as a motion to suppress, might properly be treated as preparing for trial. The text of §3E1.1(b) says “to avoid preparing for trial.” It does not say “to avoid responding to pre-trial motions” or “to avoid preparing for pre-trial hearings.” As the Tenth Circuit explained in 2003,

preparation for a motion to suppress is not the same as preparation for a trial. Even where, as here, there is substantial overlap between the issues that will be raised at the suppression hearing and those that will be raised at trial, preparation for a motion to suppress would not require the preparation of *voir dire* questions, opening statements, closing arguments, and proposed jury instructions, to name just a few examples.

United States v. Marquez, 337 F.3d 1203, 1212 (10th Cir. 2003). In addition, the government need not follow the rules of evidence at a suppression hearing, so is not required to expend the additional resources that it would take to prepare and present a witness instead of hearsay, *see United States v. Matlock*, 415 U.S. 164 (1974), or satisfy the gatekeeping requirements of *Daubert* before presenting expert testimony, *see, e.g., United States v. Stepp*, 680 F.3d 651 (6th

Cir. 2012), or prepare and present a witness to authenticate a public record, *see* Fed. R. Evid. 901, to name just a few examples.

V. Proposed Amendment: Miscellaneous and Technical

A. Recently Enacted Legislation

1. 18 U.S.C. § 39A – Aiming a Laser Pointer at an Aircraft

The Commission proposes amending Appendix A to reference the new offense at 18 U.S.C. § 39A (Aiming a Laser Pointer at an Aircraft) to §2A5.2 (Interference with Flight Crew or Flight Attendant). Section 39A provides in relevant part:

(a) Offense.— Whoever knowingly aims the beam of a laser pointer at an aircraft in the special aircraft jurisdiction of the United States, or at the flight path of such an aircraft, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Laser Pointer Defined.— As used in this section, the term “laser pointer” means any device designed or used to amplify electromagnetic radiation by stimulated emission that emits a beam designed to be used by the operator as a pointer or highlighter to indicate, mark, or identify a specific position, place, item, or object.

We have no general objection to the proposal to refer § 39A to §2A5.2, which has a series of tiered base offense levels geared toward the defendant’s culpability:

- “30, if the offense involved intentionally endangering the safety of . . . an aircraft”
- “18, if the offense involved recklessly endangering the safety of . . . an aircraft”
- a cross-reference to §§2A1.1 – 2A2.4 if an assault occurred
- 9, as the minimum offense level.

We do, however, take issue with the government’s suggestion that the Commission include in the commentary “aggravating factors” that a court should consider in determining where within the guideline range to sentence the defendant or whether an upward departure might be warranted.⁷⁵ Many of the government’s assertions reflect a misunderstanding of how lasers operate and the different hazards associated with pointing a laser at a person’s eye at close range and pointing it up in the air where it might illuminate the cockpit of an aircraft. Before

⁷⁵ DOJ March 2013 Letter, at 30.

getting into the details of the government's proposal for additional commentary to §2A5.3, a brief overview of lasers and their general hazards will provide helpful background information.⁷⁶

Visible continuous wave lasers, where the output is more or less constant,⁷⁷ are categorized into four classes by the U.S. Food and Drug Administration, Center for Devices and Radiological Health (CDRH).⁷⁸ Class I lasers are low powered devices that are non-hazardous or higher-powered lasers that prevent human access to laser radiation, such as lasers used in high performance laser printers or DVD burners. Class II and IIa lasers are low powered (<1mW) (mW = milliWatt, i.e., 1/1000th of a watt), which are typically used in bar code scanners. Because of normal human aversion responses, including blinking, these devices do not normally present a hazard unless viewed for an extended period of time. Class IIIa lasers (1-5mW), normally would not cause injury to the eye if viewed momentarily but would present a hazard if viewed using an optical device such as a telescope. Laser pointers used for presentations, astronomy, playing with pets, and other hobbyist activities fall within Class IIIa.⁷⁹ Class IIIb lasers (5-500mW) present skin or eye hazards when viewed directly. They do not produce a hazardous diffuse reflection (e.g., from paper or other surfaces that reflect light in a broad range of directions) except when viewed at close proximity. These are used in laser light shows and for industrial or research purposes. Class IV lasers (500mW) present the greatest eye hazard from direct, specular (a mirror-like reflection that sends light out in a single direction) and diffuse reflections. They may also present a fire hazard and produce skin burns. These are often used in laser light shows and for surgery, cutting, drilling, welding, and other industrial uses.

The lasers at issue in aviation incidents are either Class IIIa, IIIb, or IV. Laser pointers legally available for use by the public are Class IIIa. These are what we commonly know as presentation pointers that are also safely used for other purposes such as playing with pets.

⁷⁶ In preparing these comments, we consulted with a laser expert, Samuel M. Goldwasser, Ph.D. Dr. Goldwasser is an electrical engineer who has worked in industry, academia, and as a private consultant for many years. His academic affiliations have included the University of Pennsylvania and the Center for Microwave/Lightwave Engineering, Drexel University, Philadelphia, Pennsylvania. In 1994, he began to make available on the internet his vast knowledge of lasers and links to a host of other resources on lasers. See *Sam's Laser FAQ: A Practical Guide to Lasers for Experimenters and Hobbyists* (2013), <http://www.repairfaq.org/sam/lasersam.htm>. Dr. Goldwasser is known as the "laser guru" among his colleagues. See Christine Negroni, *High-Powered Laser Pointers Pose Risk to Pilots*, N.Y. Times, Jan. 21, 2011, http://www.nytimes.com/2011/01/22/us/22lasers.html?_r=0. His curriculum vitae is available online at <http://repairfaq.cis.upenn.edu/Misc/sambio.htm>.

⁷⁷ In contrast, pulsed lasers operate in a repetitive pulse. Goldwasser, *supra* note 76.

⁷⁸ FDA, *Radiation-Emitting Products: Laser Products and Instruments*, <http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/LaserProductsandInstruments/default.htm>. See also 21 C.F.R. § 1040.10(b)(5) – (11).

⁷⁹ *Id.*

Notwithstanding regulatory controls, higher power laser pointers (mostly Class IIIb) are readily available on-line and through mail order. These too may be used for legitimate purposes such as pointing out stars in the night sky or for industrial uses such as pointing out a leak or identifying a pipe at a chemical plant.⁸⁰ Unfortunately, persons who purchase or borrow lasers may not even be aware of the nature of the laser. Lasers have been marketed on Amazon.com as Class IIIa lasers, with a power of 5mW or less when in fact they averaged 41mW, with one as high as 111.9mW.⁸¹

From an aviation perspective, Class IIIa to IV lasers generally present three different hazards for pilots: (1) distraction, which is the least dangerous and occurs at greater distances; (2) glare, which occurs at a closer distance; and (3) temporary flash blindness, which occurs at a shorter distance and can occur with exposure to any bright light.⁸² Much like being exposed to a camera flash or going inside from bright sunlight, flash blindness will result in temporary reduction in visual perception, afterimages (the perceptions of spots in the field of vision), and a lessened ability to adapt to the dark.

Contrary to the government's assertion that aiming a laser at an aircraft can cause retina damage or skin burn, much of the danger to the human eye and skin comes from lasers used at close distances. Laser beams do not behave like those depicted in Hollywood.⁸³ The beam spreads as the distance from the laser increases. As Dr. Goldwasser explained in our consultation with him: "the typical green laser pointer has a divergence of 1milliRadian (mR) which means it expands at 1 part per 1,000. So, after 1,000 feet, the spot is around 1 foot in diameter; at 5000 feet, it is 5 feet in diameter. Spreading the original power of the laser over that area reduces the amount that can enter the eye dramatically." He further explained: "Only under point-blank conditions where the entire beam can enter the eye and the subject was cooperating (playing chicken) by holding their gaze absolutely steady could there be any permanent harm to vision from a Class IIIa laser (1-5mW). And documented cases of permanent vision damage

⁸⁰ Goldwasser, *supra* note 76.

⁸¹ *Illegal Laser Pointers on Amazon.com*, <http://www.laserpointersafety.com/illegalpointers/illegalpointers.html>.

⁸² *Aiming Lasers at Aircraft is Not Safe*, http://www.laserpointersafety.com/laser-hazards_aircraft/laser-hazards_aircraft.html.

⁸³ On one CSI: Miami episode, a laser pointer brought down a plane by injuring the pilot's eyes about two miles away. Experts agree that the scenario is not plausible and that the beam would present a distraction at two miles, but it would not cause glare, flash blindness, or eye injury. *Frequently Asked Questions: General Interest Questions*, http://www.laserpointersafety.com/FAQ/FAQ.html#On_CSI_Miami_a_laser_pointer_br.

from a 5mW laser are almost non-existent.”⁸⁴ The beams on Class IV lasers expand as well, lessening the risk to vision as the distance increases.

In a training video prepared by the FAA and U.S. Navy, the commentator states: “[i]n the scenario of cockpit laser illuminations, permanent physical damage to the eye is highly unlikely.” Even with a Class IV laser, “[a]t 733 feet, there is essentially no chance of causing a retinal lesion in the eye.”⁸⁵ And one expert has concluded that at 500 feet, “the possibility of a minimal injury is almost non-existent.”⁸⁶ Indeed, there has not been a documented instance of permanent eye injury resulting from a laser aviation incident.⁸⁷

Similarly inaccurate and misleading is the government’s suggestion that multiple laser bursts or tracking the movement of an aircraft with a laser indicates an intent to endanger the safety of the aircraft or demonstrates reckless endangerment.”⁸⁸ Dr. Goldwasser does not “consider multiple bursts and/or apparent tracking of the aircraft to be of much significance.”⁸⁹ This is because “laser pointers and so-called ‘hand-held lasers’ typically have a pushbutton to turn the beam on. So, multiple presses of the button are a natural way to use these, not something special. Tracking is also something that is a consequence of the desire to show an ability to keep the laser spot on the plane. But that isn’t necessarily to cause harm but to simply prove they can do it. Holding a laser spot on something a mile away is a challenge.”⁹⁰ Some pilots may experience the general intermittent pointing of a laser as multiple bursts or tracking even if the defendant had no intent to stay fixed on the aircraft.

The government’s notion of a “presumed” recklessness is also misplaced. The FDA regulates lasers and requires that certain information be placed on a warning label. The risk posed to aviators, however, is not among the required warnings. And, as mentioned previously, pointers marketed as within the legal limit of 5mW units may be substantially more powerful

⁸⁴ Goldwasser, *supra* note 76.

⁸⁵ *Different Lasers’ Hazards Compared*, http://www.laserpointersafety.com/page52/laser-hazard_diagram/different-lasers-compared.html.

⁸⁶ *Id.*

⁸⁷ *Fast Laser Facts for Media*, <http://www.laserpointersafety.com/media/media.html>.

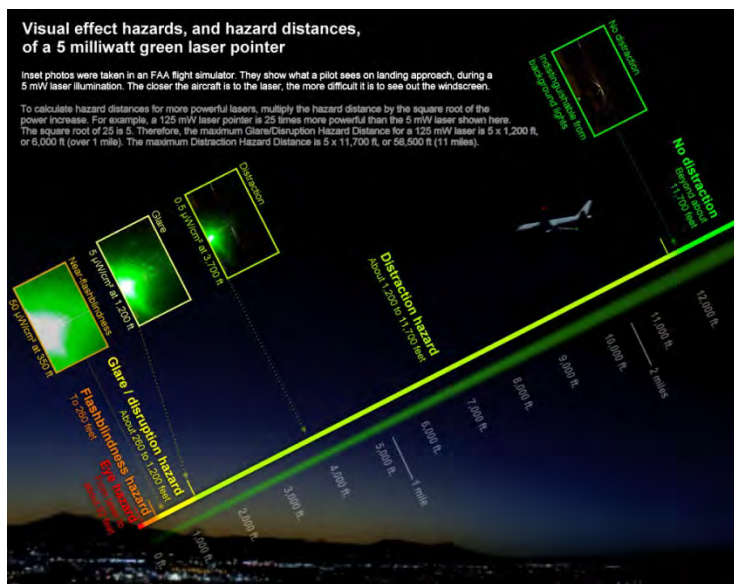
⁸⁸ What the government seeks is not a note on what the court should consider when sentencing within the guideline range or deciding whether to depart, but language that will lead the court to double the base offense level from 9 to 18 or more than triple it from 9 to 30 in any case where a laser illuminates an aircraft more than once.

⁸⁹ Goldwasser, *supra* note 76.

⁹⁰ *Id.*

without the user even knowing it. Even assuming the user is familiar with the output of a 5mW laser, the beam on a 50mW laser does not appear ten times brighter, but perhaps only two or three times brighter.⁹¹ This difference might not even be detected unless a 5mW and 50mW laser were compared side-by-side.⁹²

The most important facts in assessing the risk posed by laser illumination are the proximity of the aircraft to the airport and its altitude. Pilots performing critical maneuvers such as landings and take-offs, which occur at lower altitudes, are the most at risk when dealing with laser cockpit illumination. As the picture below demonstrates with a 5mW green laser pointer – one of the most prevalent kind of lasers – laser cockpit illumination has a significantly different effect at various distances.⁹³ If the person is pointing a laser at a plane performing a critical maneuver at a low altitude, then the risk is greater because the pilot may be distracted or less capable of performing necessary tasks.



Even with that risk at a lower altitude, it is important not to lose sight of the actual facts. Notwithstanding the volume of reports about lasers being shined on aircraft, there has not been a single reported incident of a crash or a hard-landing as a result of a cockpit being illuminated by a laser light. Pilots are trained to handle these incidents to minimize the effects of cockpit

⁹¹ *Id.*

⁹² *Id.*

⁹³ *What Makes Lasers Hazardous to Aviation*, http://www.laserpointersafety.com/page52/laser-hazard_diagram/laser-hazard_diagram.html.

illumination. And the FAA continues to explore more strategies, including laser eye protection and laser detection systems that will protect pilots from laser illumination.⁹⁴

Many of our clients are young men caught playing with lasers when they are intoxicated. They are often unaware of the risks posed by pointing lasers at aircraft and have no intention of doing anything but seeing whether they can shine the laser on the body of the plane. Few even aim for the cockpit, believing instead that they are simply hitting the underside of the plane. To presume that they intended to endanger the safety of the aircraft is unfair and unwarranted, particularly since not a single regulation requires laser manufacturers to warn users of the risk of shining a laser at an aircraft.⁹⁵ For all of these reasons, we think the Commission should refer 18 U.S.C. § 39A to §2A5.2 and do nothing more. Courts are capable of looking at the individual facts of a case, including the nature of the laser, the circumstances surrounding the incident, technological advances in the prevention of laser illumination incidents, and the intent of the defendant, in deciding which base offense level applies under §2A5.2, where to sentence within the range, or the appropriateness of a departure. This is what courts have been doing with these cases to date.

2. 18 U.S.C. § 1752 – Restricted Buildings or Grounds

The Commission proposes referencing 18 U.S.C. § 1752 to §2A2.4 (Obstructing or Impeding Officers) and §2B2.3 (Trespass). We have no objection to this cross-reference. Defenders do, however, oppose the government’s proposed enhancements to §2B2.3.

Congress amended 18 U.S.C. § 1752 in two significant ways. First, it removed the element of willfulness from the statute. Before the 2012 amendment, the statute required proof that the defendant acted willfully and knowingly. It now only requires that the defendant acted knowingly. This is a significant diminution of the proof required for the government to obtain a conviction for trespassing at restricted buildings and grounds. “[T]he term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense.” *Dixon v. United States*, 548 U.S. 1, 5 (2006). In contrast, the term “willfully” “requires a defendant to have ‘acted with knowledge that his conduct was unlawful.’” *Id.* Second, the statute added to the list of restricted places so that it now includes the White House and the Vice President’s residence, i.e., the Naval Observatory.

Against this backdrop, where it is now easier to prove a violation that can occur in even more locations, the government, as part of its seemingly endless requests for higher and higher sentences, suggests that the Commission (1) triple the current 2-level increase for trespassing at

⁹⁴ Federal Aviation Administration, *Laser Hazards in Navigable Airspace* 3-4 (undated), http://www.faa.gov/pilots/safety/pilotsafetybrochures/media/laser_hazards_web.pdf.

⁹⁵ 21 C.F.R. § 1040.10(g).

certain locations by adding a 6-level specific offense characteristic where the trespass occurred at restricted buildings or grounds as defined in 18 U.S.C. § 1752(c); and (2) increase to 4 the current 2-level enhancement if a dangerous weapon was possessed. To support its request, the government offers nothing more than rhetoric about the dangers of an armed person scaling the fence at the White House and being subject to a low base offense level under §2B2.3, and the “burden” on the Secret Service of dealing with trespassers at the White House and other restricted grounds. The government offers not a single instance where it has been unable to obtain a sufficient sentence for a § 1752 violation, even though the statute has existed for over forty years and has never been referenced in the Appendix to the guidelines. Nor does the government offer a single instance where the sentences imposed under §2B2.3, which covers a wide variety of trespasses at sensitive properties, including nuclear facilities, have been inadequate.

The government’s suggestion that a fence jumper with a loaded gun running across White House grounds would face an offense level of 8 under §2B2.3 is unrealistic. First, such a defendant is likely to face more serious charges than trespass.⁹⁶ Second, the Commission also proposes to reference § 1752 to §2A2.4 (Obstructing or Impeding Officers), which contains higher base offense levels and more adjustments. Third, §2B2.3 contains a cross-reference where the offense was committed with the intent to commit a felony offense and the resulting offense level is greater than that determined under §2B2.3. Fourth, the guidelines contain an upward departure provision for situations involving any significant disruption of governmental functions. USSG §5K2.7 (Disruption of Governmental Function). Thus, the fence jumper in the government’s hypothetical is unlikely to receive a probationary sentence.

The government’s suggestion that trespass at “restricted buildings and grounds” “merits a more significant punishment than similar conduct at other locations” is misplaced and would inject unwarranted disparity into the guidelines. The Commission established a 2-level enhancement for “trespass on secure government installations (such as nuclear facilities) and other locations (such as airports and seaports) to protect a significant federal interest.” USSG §2B2.3, comment. (backg’d). Thus serious forms of trespass are addressed by a 2-level enhancement. The venues covered by § 1752, however, are much broader than those included in §2B2.3(b)(1). For example, the venues associated with an event of “national significance” under 18 U.S.C. § 1752(c)(1)(C) include major sporting events, presidential nominating conventions, and major international meetings.⁹⁷ Trespassing at one of those events does not warrant the 2-level enhancement applied for trespassing at a secure government facility like a nuclear energy

⁹⁶ See *United States v. Modjeski*, No. 1:95-cr-00139-SSH (D.D.C. 1995) (defendant jumped fence with unloaded gun, was shot by Secret Service, and charged with forcible assault under 18 U.S.C. § 111, and interstate transportation of a firearm under 18 U.S.C. § 924(b)).

⁹⁷ Shawn Reese, Congressional Research Service, *National Special Security Events 1* (2009).

facility, a military vessel or aircraft, or a secure area of an airport, and certainly does not warrant the 6-level enhancement proposed by the government.

The government's attempt to have the Commission increase sentences for trespassing under § 1752 is offensive to the spirit of peaceful civil disobedience that has long been a hallmark of political protest in this country. Protesters are arrested at the White House every year. Just last month, forty-eight environmental activists, including Julian Bond, former president of the NAACP, and James Hansen, director of the Goddard Institute for Space Studies, were arrested trying to make their case against the proposed Keystone XL pipeline.⁹⁸ Last year, a group of pro-life advocates, including Rev. Pat Mahoney, were arrested as they protested new rules requiring religious groups and employers to pay for birth control.⁹⁹ In 2011, more than 100 anti-war protesters were arrested for refusing to move away from the gates of the White House.¹⁰⁰

Similarly, protests at national political conventions have a long history in our democracy. Under the revised version of 18 U.S.C. § 1752, a person faces arrest and criminal prosecution if he protests in a designated part of a National Special Security Event even if he does not know that to do so is against the law, i.e., if he does not act willfully. The law alone has been criticized for its chilling effect on First Amendment rights.¹⁰¹ If the Commission were to triple the enhancement for trespassing at such events without substantial evidence that such increases are necessary, then it would only add to the problem.

The government's request to triple the enhancement for trespassing on restricted buildings and grounds also appears to be a thinly veiled attempt to increase its plea bargaining leverage. The Commission should be mindful of how the government uses guidelines to leverage plea bargains and extract penalties. Under the government's proposal, all defendants convicted of trespassing on restricted buildings and grounds would be subject to a minimum offense level of 10 (base offense level 4 plus 6-level proposed enhancement). That puts a first-time offender in Zone B of the guidelines, with a range of 6-12 months. The only way that a

⁹⁸ *Activists Arrested at White House Protesting Keystone Pipeline*, Wash. Post, Feb. 13, 2013, http://www.washingtonpost.com/national/health-science/activists-arrested-at-white-house-protesting-keystone-pipeline/2013/02/13/8f0f1066-75fa-11e2-aa12-e6cf1d31106b_story_1.html.

⁹⁹ *Pro-Life Advocates Arrested at White House Protesting Mandate*, LifeNews.com, Feb. 16, 2012, <http://www.lifenews.com/2012/02/16/pro-life-advocates-arrested-at-white-house-protesting-mandate>.

¹⁰⁰ *Anti-war Protesters Arrested Near White House*, Colum. Daily Trib., Mar. 20, 2011, http://www.columbiatribune.com/wire/anti-war-protesters-arrested-near-white-house/article_188e4b5d-c41d-516b-be3e-129d870e9abb.html.

¹⁰¹ Traci Yoder & Nathan Tempey, *National Lawyers Guild, Developments in the Policing of National Security Events: An Analysis of the 2012 RNC and DNC* (2013).

defendant may get back to Zone A is to plead guilty and obtain the 2-level reduction for acceptance of responsibility. Absent sufficient evidence that tripling of the enhancement is necessary, the guidelines should not be deliberately structured to give the government the kind of leverage that may make a difference between a sentence of probation and one of imprisonment.

The government also proposes increasing from 2 levels to 4 levels the enhancement at §2B2.3(2) for possession of a dangerous weapon at the buildings and grounds covered under § 1752(c). Such an increase would result in unwarranted disparity. A person who possesses a “dangerous weapon,” which includes an object that is used in a manner to create the impression that it is a weapon,¹⁰² while trespassing at a restricted building or ground is not any more culpable than one who commits the same act at a Naval base where a nuclear submarine is docked. Additionally, a 4-level increase for possession of a dangerous weapon would be disproportionate to other guidelines that contain only a 2-level adjustment for the same conduct. *See, e.g.*, USSG §§2A6.2(b)(1); 2B1.1(b)(14); 2B2.1(b)(4); 2B5.3(b)(5); 2D1.1(b)(1); 2D1.11(b)(1).¹⁰³

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

The Commission proposes amending four of the Chapter Two, Part J offense guidelines that currently provide in the commentary that Chapter Three, Part C does not apply unless the defendant obstructed the instant offense, §§2J1.2, 2J1.3, 2J1.6, 2J1.9. Specifically, the Commission proposes narrowing the exception from all of the obstruction and related adjustments in Chapter Three, Part C (4 guidelines) to only one: §3C1.1 (Obstructing or Impeding the Administration of Justice). Defenders believe that any change to the commentary in §2J should continue to exclude §3C1.2 in addition to §3C1.1. For example, Application Note 2(A) to §2J1.2 could read:

Inapplicability of ~~Chapter Three, Part C~~ §3C1.1 and §3C1.2. – For offenses covered under this section, ~~Chapter Three, Part C (Obstruction and Related Amendments)~~ §3C1.1 (Obstructing or Impeding the Administration of Justice) and §3C1.2 (Reckless Endangerment During Flight) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.

The proposed amendment was precipitated by the First Circuit’s decision in *United States v. Duong*, 665 F.3d 364 (1st Cir. 2012), which recognized a conflict between the application

¹⁰² USSG §1B1.1, comment. (n.1(D)).

¹⁰³ A 4-level increase exists in some guidelines for the use of a weapon, not mere possession. *See, e.g.*, USSG §2A2.2(b)(2)(B); §2B3.1(b)(2); §2E2.1(b)(1)(B); §2H4.1(b)(2).

notes in §2J1.6 and the statutory mandate in 18 U.S.C. §3147 that is behind §3C1.3 (Commission of Offense While on Release). One other court, in an unpublished opinion, recognized the same conflict. *See United States v. Ordonez*, 305 Fed. Appx. 980, 984 (4th Cir. 2009) (per curiam). Both courts relied upon the plain terms of 18 U.S.C. § 3147 and the history of §3C1.3. *Duong*, 665 F.3d at 368-69; *Ordonez*, 305 Fed. Appx. at 984-85. Neither *Duong* nor *Ordonez* addressed any Chapter Three guideline other than §3C1.3.

The notion that the continued existence of the §2J application notes excluding application of Chapter 3 adjustments is a historical remnant that was never corrected when Chapter Three, Part C expanded from one guideline to four is misplaced. To be sure, the application notes in §2J were part of the original guidelines, which only contained §3C1.1.¹⁰⁴ At that time the conduct that is now addressed in §3C1.3 was addressed in §2J1.7.¹⁰⁵ In 2006, §2J1.7 was moved to §3C1.3.¹⁰⁶ The application notes in §2J, which excluded Chapter 3, Part C, were not changed at that time, giving rise to the conflict between application note 2 of §2J1.6 and 18 U.S.C. § 3157. Just two years ago, however, in 2011, the Commission amended the application notes in §§2J1.2, 2J.13, 2J1.6 and 2J1.9 to refer not just to “Obstruction” but “Obstruction and Related Adjustments.”¹⁰⁷ Those amendments were plainly made at a time when Chapter Three, contained more than one guideline, including §3C1.2.

Defenders are not aware of a single case that has identified any problem with following the direction in §2J application notes to not apply a different adjustment, §3C1.2 (Reckless Endangerment During Flight). This is significant because there has been plenty of opportunity for any conflict or problem to be identified and noted. Section 3C1.2 and the §2J application notes excluding application of Chapter Three, Part C adjustments, have been in the Guidelines Manual together since 1990.¹⁰⁸ After more than two trouble-free decades, Defenders see no need to suddenly start applying §3C1.2 to the referenced §2J offenses.

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

At the urging of the Department of Justice, the Commission proposes referencing 18 U.S.C. § 554 to §2M5.1, and possibly §2M5.3, in addition to the current references to §§2B1.5, 2M5.2, and 2Q2.1. The stated rationale is that §2M5.1 rather than §2M5.2 is more appropriate when the violation of export controls does not involve munitions, but dual-use goods.

¹⁰⁴ *See* USSG §§2J1.2, 2J1.3, 2J1.6, 2J1.9 (1987).

¹⁰⁵ *See* USSG §2J.16 (1987).

¹⁰⁶ *See* USSG App. C, Amend. 684 (Nov. 1, 2006).

¹⁰⁷ *See* USSG App. C, Amend. 758 (Nov. 1, 2011).

¹⁰⁸ *See* USSG App. C, Amend. 347 (Nov. 1, 1990); USSG §§2J1.2, 2J1.3, 2J1.6, 2J1.9 (1990).

The fundamental problem here is not whether § 554 offenses involving dual-use goods should be referenced to §2M5.1, but whether all of these offenses should be subject to a base offense level of 26, as provided in §2M5.1 and §2M5.2. Some cases involving violations of export controls simply do not warrant an offense level of 26. Indeed, the government has stipulated to a base offense level of 14 under both §§2M5.1 and 2M5.2, when the offense conduct involved an evasion of national security controls, which is a base offense level of 26 under §2M5.1. In one such case in Connecticut, the defendant sent three devices to Taiwan – two night vision scopes and a laser aiming sight. Night-vision equipment and components are controlled on the United States Munitions List and the Commerce Control List, making many of these items dual-use goods.¹⁰⁹ After the government agreed that the base offense level should be 14, the court sentenced the defendant to 1 day imprisonment and 3 years of supervised release with 3 months of home confinement.¹¹⁰ Another defendant who sold scopes and night-vision devices over the Internet was sentenced to 14 months imprisonment when the government agreed the offense level should be 14 under §2M5.1(a)(2).¹¹¹ In other cases, the government has agreed to a below-range sentence, recognizing that the offense conduct was less harmful than the typical violation of export control laws. *See United States v. Anna Fermanova*, No. 1:11-cr-00008 (E.D.N.Y. 2011) (defendant subject to 46-57 months guideline range under §2M5.2 for violating 22 U.S.C. § 2778(b)(2) by exporting four rifle sights to Russia for her husband and father to sell to sportsman received a sentence of 4 months imprisonment and 3 years of supervised release with 4 months of home detention).

Under the Commission’s proposed amendment, the base offense level for offenses like those discussed above, would be a 26 because the items are subject to national security controls.¹¹² Yet, as the government’s position in the above-referenced cases show, level 26 is simply too high in some cases. Beyond optical devices like those at issue in the cases above, the Commerce Control List contains a vast number of “dual-use” items that are subject to national security controls, and thus subject to a base offense level of 26 under §2M5.1(a)(1), but that do

¹⁰⁹ Office of Technology Evaluation, Bureau of Industry and Security, U.S. Dep’t of Commerce, *Critical Technology Assessment: Night Vision Focal Plane Arrays, Sensors, and Cameras* 4 (2012), <http://www.bis.doc.gov/news/2012/2012-Night-Vision-Assessment.pdf>.

¹¹⁰ *United States v. Ren*, No. 3:08-cr-185 (D. Conn. 2009).

¹¹¹ *United States v. Lam*, No. 3:05-cr-290 (D. Conn. 2007).

¹¹² *Critical Technology Assessment*, *supra* note 109, at 5; 15 C.F.R. Pt. 774, Supp. 1 (2011) (6A002 Optical Sensors).

not present sufficient harm to warrant such a high offense level, particularly when exported in small quantities.¹¹³

If the Commission decides to reference 18 U.S.C. § 554 to §2M5.1, it should seek to avoid disproportionately high sentences under §2M5.1 for certain export violations involving dual-use goods. One solution to the problem would be for the Commission to add to §2M5.1 an application note that encourages a downward departure in cases where the offense involved a dual-use item subject to national security controls but where the offense conduct posed no discernible risk to a security interest of the United States. This would be similar to the departure provision in §2M5.2, comment. (n.1).

We do not believe that offenses under 18 U.S.C. § 554 should be referred to §2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purposes). For the higher penalties in §2M5.3 to apply to an export violation, the government should be required to plead and prove a violation of the International Emergency Economic Powers Act at 50 U.S.C. § 1705, which is referenced to §2M5.3. Section 1705(a) makes it unlawful for a “person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this chapter.” A civil penalty may be imposed on any person who commits such an unlawful act. 50 U.S.C. § 1705(b). A criminal penalty, however, may only be imposed upon a showing that the person “willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of, an unlawful act described in subsection (a).” 50 U.S.C. § 1705(c). The maximum term of imprisonment under § 1705(c) is twenty years.

In contrast to § 1705(c), § 554 requires the government to show only that the defendant “fraudulently or knowingly exports” certain items “contrary to any law or regulation of the United States.” Significantly, § 554 does not have the element of willfulness set forth in § 1705(c). It would be fundamentally unfair to reference § 554 to §2M5.3 and then permit the government to obtain the benefit of a guideline designed for a more serious offense, but upon lesser proof than required under 50 U.S.C. § 1705.

¹¹³ See generally Bureau of Industry and Security, *Alphabetical Index to the Commerce Control List* (2013) (seventy-four page partial listing of items on list), http://www.bis.doc.gov/policiesandregulations/ear/ccl_index.pdf.

Honorable Patti B. Saris

March 19, 2013

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VI. Conclusion

As always, we appreciate the opportunity to submit comments on the Commission's proposed amendments. We look forward to continuing to work with the Commission on matters related to federal sentencing policy.

Very truly yours,

/s/ Marjorie Meyers

Marjorie Meyers

Federal Public Defender

Chair, Federal Defender Sentencing

Guidelines Committee

Enclosures

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DECLARATION OF THOMAS J. NOLAN

I, Thomas J. Nolan, declare:

1. I am an attorney admitted to practice law in the State of California

2. I am a senior partner at the law firm Nolan, Armstrong & Barton, LLP, in Palo Alto, California, where I exclusively practice criminal defense.

3. I have had a private practice for over 42 years and am a Certified Criminal Defense Specialist with the State Bar of California.

4. I am an adjunct Lecturer at Stanford University, School of Law, where I have taught Advanced Criminal Practice for over 20 years.

5. Since the late 1980s, I have defended individuals accused of theft of trade secrets in both state and federal court, up through and including jury trial.

6. The first theft of a trade secret case that I tried before a jury was in 1993. The trial lasted four and a half months, after four years of litigation. The purported intellectual property belonged to Intel Corporation. My client was acquitted.

7. My most recent jury trial involving theft of trade secrets was in 2011 in the Northern District of California, San Jose Branch. The trial was the first jury trial involving charges that the theft of the trade secrets was done to benefit a foreign government. My client was acquitted of some charges and the jury could not reach a verdict on other charges. The government ultimately dismissed those charges.

8. In 2012, I gave a speech to members of the Chinese American Biopharmaceutical Association regarding theft of trade secret prosecutions. This is an American organization of Chinese owned or operated biopharmaceutical companies.

9. To prepare for the speech, I employed my associate, Jenny Brandt, to survey PACER for the dockets of prosecutions for Economic Espionage Act violations across the United States, from the passage of the Economic Espionage Act in 1996 to the present date.

10. Ms. Brandt visited the PACER websites for the 94 United States District Courts.

1 11. On each PACER website for each District Court, Ms. Brandt searched the criminal
2 case reports for violations of 18 U.S.C section 1831 [Economic Espionage] and 1832 [theft of
3 trade secret].

4 12. Ms. Brandt viewed the dockets for each case in each district that involved a
5 prosecution for either section 1831 or 1832 or both. She viewed pertinent documents, if available,
6 including the complaint or indictment, sentencing memoranda and judgments.

7 13. She then documented in the chart attached hereto as Exhibit A, the name of the
8 defendant, the name of the alleged victim, the charges alleged, the country the alleged intellectual
9 property was taken to, facts underlying the indictment or complaint, and the disposition of the
10 case, if available.

11 14. She also performed google news searches to obtain information about cases that do
12 not have accessible documents on PACER due to their age.

13 15. This research was not intended for publication nor has it necessarily been
14 conducted to the standards necessary for it to be relied upon for an academic journal. [minor
15 errors may be present.]

16 16. After the chart was prepared, Ms. Brandt and I reviewed it to evaluate any notable
17 facts or patterns. We gleaned the following facts:

- 18 a. In many cases (48%), the government's allegations of trade secret theft related
19 to conduct within the United States. In other cases, the government alleged that
20 the defendants planned to take or did take the trade secrets to benefit companies
21 in countries all over the world including China (25%), India (2 cases), Germany
22 (1 case), Israel (2 cases), Australia (2 cases), Japan (3 cases), Italy (1 case),
23 South Africa (1 case), Iran (1 case), Taiwan (1 case), S. Korea (1 case) and the
24 Czech Republic (1 case). In two cases, the information was published the
25 world wide web. Two cases involved no allegation of taking the information to
26 benefit another company. In ten cases, no information about the country where
27 the trade secret was purportedly taken was available.

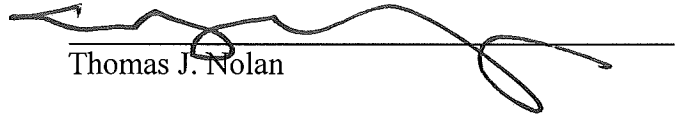
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- b. Sentences for 102 defendants were available. The sentences ranged from probation with no jail time to 188 months.
- c. The average sentence of those who were incarcerated is 31 months. Note, this does not take into account the length of a sentence imposed as home confinement.
- d. The average sentence where the allegation involved use of the intellectual property in China was 42 months.
- e. The allegations involved not only theft of trade secrets and/or economic espionage but also computer fraud, obstruction of justice, false statements to the FBI, dissuading a witness and perjury.

17. The chart was last updated in July 2012 and does not reflect any prosecutions since that date.

I declare under penalty of perjury under the laws of the United States that the foregoing is true, except for those matters stated on information and belief, and as to those matters, I am informed and believe them to be true.

This declaration was executed in Palo Alto, California on March 15, 2013.


Thomas J. Nolan

#	Case name	Case number	Year	Jurisdiction	Charges	Disposition	Corporation victim	Country Exported to	Notes re conduct
1	David Yen Lee	09-cr-00290	2009	Northern District of Ill	Theft of trade secrets	Pled guilty to theft of trade secret; sentenced to 15 months prison; 100k fine and 30k restitution	Valspar Corporation (manufactures and sells paint coating products)	China	Worked at paint company then accepted employment with another paint company in China. Allegedly downloaded technical documents and materials and transferred to thumb drive
2	John Keller Norris; Matthew Knox Norris	07-CR-02913	2007	Southern District of CA	Conspiracy to steal trade secrets	John Norris pled guilty sentenced to probation; Matthew Knox Norris- Dismissed;	Imperial Group	US	Supposedly took confidential bidding information that the Imperial Group submitted to the US GSA re a proposal to build a facility for ICE. Allegedly physically broke into Imperial's office and stole the bid book.
3	Michael E. Laude	06-CR-02147	2006	Southern District of CA	Theft of trade secrets	Pled; 3 years probation	Qualcomm	Nokia US	Supposedly took 400K+ files containing source code with the intent to convert it for competitor Nokia
4	Benjamin Munoz III	06-CR-00831	2006	Southern District of CA	Theft of Trade Secrets	Pled guilty; 6 months in prison	TB Penick and Son, Inc.	Progressive Concrete Inc. US	While working for a competitor accessed former employer's server and printed draft bid on project for use by new employee
5	David B. Kern	99-CR-0015	1999	Eastern District of CA	Theft of trade secrets	Pled guilty; Sentenced to 12 months 1 day in	Varuab Associates Inc.	Radiological Associate	Supposedly took detailed instructions on how to maintain, repair, and

						prison		s US	calibrate radiation therapy machines
6	Brian Murphy	11-CR-00029	2011	Northern District of CA	Possession of stolen trade secrets	Pled guilty; sentenced to 3 years probation; 40K restitution	KLA Tencor Corporation	Inspecstar US	Created his own company to compete with KT Certified. Downloaded approximately 8800 files including equality checklists, service and maintenance procedures, vendor scorecards, customer lists, customer service information and expense and pricing information. Then used a deletion program to delete his user activity.
7	David Russell Foley; Michael Daddona	09-CR-00670	2009	Northern District of CA	Conspiracy to commit mail fraud and wire fraud; trafficking counterfeit goods; theft of trade secrets; mail fraud; wire fraud; conspiracy to commit money laundering, money laundering; bank fraud;	Still pending	Global VR	US company	Supposedly took the delivery mechanism that enables games to be played on Global Vr's system.
8	Robert Scott West	08-CR-00709	2008	Northern District of CA	Possession of stolen trade secret	Pled guilty; 3 years probation	Phillips Lumileds Lighting	Bridgelux, Inc. US	Took employment with competitor then took architecture and product

							Company		specifications for one of their LED products
9	Man Wang	06-CR-00484	2006	Northern District of CA	Possession of stolen trade secrets; foreign transportation of stolen property	Pled guilty; 6 months in prison concurrent on each count	Kilopass Inc.	Aurora Semiconductor Inc.; China	Founded a company that would compete with developing a memory chip similar to the one developed by Kilopass; took a method for reducing the number of configuration bits associated with the logic element of a field programmable gate array
10	Trieu Lam; Tranh Tran	04-CR-20198	2004	Northern District of CA	Making false statements to an agency of the US; conspiracy to possess trade secrets; alteration of stolen trade secrets; possession of stolen trade secrets	2 years probation for making false statements; everything else dismissed	C&D Semiconductor or Services Inc.	More Technology Services Inc. (San Jose) US	Told FBI agent he had never visited a company named More Technology Services. Supposedly took information from C&D to produce and sell re-engineered and refurbished semiconductor equipment, called track systems, that apply photosensitive film to silicon wafers.
11	Brent Alan Woodard	03-CR-20066	2003	Northern District of CA	Theft of trade secrets x2	Pled guilty; 24 months in prison	Lightwave Microsystems Inc.	Competitor in Bloomfield, Connecticut US	Took the company's back up tape and offered to sell them to a competitor
12	Yu Xiang Dong aka Mike Yu	09-cr-20304	2009	Eastern District of Michigan	Attempted theft of trade secrets; theft	Pled guilty to theft of trade secrets (2	Ford	China	Worked at Ford as an engineer. Looked for new employment in China.

					of trade secrets; unauthorized access to protected computer	counts). Sentenced to 70 months of prison.			Copied Ford design specification and took with him to China. Lied about why he was in China to employer. First told FBI he was not interviewing in China when he was. Worked for company in China then quit and went back to Ford.
13	Nabil Ramssiss	02-CR-20083	2002	Northern District of CA	Intentionally causing damage to a computer; unauthorized access to a computer and recklessly causing damage; attempted possession of a stolen trade secret	Trade secret counts dismissed; pled guilty to intentionally causing damage to a computer and sentenced to 40 months in custody	DVA Systems corporation	none	Intentionally disabled Cisco routers after he was terminated causing the network to fail.
14	Say Lye Ow	00-CR-20110	2000	Northern District of CA	Copying a trade secret; theft of trade secrets and computer fraud	Pled guilty; 24 months in prison on copying a trade secret; other counts dismissed	Intel	Sun Microsystems US	Copied computer files relating to design and testing and planned to use it at new employment at Sun Microsystems
15	Mehdi Matt Rashidi	05-CR-00744	2005	Northern District of CA	Theft of trade secret	Pled guilty; Probation 4 years; home confinement 10 months	BioGenez Laboratories	Lab Vision Corporation (fremont CA) US	Took engineering notes re design and specifications of a product of BioGenez and planned to use as new employment with competitor.

16	Nicholas Daddona	01-CR-00122	2001	District of Connecticut	Theft of trade secret; computer fraud	Pled guilty; 5 months home confinement	Fabricated Metal Products, Inc.	Eyelet Toolmakers Inc US	Took engineering plans and delivered them to Eyelet, FMP's competitor
17	Brian Halvorsen ;	02-CR-00002;	2002	District of Connecticut	Theft of trade secrets	Pled guilty; probation	Pitney Bowse	US	Tried to sell two hard drives containing the source code for Direct Connect Software to a competitor
18	Douglas Sprenger	02-CR-0087	2002	District of Connecticut	Theft of trade secrets	Pled guilty; 6 months in prison	Pitney Bowse	US	Tried to sell two hard drives containing the source code for Direct Connect Software to a competitor
19	Kevin Smith	02-CR-00163	2002	District of Connecticut	Theft of trade secrets	Pled guilty; 5 years probation		unknown	
20	Edward Grande	07-CR-00019	2007	District of Connecticut	Theft of trade secrets	Pled guilty pre indictment for 5 years probation	Duracell	unknown	Electronically computed and downloaded research regarding AA batteries; emailed the information to his home email address. Sent information to competitor.
21	Joseph P. Petrolino; Eric Siverson	01-CR-06291	2001	Southern District of Florida	Conspiracy to steal trade secret; Theft of trade secrets;	Petrolino: 1 st trial: Hung jury; 2 nd Trial: Found G on 1 count, hung on second count; 2 years probation Siverson: pled guilty and sentenced to 12 months and 1 day in prison	First Union Securities Financial Network Inc.	n/a	Accessed a computer CD that had financial information of First Union Securities customers. Offered to sell the information to an undercover agent.

22	Donato Pompa; Anthony Norelli; Richard Patrick Tmminia	02-CR-14014	2002	Southern District of Florida	Theft of trade secrets; interference with commerce; wire fraud	Pompa: Pled guilty to Theft of trade secrets- sentenced to 5 months in prison. Interference with commerce; wire fraud counts dismissed Norelli: pled guilty to tax charges and arson—5 years in prison	Chemplex Industries Inc.	Premier Lab Supply, Inc. US	Allegedly started a company using a production machine stolen from Chemplex and took \$100k+ in business form Chemplex. Norelli supposedly hired someone to torch the building of Chemplex.
23	Hong Meng	10-CR-00056	2010	District of Delaware	Theft of trade secret *although not charged with false statement to FBI, alleged he made false statement to FBI in plea agreement memo	Pled guilty before indictment; sentenced to 14 months in prison.	EI DuPont de Nemours Corporation	China	Supposedly took a chemical process. While employed with DuPont and without their permission he took a job as a professor at PKU. He emailed a protected chemical process to his PKU email. He mailed samples of chemical compounds to colleague at Northwestern and instructed him to forward the materials to his office at PKU. 8 of the samples were trade secret compounds not publicly disclosed. Met with FBI and denied

									that he sent sample compounds to colleagues at Northwestern with instructions to ship them to China. This was false.
24	Kevin Crow	10-CR-00013	2010	Georgia Middle District	Theft of trade secrets	Pled guilty pre indictment; sentenced to 36 months in prison	Turbine Engine Components technology	Precision Components International Columbus, Georgia US	Supposedly took customer prints, models and data, drawings of power tooling files, process books, pricing and costs from his employer to use in connection with new employment with competitor
25	Mohammad Rezi Alavi	07-CR-00429	2007	District of Arizona	Transportation of stolen goods; computer fraud; illegal export; theft of trade secret	Found guilty by jury of transportation of stolen goods; fraud related activity with computer; hung jury on other counts and other charges dismissed after jury trial; sentenced to 15 months of prison	Palo Verde Nuclear Generating Station	Iran	accessed 3 KeyMaster software as part of his employment. Quit. Then tried to travel to Iran. While he was there, someone in Iran accessed the same software.

26	Jeffrey Burstein; Magdiel Castro Marcos Cavalcante William Clinton Jeffrey Richman	06-CR-00072		Eastern District of Arkansas	Theft of trade secrets Tampering with a witness Computer fraud Theft of trade secrets Tampering with a witness	Burstein: Pled guilty; Sentenced to 24 months probation Castro: 24 months probation Cavalcante: 24 months probation Clinton: 36 months probation Richman: 60 months probation	Axiom	Snipermail.com NZ company doing business in US	Hacking incident where Scott Levine, a owner of Snipermail.com Inc, supposedly hacked into axiom and stole confidential information about its customers. These Ds pled guilty to testify against Levine
27	Mark Jacobson	07-CR-00568	2007	Northern District of CA –San Francisco	Conspiracy to misappropriate trade secrets	Pled guilty; pending sentencing	Korn/Ferry	US	Before quitting downloaded executive reports from the searcher database; related to the david nosal case
28	Zhiqiang Zhang; Xiaodong Lan; Yanmin Li	10-CR-00827	2010	Northern District of CA	Conspiracy; possession of stolen trade secrets	Pending	SiRF	China	Simultaneously worked for his own company; supposedly took computer source code for program belonging to SiRf
29	Suibin Zhang	05-CR-00812	2005	Northern District of	Computer fraud; theft of	Found guilty by judge of some	Marvell Semiconductor	Broadcom	Supposedly took trade secrets belonging to

				CA	trade secrets;	counts and not guilty of others	or Inc.; Netgear	US	marvell with him to his new job at Broadcom
30	Yu Qin and Shanshan Du	2010-CR-40454	2010	Eastern District of Michigan	Possession of trade secrets; wire fraud; obstruction of justice	Still pending	General Motors	China	Qin worked for controlled power company designing electrical power equipment and systems. His wife, Du, worked for GM. Qin and Du started their own company relating to power electronics. Qin joined venture companies that developed motor control technologies for hybrid vehicles in China. Allegedly, Du obtained GM trade secrets relating to motor control of hybrid vehicles. Supposedly, Du copied thousands of GM documents to an external drive after she was offered a severance package by GM. She then told GM she returned all their information. They then drove to a dumpster behind a grocery store and discarded plastic bags of shredded documents responsive to grand jury subpoenas.
31	Dongfan "greg" Chung	08-CR-00024	2008	Central District of CA	Conspiracy to commit Economic Espionage;	Bench Trial. Found guilty on all counts except one count of	Boeing	China	PRC sent Chung requests for info relating to US Space Shuttle and military and civilian

					Acting as agent of gov't without prior notification to attorney general; obstruction of justice; false statement to FBI	obstruction of justice. Sentenced to 188 months prison.			aircraft and helicopters. Chung supposedly took documents without authorization that were trade secrets to his home. Then he traveled to PRC and gave lectures and met with officials/gov't agents of PRC involving Rockwell/Boeing technology. Witness tampering for telling his son that the FBI would be interviewing him and that he should say he did not remember anything about a meeting in Beijing. The defense responded in its trial brief that the son really did not remember the event because it was 21 years before and he was a teenager at the time; so telling him to say he didn't remember something that he did not in fact remember was not an attempt to dissuade him from talking with the FBI. False statements to FBI when he said he reported to his employer's security office, the Boeing Security Office, all of his travels to the PRC when he had no reported his
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									<p>travels. The defense says in its trial brief that the boss actually said he did not remember telling the defendant if he could bring documents home, but that many did even though they were not supposed to.</p> <p>Obstruction of justice for attempting to mutilate and conceal business records</p> <p>False statements to FBI when he said he traveled to the PRC in 1985 and 2000 when in fact he traveled there 1985, 2001, 2002 and 2003.</p> <p>False statements to FBI when he said that his boss told him he could work on Boeing projects at home. Alleges that he never had that permission.</p>
32	Fei Ye and Ming Zhong	02-cr-20145	2002	Northern District of CA	Economic Espionage; theft of trade secrets	Pled guilty to economic espionage. Sentenced to 1 year in jail.	NEC Electronics; Sun Microsystems; Transmeta; Trident Microsystems	China	<p>Allegedly trying to sell the idea of a start up to boost China's chipmaking abilities. Allegedly stole chip designs and attempted to smuggle them back to their country. Supposedly sought VC funding from Chinese government.</p>

33	Allen W. Cotten	08-CR-0042 10-CR-00812	2008 2010	Eastern District of CA	Theft of trade secrets;	Pled pre-indictment; sentenced to 24 months	Genesis Microwave Incorporated	India, Taiwan, Australia, Israel	Stole designs, specs, mechanical parts and hardware for testing of equipment used in microwaves. He supposedly sold this to other companies and foreign governments/instrumentalities.
34	Lan Lee Yuefei Ge	06-CR-00424	2006	Northern District of CA	Theft of trade secrets; conspiracy to steal trade secrets; economic espionage	Acquitted; dismissed	NetLogic; Taiwan Semiconductor or Manufacturing Company	China	Started their own company and supposedly used stolen trade secrets from company where they worked to advance business interests of their own company; had documents indicating they would
35	Aleynikov	10-CR-96	2010	New York	Theft of trade secrets; scheme to defraud; fraud activity connected with computers	Found guilty by jury; sentenced to 97 months in prison	Goldman Sachs	US	Copied source code to financial program then deleted history of his copying source code.
36	Joya Williams	06-CR-00313	2006	Georgia (Atlanta)	Theft of trade secrets	Found guilty by jury; sentenced to 96 months in prison	Coca Cola	US	Copied trade secret documents and products and sold them to third party for money (actually undercover agent)
37	Gary Min aka Yonggang	06-121	2006	Delaware	Theft of Trade Secrets	Pled Guilty; sentenced to 18 months prison	Du Pont	US	Took a new job at Victrex, a competitor of Du Pont, and accessed

	Min								confidential documents. FBI found his computer with an erasing program in the process of erasing the entire drive as well as shredded DuPont documents and ashes of documents in his fireplace.
38	Patrick and Daniel Worthing	97-9	1997	Western District of PA	Theft of Trade Secrets; Conspiracy to possess and deliver trade secrets	Pled guilty sentenced to 15 months in jail; Daniel pled guilty sentenced to 60 months probation/6 months home confinement	PPG Industries, Inc.	US	Sting operation after he contacted company's rival via letter; he collected diskettes, blueprints, other confidential research
39	Kai-Lo Hsu	97-CR-323	1997	Eastern District of PA	Attempted theft of trade secrets; conspiracy to steal trade secrets	Hsu pled guilty to conspiracy to commit trade secret theft; sentenced to CTS. Charges against Ho were dropped	Bristol-Meyers	China	Hsu was a technical director for a Taiwanese Company; Chester Ho was a biochemist/professor at a Taiwan university (also arrested); Hsu and Jessica Chou allegedly agreed to pay \$400k for a new process to create an anti-cancer drug.
40	Pin Yen Yang Hwei Chen Sally Yang	97-CR-288	1997	Northern District of Ohio	Wire fraud; conspiracy to steal trade secrets; money laundering; receipt of stolen goods	Found guilty by jury; Pin sentenced to six months of home confinement and \$250k fine; Sally Yang was fined 5K and	Avery	China	Yang was president of Four Pillars Enterprise Company, LTD of Taiwan; his daughter Hwei Chen Yang was a corporate officer and involved with research and development.

						sentenced to a year probation			Allegedly, an Avery researcher in the US, Ten Hong Lee, gave Four Pillars highly sensitive and valuable proprietary manufacturing information and research data and was reportedly paid \$150,000
41	Steven L. Davis	97-00124	1997	Tennessee	Theft of trade secrets; wire fraud	Pled guilty; sentenced to 27 months imprisonment;	Wright Industries and Gillette	US	Sent highly confidential engineering drawings to Gillette's competitors.
42	Mayra Justine Trujillo-Cohen	97-251S	1997	Southern District of Texas	Theft of trade secrets	Pled guilty; 48 months imprisonment; \$337K restitution	Deloitte & Touche	US	Took proprietary software program, deleted Deloitte's name, and then sold it to a third-party company.
43	Carroll Lee Campbell; Susan Campbell	98-CR-059	1998	Northern District of Georgia	Conspiracy to steal trade secrets	Mr. Campbell pled guilty and was sentenced to 3 months prison, 4 months home monitoring; charges dismissed against Mrs. Campbell	Gwinette Daily Post	US	Offered to sell marketing plans and subscription lists to rival paper for \$150k
44	Huang Dao Pei	98-CR-4090	1998	New Jersey			Roche	China	Supposedly took Hepatitis C monitoring kit
45	David Krumrei	98-8943; 98-00300	1998	Hawaii	Theft of trade secret	Pled guilty and sentenced to 2 years	Wilsonart	Australia	Obtained access to Wilsonart's trade secret technology and offered to give it to a competitor in Australia in exchange for employment.

46	Caryn L. Camp; Stephen R. Martin	98-48-P	1998	Maine	15 counts; wire fraud, mail fraud, conspiracy to steal trade secrets, conspiracy to transport stolen goods.	Camp pled guilty for 3 years probation. Martin was found guilty by a jury on 8 of 15 counts and sentenced to 366 days in prison	Ivexx Laboratories	US	Camp sent Martin secretes about Ivexx to start a competing company including prices and test kits
47	Hanjuan Jin	08-CR-00192	2008	Northern District of ILL	Theft of Trade Secret; Economic Espionage.	Found guilty in court trial of 3 counts of theft of trade secrets; acquitted of 3 counts of economic espionage/theft for the benefit of a foreign country; sentencing pending	Motorola	China	Took a new job at a company in China when she previously worked for a company in the US. Allegedly downloaded a bunch of documents from employer to take to new employment.
48	Steven Hallsted and Brian Pringle	4: 98M37	1998	Eastern District of Texas	Conspiracy to steal trade secrets	Hallsted Pled guilty and sentenced to 77 in prison; Pringle pled and was sentenced to 60 months in prison	Intel and Cyrix	US	Sold stolen prototype computer from Intel to undercover agent
49	John Fulton	98-059	1998	Western District of Pennsylvania	Theft of trade secrets	Pled guilty to theft of trade secrets; 12 months home detention	Joy Mining Machinery Inc.	US	Attempted to buy proprietary schematic designs from another employee
50	David	98-2000-	1998	Kansas	Theft of	Pled guilty;	Preco	US	

	Sindelar	70-01			international trade secrets	sentenced to 5 years probation			
51	David B. Kern	99 CR 15	1999	Eastern District of CA	Theft of trade secrets	Pled guilty; sentenced to 1 year prison	Varian Medical Systems, Inc.	US	Copied files from laptop left out by a service technician for use by competitor
52	Robin Carl Tampoe	99-158	1999	Southern District of Texas	Attempted theft of trade secrets; theft of trade secrets	Pled guilty; 15 months in prison	IBM	US	Employee of IBM
53	Eun Joong Kim	99-CR-481	1999	Northern District of ILL	Computer fraud; theft of trade secrets	Pled guilty; sentenced to 180 days	3COM	US	Allegedly took source code from 3COM when he accepted a new job at a 3COM rival
54	Matthew R. Lange	99-CR-00174	1999	Eastern District of Wisconsin	Theft of trade secrets; wire fraud; copyright infringement	Convicted by jury trial, sentenced to 30 months	Replacement Aircraft Part Co. Inc.	US	Tried to sell engineering drawings to a RAPCO competitor
55	Jack Shearer Tejas	99-CR-433	1999	Northern District of Texas	Theft of trade secrets	Pled guilty; 54 months in prison \$7.6 million in restitution	Caterpillar, Inc.; Solar Turbines, Inc.	US	Used information stolen from Caterpillar Inc. to build his own company ; took drawings, plans, schematics, specifications
56	Costello	99-623	1999	Southern District of Texas	Theft of trade secrets	Pled guilty; three years probation	Fina	US	Oil/gas logs manufactured by Fina D supposedly took
57	Corgnati	99-6268	1999	Southern District of Florida	Theft of trade secrets	Pled guilty; 5 years probation	Motorola	US	Theft of information relating to 2 way radios
58	Yuan Li	12-cr-00034		District of NJ	Theft of trade secret;	Pled guilty sentenced to 18 months in prison	Sanofi-Aventis Global Healthcare Pharmaceuti	China	Was a medical chemist. Was a 50% partner in Abby Pharmatech which was a company that sold and distributed chemical

							cals		compounds to be used in the pharmaceutical industry; the company was a US Subsidiary of a company in China. Allegedly downloaded info about Sanofi Compounds and then made the info available to Abby Pharamtech.
59	Mark Everheart	00-56	2000	Western District of PA	Theft of trade secrets	Pled guilty; 1 year probation	Werner Ladder	US	Stole sales and pricing data
60	Mikahel Chang and Daniel Park	00-20203	2000	Northern District of CA	Theft of trade secret;	Chang pled guilty to theft of trade secrets; sentenced to 12 months 1 day; Park pled guilty to copyright infringement for 2 years probation	Semi-Supply Inc.	unknown	Chang admitted buying trade secret information from Park, who admitted accessing a FoxPro database program to access stolen trade secret information
61	Jolene Neat Rector and Steven Snyder		2001	M.D. Florida	Conspiracy to convey trade secrets; conveying trade secrets	Pled guilty. Rector sentenced to 14 months; Snyder sentenced to 10 months	R.P. Scherer	Nelson Paint Ball Inc. US	Obtained proprietary documents and data from RP Scherer including gel formulas, fill formulas, sheer weights, and experimental production order data. Tried to sell the information to Nelson Paint Ball Inc.
62	Peter Morch	01-Cr-00100	2001	Northern District of	Exceeding authorized	Pre-indictment plea; probation	Cisco	Calix Networks	Resigned from Cisco and allegedly burned onto

				California	access to a protected computer			US	CDs proprietary documents. Then worked at competitor of Cisco.
63	Fausto Estrada	01-CR-00616	2001	Southern District of New York	Theft of trade secrets; mail fraud; interstate transportation of stolen property	Pled guilty; sentenced to 12 months prison	MasterCard	Visa US	Tried to sell stolen MasterCard secrets to Visa
64	Kurtis Kenneth Cullen and Bruce Zak	01-CR-00023	2001	Western District of Kentucky	Conspiracy to steal trade secrets; attempted theft of trade secrets; wire fraud	Pled guilty but then successfully withdrew plea and case was dismissed	ZirMed.com	unknown	Offered to pay \$10K for source code belonging to ZirMed.com
65	Junsheng Wang and Bell Imaging Technology Corp	01-CR-20065	2001	Northern District of CA	Theft of trade secrets	Pled guilty; died before sentenced	Acuson Corporation	Company based in China	Admitted he accessed Acuson trade secret materials through his wife who brought them home with her. He copied documents and took them to a business trip in China.
66	Hai Lin, Kai Xu, Yong-Qing Cheng	01-CR-00365	2001	District of New Jersey	Theft of trade secrets; conspiracy to commit wire fraud	Dismissal	Lucent	China	Two of the three men were Lucent scientists who started their own company in China that was funded by their business partner in China who they sent Lucent information to
67	Takashi Okamoto,	01-CR-00210	2001	Northern District of Ohio	Theft of trade secrets; economic	Possibly never extradited from Japan;	Lerner Research Institute of	Japan	Okamoto accepted employment at a Japanese quasi public corporation

					espionage/theft of trade secret to benefit foreign government		Cleveland Clinic Foundation		as a neuroscience researcher. Supposedly misappropriated DNA and cell line reagents destroyed and sabotaged DNA and cell line reagents.
68	Wen Chyu Liu aka David W. Liou	05-CR-00085	2005	Middle District of Louisiana	Conspiracy to steal trade secret; perjury	Found guilty of all counts by jury. Sentenced to 60 months in prison; fined \$25k	Dow	China	<p>Created his own company and intended to create chemical engineering design packages for companies in the US and PRC.</p> <p>Allegation of perjury for testimony in deposition. He stated that he did not in any way assist someone named Mr. Stoecker in arranging for his travel to China. He stated he did not assist or arrange for accommodations or for the travel to be paid for. He stated that to his knowledge, his wife did not arrange for payment of the travel expenses and that he was unaware if she did this. He said he did not know if the man used Gateway Travel to take a trip to China and he did not know how Mr. Stoecker would have paid for a trip to China. He</p>

									stated he did not know whether the man went to China. The prosecution alleged this testimony was perjury because he had arranged for Stoecker to travel to PRC including arranging for the cost of the airline tickets to be paid to USA Gateway Travel with a check drawn by his wife's coworker, and he arranged to reimburse the wife's coworker.
69	Xingkun Wu	05-CR-06027	2005	Western District of New York	Theft of trade secrets	Possibly never arrested	Corning Incorporated	China	Supposedly took a presentation, document, technical design drawings, and file
70	Tse Thow Sun	02-CR-00106	2002	Northern District of CA	Theft of Trade Secrets; interstate transportation of stolen property	Pled guilty; unknown sentence	Online interpreters	US/Language Line Services US	Tried to sell proprietary information to competitor of company he worked for
71	Jeffrey A. Forgues	02-CR-40011	2002	Massachusetts	Attempting to buy trade secret information	Pled guilty; sentenced to 2 months	Alpha Gary Corp.	unknown	Tried to buy chemical ingredients of Alpha Gary products
72	Jeffrey W. Dorn	02-CR-20040	2002	District of Kansas	Theft of trade secret	Pled guilty; sentenced to 2 years probation	Spencer Reed Group	US	Took information re matching employees with employers from temp agency and used the information to place

									someone with a company for which he was paid
73	Jiangyu Zhu; Kayoko Kimbara	05-CR-10153	2005	Massachusetts	Interstate transportation of stolen property	dismissed	Harvard Medical School	Japan	Sent genes to a biochemical company in Japan and sent antibodies to University of Texas where Zhu accepted a new job
74	John Berenson Morris	02-CR-01834	2002	Delaware	Attempting to steal and transmit trade secret information	Pled Guilty; sentenced to probation and community service	Brookwood Companies	US/W.L. Gore & Associates, Inc.	Supposedly attempted to sell Brookwood's proprietary pricing information to its competitor
75	Igor Serebryany	03-CR-0042	2003	Theft of trade secrets	Theft of trade secrets	Pled guilty; 5 years probation	DirecTV	DSShackers.com – world wide web	Stole access card from law office and distributed it including internal design notes
76	William P. Genovese	05-CR-00004	2005	Southern District of New York	Theft of Trade secrets	Pled guilty; sentenced to 24 months in prison	Microsoft	World wide web	Published source code to Microsoft operating systems to internet
77	Qinggi Zeng	08-075	2008	Southern District of Texas	Theft of trade secrets; computer fraud	Pled guilty; sentenced to 12 months and 1 day imprisonment	International Paint, LLC	US company but ties to China	Started his own company called Epochem Technologies and supposedly took the formula for a fireproof coating
78	Kexue Huang	11-CR-00163 10-CR-00102	2011 2010	Southern District of Indiana	Economic espionage; transportation of stolen property	Pled guilty to theft of a trade secret; Sentenced to 87 months in prison Pled guilty to economic espionage sentenced to 82	Dow AgroSciences; Cargill Inc.	China Germany	Supposedly took biological materials to Chinese University to benefit the Chinese government

						months			
79	Hiroaki Serizawa	01-CR-00210; 02-CR-00156	2001 2002	Northern District of Ohio	Conspiracy; Economic Espionage; interstate transportation of stolen property; False statements to the government	Pled guilty to false statements to the government; sentenced to 3 years probation	Lerner Research Institute of Cleveland Clinic Foundation	Japan	Admitted to giving the FBI false information about his relationship with Okamoto, someone also accused of theft of trade secrets. Denied knowing that Okamoto took a position with a Japanese sponsored research facility.
80	David Nosal	08-CR-0237	2008	Northern District of CA	Northern District of CA; Conspiracy to possess/transmit trade secrets; unauthorized access to computer; mail fraud aiding and abetting; conspiracy to commit mail fraud	Still pending	Korn/Ferry (executive search firm)	US	After he quit, he started a competing business with employees at Korn Ferry. Those employees transferred source lists, names and contact information from a company database.
81	Atul Malhotra	08-CR-0423	2008	Northern District of CA	Theft of Trade Secrets	Pled pre indictment; sentenced to 5 months	IBM	HP US	Gave a trade secret document to HP
82	Biswamohan Pani	08-CR-40034	2008	Massachusetts	Theft and attempted theft of trade secrets; wire	Pled guilty; Sentencing pending	Intel	Advanced Micro Devices Inc.	Pani was offered a job at AMD; quit intel and lied about why he was quitting. Worked

					fraud			US	simultaneously for intel and AMD. Accessed Intels computer network and downloaded 13 top secret documents to an external hard drive.
83	Clark Alan Roberts;	08-CR-175	2008	Eastern District of Tennessee	Theft and attempted theft of trade secretes; wire fraud	Found guilty by jury. Roberts sentenced to 4 years probation	Goodyear	US company but for business in China	Took unauthorized photographs of goodyear roll over ply down device to manufacture a similar device for a competitor
84	Chunlai Yang	11-CR-00458	2011	Northern District of ILL	Theft of trade secrets	Still pending	CNE Group (trading company)	China	Downloaded files then transferred them to his USB flash drive then to his home computer. Started his own company in China
85	Larry Satchell	04-mj-01067	2004	Central District of California	Conspiracy to possess/conceal trade secrets; obstruction of justice	Dismissed	Lockheed Martin	Boeing US	
86	Yihao Pu	11-CR-00699	2011	Northern District of Illinois	Theft of trade secrets; computer fraud	Pending	Citadel LLC	China	Downloaded source code on his personal computer then downloaded files including trading strategy and infrastructure source code to a personal storage device
87	Unnamed	05-CR-00187	2005	Northern District of Illinois	Theft of trade secrets	Acquitted and expunged	Unknown because of expungement	Unknown because of expungement	Unknown because of expungement

88	Terry Gunderson	02-CR-00055	2002	Northern District of Iowa	Theft of trade secrets	Pre-indictment plea; Sentenced to 27 months in prison	Siemens	US competitor	Admitted he stole trade secret information related to engineering and bidding and tried to sell it to a competitor
89	Prabhu Mohapatra	11-CR-00132	2011	District of Utah	Theft of trade secrets; wire fraud and attempt; computer related fraud	Pled guilty to unlawful access to a protected computer; Sentencing pending.	Frontier Scientific Inc. (affiliated with Echelon Biosciences Inc.)	India	Worked at FSI. Started discussing opening a new company in India for production and marketing of chemical compounds. Allegedly copied chemical compound information and sent to his new business partner
90	Shawn Childs	03-CR-10131	2003	Kansas	Computer fraud; theft of trade secrets; conveying trade secrets; wire fraud	Pled guilty to computer fraud; 1 year probation	Precision Pattern Inc.	unknown	
91	Randall Mulhollen	10-CR-00013	2010	Western District of Kentucky	Theft of trade secrets	Pled guilty; Sentenced 12 months and 1 day	Swedish Match North America	Good Times US	Supposedly took "starter" tobacco
92	Matthew W. Bittenbender	08-CR-00005	2008	District of Maryland	Conspiracy to defraud the US; Conspiracy to commit wire fraud; conspiracy to steal trade secrets	Pled guilty; sentenced to Probation	United States defense energy support center (dep't of defense)	Czech Republic	Supposedly accessed confidential bid information and gave the information to someone making a bid on a project
93	Troy Matthew Ulmer	05-CR-00203	2005	Western District of Michigan	Attempted theft of trade secrets	Pre-indictment guilty plea; sentenced to 1	J. Rettenmaier USA LP	Unknown	Contacted his company's competitor and offered to sell proprietary

						year probation			information of the company
94	Eric Helrigel	02-CR-00666	2002	Eastern District of New York	Theft of trade secret	Pled guilty; sentenced to 2 years probation		unknown	
95	James Alarcon	07-CR-00454	2007	Eastern District of New York	Theft of trade secret	Pled guilty pre indictment; sentenced to 3 years probation	Bonholder Communication Group LLC	US	Supposedly stole plans and designs, computer programming codes and passwords to computer network and delivered the information to non employee co conspirators
96	Robert A. Schetty III	07-CR-00582	2007	Eastern District of New York	Theft of trade secrets	Pled guilty; sentenced to probation for 1 year	Amkor	US	Supposedly sabotaged a trade secret of a competitor
97	Shalin Jhaveri	10-CR-00523	2010	Northern District of New York	Theft of trade secrets	Pled guilty; CTS/probation	Bristol-Meyers	India	Took information then sent information to financier who would help him start a pharmaceutical facility in India.
98	Timothy Kissane	02-CR-00626	2002	Southern District of New York	Theft of trade secrets	Pled guilty sentenced to probation	System Management Arts Incorporated	US competitors	Tried to sell source code to his company's competitors
99	Ira Chilowitz	07-CR-00080	2007	Southern District of New York	Conspiracy to defraud the US; Scheme to Defraud; Theft of Trade secrets; unauthorized computers	Pled guilty to 4 counts and is sentenced to probation	Morgan Stanley	US	Accessed confidential documents then emailed them to his personal email address and to coconspirator who wanted to use information to compete with Morgan Stanley
100	Elliot Doxer	11-CR-10268	2011	District of Massachuset	Economic espionage;	Pled guilty to economic	Akamai Technologie	Israel	Sold customer list information and

				ts		espionage; sentenced to 6 months in prison	s		confidential contract information to who he believed was an Israeli national but was actually an undercover agent.
101	Paul Kuruzovi ch	09-CR- 00824	2009	Southern District of New York	Theft of trade secrets; blackmail	Pled guilty to blackmail for 1 year imprisonment	Guidepoint Global LLC dba Clinical Advisors	US	When fired, sent blackmailing email then accessed database to take client information
102	Samarth Agrawal	10-CR- 00417	2010	Southern District of New York	Theft of trade secrets; scheme to defraud money	Found guilty by jury; 36 months in prison	Societe Generale	US	Took high frequency trading algorithm
103	Douglas Sprenger	04-CR- 01236	2004	Southern District of New York	Theft of trade secrets	6 months supervised release			
104	John O'Neil	08-CR- 00686	2008	Southern District of New York	Theft of trade secrets	12 months 1 day in prison	Niku	US	Accessed over 1k documents containing trade secrets
105	Jeffrey Bostic	11-CR- 00218	2011	North Carolina Middle District	Theft of trade secrets	Pre-indictment Plea guilty; 5 years probation; 255k restitution	Armacell	Italian company	D was a chemist responsible for research and development. Agreed to employment at K-Flex USA, Italian company in the US. Downloaded 1800 files from Armacell before resigning.
106	Jack A. Buffin	06-CR- 00031	2006	Northern District of Ohio	Theft of trade secrets	Pled guilty; 2 years probation	Guyan International dba Permco	South African company	Transmitted via email confidential business information without the authorization of Pemco
107	Kyung Kim	08-CR- 00139	2008	Northern District of Ohio	Theft of trade secret, conspiracy	Pled guilty; 19 months in prison	Lubrizol	Seoul S. Korea	Took T/s and put on external hard drives

108	Xiaorong Wang	12-CR-00228	2012	Northern District of Ohio	Theft of trade secrets; false statements	Pending	Bridgestone	China	Supposedly downloaded a 6 CDS of proprietary information. Told FBI he had no plans to move abroad but actually they found out he had interviewed in China.
109	Jing He	09-CR-00424	2009	Eastern District of PA	Theft of trade secrets	Pled guilty for 24 months in prison	Unnamed	China	Took medical programming information
110	Tung Pham	11-CR-00722	2011	Eastern District of PA	Theft of trade secrets; wire fraud	Pending	Company that manufactured solar cells; unnamed	China	D was scientist in the development of past for the manufacture of solar cells. Went to China to develop a company that would compete with the company that employed him. He allegedly copied a formula he worked on to his home computer; later copied more than 1k documents to his home computer including formulations for products the company sold.
111	Yan Zhu	09-CR-00722	2009	District of New Jersey	Theft of trade secrets (x2); Conspiracy to steal trade secrets; wire fraud; theft of trade secrets	Dismissed and acquitted of theft of trade secrets; guilty of wire fraud; Sentenced to three years of probation	Enfo Tech Inc., develops/supports environmental software for government entities	China	Became a project manager to develop a similar project for a company his cousin-in-law started in China. Wire fraud comes from D emailing his company's design materials to the Chinese company.
112	Wen-	12-CR-	2012	Southern	Copying,	Pled guilty but	Jet Products	unknown	

	Long Huang	00189		District of Texas	Duplicating, photographing trade secret	pending sentencing	LLC		
113	Janice Kuang Capener; Jun Luo	12-CR-00027	2012	Northern District of Utah	Theft of trade secrets; attempt and conspiracy to commit mail fraud; fraud by wire	Pending	Orbit Irrigation Products, Inc.	China	Created a company to sell sprinkler/irrigation products in competition with her former employer. Downloaded sales and pricing information the day she was terminated.
114	Robert M. McKimmey	07-CR-0079	2007	Eastern District of Virginia	Conspiracy to commit theft of trade secret	4 months custody	Niku	US	Accessed over 1k documents containing trade secrets
115	Michael David Mitchell	09-CR-00425	2009	Eastern District of Virginia	Theft of trade secrets; obstruction of justice	Pled guilty; 18 months in prison	DuPont	Korea	Took a document relating to Kevlar and emailed it to competitor. Began working undercover for the government but without the government's authorization he revealed to the competitor that he had recorded their conversation and wanted \$20k or he would turn the tape to the authorities (obstruction of justice charge)
116	Stephen Marty Ward	11-CR-02123	2011	Eastern District of Washington	Theft of trade secrets	Pending	Insitu Incorporated	US	Allegedly duplicated/downloaded a manual for a drone then offered to sell it back for \$400k after he was terminated
117	Richard G. Koval	04-CR-00061	2004	Eastern District of	Theft of trade secret	Pled guilty; sentenced to 2	SBC Communicat	ATT	Supposedly called ATT and offered to provide

				Wisconsin		years probation	ion		trade secret information
118	Michael P Conti; Frederick P. Anderson; Richard Degroot;	05-CR-0151	2005	Eastern District of Wisconsin	Theft of trade secret	Pled; sentenced to 1 year probation and 180 days home confinement;	Dual Temp Wisconsin Inc.	US Company	Conti, Anderson and De Groot planned to leave their company and start a competing company. Allegedly left the office with copies of documents and computer records of proposals, change orders, projects, expenses incurred by the company, Auto CAD drawings, operations/maintenance manuals, customer project files including bids, safety information, drawings of systems drawn for customers, emails re proposals, overhead and labor cost analyses
119	Donald Allen Hawkins	02-CR-00469	2002	District of Oregon	Theft of trade secrets	Probation		Unknown	
120	Shengbao Wu; Thongsouk Soutavong; Hock Chee Khoo;	09-CR-00321	2009	District of Oregon	Conspiracy to defraud the US; wire fraud; theft of trade secrets	Dismissed	The Hoffman Group	China	Started a competing company and took vendor and customer lists, images, technical information, sales data, and sales information. Dismissed because government changed what was the alleged trade secret when it filed a bill of particulars and that had never been brought to the grand jury.

121	Sixing Steve Liu	11-cr-00208	2011	District of NJ	Exporting defense articles; transporting stolen goods; 3 counts of false statements to law enforcement.	Still pending	Worked for L-3 Communications Division of Space and Navigation	China	Gave speech at a conference in China about his work and was looking for other employment (in the U.S.). False statements to law enforcement: stated his trip to China was to visit family when he was there to deliver presentations about technology. Agents pointed out an access card he had to a conference. He replied that it was a small and informal conference. US Attorney alleges that it was a formal, international gathering. [Second Superseding Indictment 19-20]. Falsely states that he did not know what the final application would be for his work when he knew it was for military application
122	Tze Chao, Walter Liew, Christina Lew, Hou Shengdong, Robert Maegerle	CR-11-573	2011	Northern District of CA	Conspiracy to Commit Economic Espionage; Conspiracy to Commit theft of Trade Secrets; Attempted Economic	Still pending	DuPont	China	Walter Liew and Christina Liew denied knowledge of bank safe deposit box keys found in their home when they knew that they had a safe deposit box to which one of the keys corresponded. Conspiracy to tamper

					Espionage; Attempted Theft of Trade Secrets; Possession of Trade Secrets; Conveying Trade Secrets; Aiding and Abetting; Conspiracy to Tamper with Witness and Evidence; Witness Tampering; False Statements;				<p>with witness allegation is that Walter Liew filed an answer in the corresponding civil suit stating that defendants never misappropriated any information from DuPont.</p> <p>Witness tampering: Walter Liew told his former employee not to say anything about former DuPont Employees because it would be bad for the former employee's family.</p> <p>Witness tampering: Christina Liew met with a former employee about the civil litigation and told him not to reveal former DuPont employees who worked with their new company.</p>
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Written Statement of Denise C. Barrett

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission

Public Hearing on Pre-Retail Medical Products

March 13, 2013

Testimony of Denise C. Barrett
Before the United States Sentencing Commission
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My name is Denise C. Barrett and I am National Sentencing Resource Counsel with the Federal Public and Community Defenders. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding pre-retail medical products.

The SAFE Doses Act, Pub. L. 112-186, creates new criminal penalties for theft and fraudulent conduct involving “pre-retail medical products.” Although Congress passed the Act with large-scale organized cargo thefts in mind,¹ the statutory language sweeps so broadly as to include within its reach a wide variety of conduct:

- stealing a box of infant formula from a pharmacy wholesaler;
- creating fake shipping documents and other “drug pedigrees”² as part of a scheme to hide a theft or to further a gray market scheme;
- stealing a parked tractor trailer loaded with latex gloves, bed pans, urinals, and ice bags;
- fencing stolen pre-retail medical products;
- stealing a warehouse full of pharmaceuticals;
- reselling millions of dollars’ worth of prescription drugs obtained from cargo thieves that were not stored properly and caused physical injury to the end user.

Consequently, the guidelines regarding these offenses must permit consideration of a wide-range of aggravating and mitigating circumstances. Because §2B1.1, to which the new offense and many of the related offenses covered under the SAFE Doses Act, should be referred, is already unduly complicated and undergoing a multi-year review, we believe that the prudent course of action is to simply cross-reference 18 U.S.C. § 670 to §2B1.1 and do nothing more. It seems especially cumbersome to add yet another series of specific offense characteristics (SOCs)

¹ Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012, H. Rep. No. 112-459, at 4 (2012). *See also DIA and FDA Host Conference on Cargo and Warehouse Theft of Medical Products*, <http://www.prweb.com/releases/2011/4/prweb8307568.htm>.

² “A drug pedigree is a statement of origin that identifies each prior sale, purchase, or trade of a drug, including the date of those transactions and the names and addresses of all parties to them.” FDA, *CPG Sec. 160.900 Prescription Drug Marketing Act – Pedigree Requirements under 21 C.F.R. Part 203*, <http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/ucm073857.htm>.

to §2B1.1, grapple with how they interact with existing SOCs, and adequately consider mitigating factors in an effort to account for offenses that are prosecuted infrequently.

I. Overview of the Reach of the SAFE Doses Act

A. The SAFE Doses Act Sweeps Broadly, Covering a Wide-Variety of Products Whose Theft Poses No Harm to Public Safety and at a Time when the Incidence of Cargo Theft of Medical Products Has Declined.

Before addressing the proposed amendments and issues for comment, we think it helpful to set forth the scope of the definition of pre-retail medical products to dispel the notion that the theft of all such products presents a risk to public safety, or that harsh sentences as opposed to effective loss prevention efforts are necessary to deter such crimes.

1. The Definition of Pre-retail Medical Product Is Extraordinarily Broad.

The definition of “medical product”³ is so broad as to include ice bags,⁴ hot/cold water bottles,⁵ tongue depressors,⁶ dental floss,⁷ toothbrushes,⁸ bedpans,⁹ elastic bandages,¹⁰ adhesive tape,¹¹ gloves,¹² arm slings,¹³ heating pads,¹⁴ examination gowns,¹⁵ anti-bacterial hand soap,¹⁶

³ The Act defines “medical product” as “drug, biological product, device, medical food, or infant formula,” which in turned are defined by reference to the Federal Food, Drug and Cosmetic Act, the Public Health Services Act, and the Orphan Drug Act. 18 U.S.C. § 670 (e).

⁴ 21 C.F.R. § 880.6050.

⁵ 21 C.F.R. § 880.6085.

⁶ 21 C.F.R. § 880.6230.

⁷ 21 C.F.R. § 872.6390.

⁸ 21 C.F.R. § 872.6855.

⁹ 21 C.F.R. § 880.6800.

¹⁰ 21 C.F.R. § 880.5075.

¹¹ 21 C.F.R. § 880.5240.

¹² 21 C.F.R. § 800.20.

¹³ 21 C.F.R. § 890.3640.

¹⁴ 21 C.F.R. § 890.5740.

¹⁵ 21 C.F.R. § 880.6256.

antiperspirants,¹⁷ sunscreen,¹⁸ hearing aids,¹⁹ wheelchairs,²⁰ hospital beds,²¹ mobile medical apps,²² programmable pacemakers,²³ prescription drugs,²⁴ and laser surgical devices.²⁵

2. Not All Thefts of Pre-retail Medical Products Pose a Threat to Public Safety and of Those that Do, the Severity of the Threat Varies Widely.

Because the definition of “medical product” covers so many different kinds of products, it cannot be assumed that the theft and distribution of a medical product poses a threat to public safety. The U.S. Food and Drug Administration’s (FDA) notification procedures for stolen medical products demonstrate this point. For some stolen products, like dental floss, hand cream, first aid kits, and sunscreen, the FDA may issue no consumer warning whatsoever.²⁶ For others, like infant formula, the FDA may simply provide notice of the product stolen and warn consumers to look for signs of tampering. Significantly, it does not warn consumers to discard

¹⁶ See 21 U.S.C. § 321(g)(1) (B) (“drug” means “articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals”); see also ISSA’s *Guide to the Regulation of Antibacterial Hand Soaps*, <http://www.issa.com/data/files/articles/88/soap.pdf>.

¹⁷ 21 C.F.R. § 350.3.

¹⁸ 21 C.F.R. § 352.3.

¹⁹ 21 C.F.R. § 874.3300.

²⁰ 21 C.F.R. § 890.3850.

²¹ 21 C.F.R. § 880.5120.

²² 21 C.F.R. § 880.6310.

²³ 21 C.F.R. § 870.1750.

²⁴ 21 U.S.C. § 321(g)(1).

²⁵ 21 C.F.R. § 878.4810.

²⁶ FDA, *Notification of Stolen Johnson & Johnson Group of Consumer Complaints Products* (Clayton, Indiana), <http://www.fda.gov/ICECI/CriminalInvestigations/ucm271551.htm>. See also FDA, *Notification Regarding Stolen Proctor and Gamble Non-Prescription Healthcare Products, Cosmetics, Dental Floss, Toothbrushes, and Feminine Hygiene Products*, <http://www.fda.gov/ICECI/CriminalInvestigations/ucm241181.htm>.

the product or not to use it.²⁷ In contrast, when certain medications are stolen, the notice may warn those in possession of the stolen product to discontinue its use and discard it.²⁸

The regulatory framework governing medical devices also demonstrates the point that not all stolen medical products pose a danger to public safety if they work their way into the supply chain. The FDA regulations set forth three categories of regulatory control for medical devices. Class I devices are subject to limited general controls, which are deemed “sufficient to provide reasonable assurance of the safety and effectiveness of the device.”²⁹ Class I devices “present minimal potential for harm to the user and are often simpler in design than Class II or Class III devices.”³⁰ Class I includes such items as rubber tips for canes, ice bags, and elastic bandages. “[Forty-seven percent] of medical devices fall under this category and 95% of these are exempt from the regulatory process.”³¹ Class II devices are subject to special controls to assure safety and effectiveness. These controls may include performance standards, post market surveillance, patient registries, and guidance documents. Examples of class II devices include powered wheelchairs, infusion pumps, and surgical drapes.³² “[Forty-three percent] of medical devices fall under this category.”³³ Class III devices require premarket approval and include life-sustaining or life-supporting devices, or devices meant “for a use which is of substantial importance in preventing impairment of human health, or if the device presents a potential

²⁷ FDA, *Notification of Stolen Mead Johnson Infant Formula Products*, <http://www.fda.gov/ICECI/CriminalInvestigations/ucm191658.htm>. See also Information Notice on Stolen Consumer Health Products from GlaxoSmithKline (2011) (theft of shipment of Tums and Os-Cal), <http://www.fda.gov/ICECI/CriminalInvestigations/ucm240206.htm>.

²⁸ FDA, *FDA Warns Consumers, Pharmacists, and Wholesalers Not to Use Stolen Advair Diskus Inhalers* (2010), <http://www.fda.gov/ICECI/CriminalInvestigations/ucm219418.htm>.

²⁹ 21 C.F.R. § 860.3(c)(1). Thus even though a medical product may be subject to FDA general controls, it may be exempt from many good manufacturing practices, including regulations governing production, packing, handling, and distribution. See generally 21 C.F.R. § 820 et. seq. Examples of devices free of such regulations include elastic bandages, 21 C.F.R. § 880.5075(b), stand-on patient scales, 21 C.F.R. § 880.2700, skin pressure protectors, 21 C.F.R. § 880.6450, and irrigating syringes not labeled or represented as sterile. 21 C.F.R. § 880.6960.

³⁰ FDA, *Medical Devices: General and Special Controls*, <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/GeneralandSpecialControls/default.htm> (hereinafter *General and Special Controls*).

³¹ FDA, *Medical Devices: Learn if a Medical Device Has Been Cleared by FDA for Marketing*, <http://www.fda.gov/medicaldevices/resourcesforyou/consumers/ucm142523.htm> (hereinafter *Learn if a Medical Device Has Been Cleared*).

³² *General and Special Controls*, supra note 30.

³³ *Learn if a Medical Device Has Been Cleared*, supra note 31.

unreasonable risk of illness or injury.”³⁴ Examples of Class III devices are replacement heart valves, breast implants, and pacemakers. “[Ten percent] of medical devices fall under this category.”³⁵

3. The Theft of Pre-Retail Medical Products has Taken a Downward Turn as a Result of Industry Safeguards.

According to FreightWatch International’s *2012 U.S. Cargo Theft Report*, pharmaceutical cargo theft has taken a dramatic turn downward as a result of protections the industry has put in place. In 2012, the industry saw 30 reported cargo thefts, with an average loss of \$168,219, down from the \$585,000 average loss in 2011, and the \$3.7 million loss in 2010.³⁶

Recent thefts have been unsuccessful because of swift and effective responses by law enforcement and the use of covert tracking. For example, on January 23, 2013, a tractor trailer load of pharmaceuticals was stolen from a rest stop in Jackson, Georgia. The load contained an embedded GPS tracking device, which enabled police to track the trailer and recover it abandoned, “likely due to the thieves monitoring of police frequencies alerting them to swift law enforcement engagement.”³⁷ Similarly, on Feb 1, 2013, a load of pharmaceuticals stolen from a truck stop in Michigan was found eight miles away as a result of the use of covert tracking devices.³⁸

II. Proposed Amendment

At least until the Commission finishes its multi-year review of §2B1.1 and collects more data on the prosecutions of pre-retail medical products under these new statutory provisions, we think it better to allow existing guideline provisions to account for the wide-range of conduct that may occur in these cases.

³⁴ 21 C.F.R. § 860.3(c)(3).

³⁵ *Learn if a Medical Device Has Been Cleared*, *supra* note 31.

³⁶ Eric Palmer, *Cargo Theft Down in Year of Key Arrests* (Jan. 22, 2013), <http://www.fiercepharmamanufacturing.com/story/cargo-theft-down-year-key-arrests/2013-01-22>.

³⁷ FreightWatch International, *Pharmaceutical Theft and Recovery, Georgia*, <http://www.freightwatchintl.com/intelligencecenter/securitynews/pharmaceutical-theft-and-recovery-georgia>.

³⁸ FreightWatch International, *Pharmaceutical Theft and Recovery, Michigan*, <http://www.freightwatchintl.com/intelligencecenter/securitynews/pharmaceutical-theft-and-recovery-michigan>.

The guidelines already provide for significant terms of imprisonment for persons engaged in the theft, receipt, and resale of medical products. Three case examples demonstrate this point. William Rodriguez, a Florida man involved in a scheme to resell drugs he obtained from cargo thieves received a ten-year term of imprisonment and was ordered to forfeit \$55 million.³⁹ His guideline range under §2B1.1 was 262-327 months.⁴⁰ In another case, a customer service distribution manager for a medical supply company, convicted of conspiracy to transport stolen property in connection with a scheme to steal and sell ultrasound probes received a below-guideline sentence of 24 months imprisonment, which was just 3 months below the government's recommended sentence under the 1998 guidelines, and was ordered to pay \$368,000 in restitution.⁴¹ Finally, two brothers who ran a wholesale grocery business were sentenced to a below-guideline range of 22 months imprisonment for buying stolen infant formula on the secondary market.⁴²

Loss amounts alone can quickly drive up sentences in these cases because of the high volume of products involved, the value of the products, or both. Moreover, because the bulk of these offenses are cargo thefts,⁴³ the November 1, 2007 amendment for cargo theft already provides for a 2-level increase and a minimum offense level of 14. In addition to those increases, many other specific offense characteristics exist to cover the aggravating factors set forth in the statute and that may otherwise be present in offenses involving pre-retail medical products. These include:

³⁹ He received a thirty month sentence of imprisonment for conspiracy to commit fraud under 18 U.S.C. § 371 and ninety months consecutive for money laundering. *United States v. William Rodriguez*, 12-202160-CR-Gragam (S.D. Fla. 2012).

⁴⁰ The parties agreed to the following guidelines for the conspiracy under 18 U.S.C. § 371: §2B1.1 base offense level of 6; 24 levels for loss; 2 levels for 10 or more victims; 2 levels for sophisticated means; 2 levels because the goods were part of a cargo shipment; 2 levels for conscious risk of death or serious bodily injury; 4 levels for aggravated role in the offense. The final offense level for the money laundering offense was 36. The two offenses grouped for a combined offense level of 42, with a final offense level of 39 after a 3-level reduction for acceptance of responsibility.

⁴¹ *United States v. Sess Merke*, No. CR05-270L (W.D. Wash. 2006). Had he been sentenced under the 2012 guidelines, his guideline range would have been 30-37 months because both the base offense level and the loss amounts under §2B1.1 have increased.

⁴² *United States v. Ishaq and Rasseem Kaloti*, 2:11-cr-00215-JPS-1 (E.D. Wis. 2012).

⁴³ FDA, *Inspections, Compliance, Enforcement, and Criminal Investigations: Cargo Thefts*, <http://www.fda.gov/ICECI/CriminalInvestigations/ucm182888.htm> (reporting on thefts of cargo from tractor-trailers and warehouses).

- A 2-level increase “if the offense involved receiving stolen property and the defendant was a person in the business of receiving and selling stolen property.” §2B1.1(b)(4).
- A 2-level increase and minimum offense level of 14 “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.” §2B1.1(c)(14).
- A cross-reference to the drug guideline at §2D1.1 if the theft involved a controlled substance. §2B1.1(c).
- A 2-level increase “if the defendant abused a position of public or private trust,” *e.g.*, by using one’s employment in the supply chain to carry out the offense. §3B1.3.⁴⁴
- An upward departure provision at §5K2.1 for death.
- An upward departure provision at §5K2.6 for the use or possession of a weapon or dangerous instrumentalities.

Should the Commission not be satisfied that existing provisions can account for the wide variety of conduct involved in the theft of pre-retail medical products and proceed to tinker with §2B1.1 by adding more SOCs, those SOCs should be carefully crafted. Specifically, the proposed SOCs should (1) apply only to the “aggravated offenses “defined at 18 U.S.C. § 670(b); (2) be limited to a 2-level, not a 4-level, increase; and (3) not cumulate with similar specific offense characteristics. First, the commentary should make clear that for any of the proposed SOCs to apply, the defendant must be convicted of the corresponding aggravated offense set forth in 18 U.S.C. § 670(b). The government should not be able to avoid proving the elements of one of the aggravated offenses, but then be able to enhance the defendant’s sentence based upon the same conduct proven only by preponderance of the evidence and without the same evidentiary safeguards available in a trial. Congress chose to define aggravated offenses, not a single offense with aggravating sentencing factors. The Commission should not undo that choice.

Second, the proposed increases should be limited to two-levels to maintain some semblance of proportionality with similar SOCs and to prevent factor creep – a continuing

⁴⁴ To cover those cases that may arise where §3B1.3 does not expressly apply under its current terms, the Commission could either add an application note to §3B1.3 or an application note to §2B1.1 to encourage an adjustment, similar to what it did in 2011 when it amended §2D1.1, n. 22 to cover persons convicted of drug offenses in the waste disposal chain. *See Discussion infra.*

problem with §2B1.1 discussed later in these comments. The proposed amendment provides for a [2][4] level increase if “*the offense involved the use of . . . violence or force.*” (emphasis added). Section 2D1.1(b)(2), the drug guideline, calls for a 2-level increase if the “*defendant used violence, made a credible threat to use violence, or directed the use of violence.*” (emphasis added). There is no reason why a defendant convicted of the theft of pre-retail medical products, but who did not personally use violence or force and may be subject to the enhancement only because of the relevant conduct of others, should receive a greater increase in offense level than a defendant convicted of a drug trafficking offense who personally used or directed violence.

The proposed amendment also provides for a [2][4] level increase if the offense involved the use of a deadly weapon. The guidelines maintain no consistency in how they treat the use of a deadly weapon, *see* §2A2.4(b)(1) (3-level increase for possession or threatened use of dangerous weapon); §2A4.1(b)(3) (2-level increase “if a dangerous weapon was used”); §2A6.2(b)(1)(C) (2-level increase for “possession, or threatened use, of a dangerous weapon”); §2B1.5(b)(6) (2-level increase for brandishing or threatening use of dangerous weapon); §2B3.1(b)(2) (setting forth six different levels of increase for various conduct, including four levels for use of a dangerous weapon). A 2-level increase, however, is more common and thus a 2-level increase under proposed §2B1.1(b)(14) would maintain some level of proportionality with other guideline provisions. Moreover, should a theft of a pre-retail medical product involve the use of violence, force, a threat of violence or force, or a deadly weapon, and the government wants to seek a higher guideline range, then it can always prosecute the offense as a robbery rather than a theft.

Defenders also believe that nothing more than a 2-level increase is called for in cases where the “offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved.” As drafted, this adjustment requires no personal culpability on the part of the defendant. It is a strict liability enhancement that does not require conscious, reckless, or deliberate risk of serious bodily injury or death. It, like the other proposed enhancements, also holds the defendant accountable for the conduct of others involved in the offense, not just his or her own conduct. Under those circumstances, if there is to be any enhancement, it should be limited to two levels.

III. Issues for Comment

A. Section 670(b)(2)(C) May be Referenced to §2A1.4. The Other Sections of 18 U.S.C. § 670 Should be Referenced to §2B1.1 and No Other Guideline. The References to the Other Offenses Covered in the Safe Doses Act Should Remain the Same.

The Commission seeks comment on whether 18 U.S.C. § 670 should be referenced to a guideline other than §2B1.1, including §2A1.4. In particular, the Commission asks whether

§ 670 should be referenced to §2B5.3 (Criminal Infringement of Copyright or Trademark), §2N1.1 (Tampering or Attempting to Tamper [With Consumer Products] Involving Risk of Death or Bodily Injury), §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product), and §2A1.4 (Involuntary Manslaughter). It also asks whether it should reference any of the other offenses covered by the directive to guidelines other than those to which they are currently referenced.

We have no objection to referring 18 U.S.C. § 670(b)(2)(C) – an aggravated form of a section 670 offense – to §2A1.4, the guideline for involuntary manslaughter. That guideline may be appropriate in cases where the offense or use of the medical product involved in the offense resulted in death.

Section 670 should not be referenced to §§2B5.3, 2N1.1, or 2N2.1. A reference to §2B5.3 (Criminal Infringement of Copyright or Trademark) is not appropriate because a section 670 (a)(2) counterfeit label or documentation offense is unlike the true counterfeiting offenses covered under §2B5.3. While section 670(a)(2) includes counterfeiting the labeling or documentation of a pre-retail medical product, the offense is only superficially similar to 18 U.S.C. § 2320 and the other counterfeiting offenses referenced to §2B5.3. Section 2B5.3 is targeted at counterfeit retail products, where the offense conduct typically involves trafficking in fake goods that infringe on the rights of a copyright or trademark holder. In such cases, calculation of the “infringement amount” drives the offense level. Calculation of the infringement amount depends upon a complicated series of rules and may include the retail value of the infringed item or the retail value of the infringing item. None of those rules have relevance to a section 670 offense, which may involve counterfeit labels or documentation, but where the pre-retail medical products are not themselves counterfeit, and thus have no “infringement amount.”

A cross-reference to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury) also is inappropriate, because unlike offenses referenced to §2N1.1, the theft of a pre-retail medical product does not typically pose a risk of death or serious bodily injury much less with the mens rea required for tampering. The only offenses referenced to §2N1.1 are 18 U.S.C. §§ 1365(a) and (e), which expressly require that the tampering with a consumer product be done with “reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting an extreme indifference to such risk.” None of the offenses set forth in 18 U.S.C. § 670 require such a mens rea. And as discussed above, thefts of pre-retail medical products include so many different kinds of products that not all thefts pose a risk of death or serious bodily injury. Should the conduct of a defendant in a particular case fall within 18 U.S.C. § 1365, the government can charge and prove that offense so the defendant may be sentenced under §2N1.1.

A cross-reference to §2N2.1 also is not necessary. Section 2N2.1 covers a variety of offenses related to violations of statutes and regulations dealing with FDA and consumer products. Section 2N2.1 has two cross-references: (1) a cross-reference to §2B1.1 if the offense involved fraud; and (2) a cross-reference to any other offense guideline if “the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline.” If section 670 were to be referenced to §2N2.1, these cross-references would ensure that the §2B1.1 guideline would apply in virtually every case. It would therefore be redundant to reference section 670 to §2N2.1.

We also do not think the Commission should reference any of the other seven offenses covered by the directive to guidelines other than those to which they are currently referenced. Congress amended these statutes to ensure that they would carry the same penalty as section 670 unless the penalty provided under the specific statutory provision is greater. As applied to the theft of pre-retail medical products, the guidelines already permit these offenses to be punished the same as a section 670 offense or greater. Four of the offenses, §§ 659, 2118(b), 2314, 2315 are already referenced to §2B1.1 – the guideline for section 670.

The section 1952 offense (interstate and foreign travel or transportation in aid of racketeering enterprises) is referenced to §2E1.2, which in turn contains a reference to the offense level for the “unlawful activity in respect to which the travel or transportation was undertaken.” Hence, if a person were convicted of interstate or foreign travel or transportation in aid of racketeering with respect to the theft of pre-retail medical products, then §2B1.1 would apply.

The section 1957 offense (engaging in monetary transactions in property derived from specified unlawful activity) is referenced to §2S1.1, which uses the offense level for the underlying offense from which the laundered moneys were derived if the defendant committed the underlying offense. Hence, if the defendant committed a section 670 offense and laundered those funds, he would be sentenced under §2B1.1 and receive any number of additional enhancements. If he did not commit the underlying offense of theft of pre-retail medical products, his base offense level would start at 8 under §2S1.1(a)(2), which is higher than the base offense level under §2B1.1 and his offense level would be increased by the value of the laundered funds and other specific offense characteristics, including a 1-level increase for a conviction under 1957.

The section 2117 offense (burglary) is referenced to §2B2.1, which carries a significantly higher base offense level of 12 for burglary of a non-residential structure such as a warehouse, as compared to the base offense level of 6 or 7 set forth in §2B1.1. That guideline also contains enhancements for more than minimal planning, amount of loss, possession of a dangerous weapon, and the taking of, among other things, a controlled substance. It therefore is likely that a person convicted of a burglary involving the theft of a pre-retail medical product would receive

a higher offense level under §2B2.1 than under §2B1.1. Because the statute contemplates that the sentence for a burglary involving the theft of a pre-retail medical product might be higher than the section 670 offense, it makes little sense to further complicate the guideline by providing additional cross-references.

The remaining section 2118 offenses are referenced to guidelines (§§2B3.1, 2A2.1, 2A2.2, and 2A1.1) that account for aggravating factors like physical injury, weapons, violence, and death. All of them contain substantially higher base offense levels than §2B1.1.

B. If the Commission were to Adopt the Proposed Amendment to §2B1.1, Its Cumulative Effect Should be Limited. The Guidelines Should Provide For a Departure Where the Theft Involves Class I FDA Medical Devices That Are Subject to Minimal Regulation or Products That Would Not Require a Consumer Warning to Discard the Product.

The Commission seeks comment on several issues related to the proposed amendment to §2B1.1 should the Commission choose to adopt it, including how it might interact with other enhancements and whether it adequately responds to other directives in the Act.

1. Interaction of Proposed Amendment with Other Specific Offense Characteristics in §2B1.1

The Commission asks how the proposed amendment should interact with (a) the current 2-level enhancement and minimum offense level of 14 for cargo theft; and (b) the current 2-level enhancement and minimum offense level of 14 if the offense involved a risk of death or serious bodily injury or possession of a dangerous weapon. Defenders submit that if the proposed amendment to §2B1.1 applies, then the enhancements for cargo theft and risk of death or serious bodily injury or possession of a dangerous weapon should not apply. We also believe that the Commission should limit the cumulative effect of the cargo theft enhancement and the §2B1.1(b)(4) enhancement for being in the business of receiving stolen property.

The ever-present concerns about the cumulative effect of specific offense characteristics and how they result in disproportionate punishment increases at various offense levels are a reason why the Commission should not adopt the proposed amendment, but should instead wait until it finishes its multi-year review of §2B1.1. Factor creep, a problem acknowledged by the Commission in its *Fifteen Year Report*,⁴⁵ and addressed in our most recent priorities letter,⁴⁶ has long been a problem with certain guidelines, including §2B1.1.

⁴⁵ U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 137 (2004).

With “factor creep,” the cumulative effect of enhancements does not properly track offense seriousness. The resulting sentence increase from a single 2-level enhancement can vary dramatically and disproportionately. For example, a defendant whose offense level increases from 6 to 8 experiences no additional increase in the advisory guideline range; the defendant whose offense level increases from 11 to 13 is exposed to four additional months at the low-end of the guideline range; the defendant whose offense level increases from 20 to 22 is exposed to eight additional months; and the defendant whose offense level increases from 32 to 34 is exposed to thirty additional months. Such disparate increases based on the same conduct do not promote respect for the law or provide for fair and proportionate sentences. Indeed, long ago, the Second Circuit acknowledged how the cumulative effect of enhancements skews the guideline ranges dramatically as the offense level increases. *United States v. Lauersen*, 362 F.3d 160, 163 (2d Cir. 2004) (cumulative impact of enhancements permitted consideration of downward departure), *vacated on other grounds*, 543 U.S. 1097 (2005).

A related problem with specific offense characteristics is that they often double or triple count the same essential harms. With §2B1.1, that is especially true because a defendant will typically receive an enhancement for the magnitude of the loss and then get one or more enhancements for how the loss was caused. While the harms may be superficially different, the manner and means of committing the offense are often inextricably linked to the magnitude of the loss and thus often overstate the seriousness of the offense. For example, an organized scheme to steal cargo is likely to result in a greater loss, but the loss amount and the cargo theft each receive an enhancement under the guidelines.

Additionally, the specific offense characteristics in the proposed amendment overlap with other enhancements, and thus should be limited. For example, the enhancement for “use of force” is potentially so broad that it might apply in many cases involving the theft of pre-retail products from distribution centers and tractor-trailers. The term “force” in the proposed amendment is not limited by reference to “physical force.” *Cf.* 18 U.S.C. § 16 (crime of violence defined by reference to “physical force”). Nor is it limited to force against a person. If it includes “force” against property, it may apply in any case involving the breaking and entering into a warehouse, burglary, and theft of a tractor-trailer. At the same time, the theft of pre-retail medical products from a tractor-trailer or warehouse will usually result in an enhancement for “cargo theft.” The same essential conduct – using force to steal cargo – would result in double-counting.

Similarly, the proposed amendment and the enhancement and minimum offense level currently at §2B1.1(b)(14) for “the conscious or reckless risk of death or serious bodily injury”

⁴⁶ Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 8-9 (July 23, 2012) (hereinafter “Meyers Letter”).

or “possession of a dangerous weapon” target the same harm. Any offense that “resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved” is likely to involve the “conscious or reckless risk of death or serious bodily injury.” Any offense that involved the “use of a deadly weapon” will necessarily involve the “possession of a dangerous weapon.” In fact, under both scenarios, one enhancement could be considered a “lesser included” enhancement of the other. To apply both would result in a disproportionate increase in sentence length. In short, enhancements aimed at the same essential conduct and harm should not apply cumulatively.

Aside from the concerns delineated in the issues for comment, the Commission should also limit the cumulative effect of the cargo theft enhancement at §2B1.1(b)(13) and the enhancement for being in the business of receiving and selling stolen property at §2B1.1(4). Section 2B1.1(b)(13) provides a 2-level enhancement and minimum offense level of 14 if the offense involved an organized scheme to steal or *receive* stolen goods or chattels that are part of a cargo shipment. If the defendant received stolen good from a cargo theft, he is also likely to receive another 2-level adjustment for being in the business of receiving and selling stolen property. *See* §2B1.1(b)(4) and cmt. (n. 5) (value and size of inventory of stolen property is factor to consider in applying enhancement). Such double counting of the harm resulting from the same conduct – receipt of a high volume of stolen goods – should be limited.

Applying multiple specific offense characteristics is not necessary to arrive at an appropriate sentencing range. Even without SOCs, a guideline range based on the loss amount alone can overstate offense seriousness and produce sentences greater than necessary. A recent case involving stolen infant formula demonstrates the point. The defendant and his brother operated a grocery wholesale business. They purchased infant formula from secondary market suppliers without confirming that it was obtained from legitimate sources. Both were convicted of, *inter alia*, receiving stolen infant formula. Under §2B1.1, the guideline range was 37-46 months, based on an offense level 21 (base offense level of 6, 18 for amount of loss, and minus 3 for acceptance of responsibility), and criminal history category I. The parties stipulated that the 2-level adjustment for being in the business of stolen property did not apply. The government also agreed to a below-guideline sentence of thirty months. The court imposed a sentence of twenty-two months.⁴⁷

2. The Guidelines Already Provide for a Minimum Offense Level in Cases Involving the Theft of Pre-retail Medical Products.

The Commission asks if the “proposed amendment adequately responds to requirement (2) of the directive that the Commission consider establishing a minimum offense level for

⁴⁷ *See United States v. Rassem Kaloti and Ishaq Kaloti*, Case No. 11-cr-215 (E.D. Wis. 2011).

offenses covered by the Act.” As a threshold matter, we note that the directive requires only that the Commission *consider* establishing a minimum offense level. Nothing in the directive requires it do so. More significantly, we believe that the guidelines currently ensure a minimum base offense level for a sizable percentage of these cases. The focus of FDA efforts is on cargo thefts of FDA products that have been “stolen from warehouses or tractor-trailers.”⁴⁸ Hence, many of these cases will be subject to the cargo theft enhancement at §2B1.1(b)(13), which carries a minimum base offense level of 14. Aside from that, every section 670 offense will have a minimum base offense level of 6.

3. The Commission’s Proposal Does Not Adequately Consider Mitigating Circumstances.

The Commission requests comment on whether the proposed amendment adequately responds to the directive that the Commission account for aggravating and mitigating circumstances. The proposed amendment only responds to the aggravating factors that Congress set forth in the Act. It does not account for any mitigating circumstances. While there have been too few prosecutions involving pre-retail medical products for us to provide comprehensive comments on the mitigating factors present in these cases, several are of obvious concern. First, as is often the case, persons involved in the theft of pre-retail medical products play many different roles in the offense. Just as in a drug case, there will be defendants whose role in the offense was limited to being nothing more than a carrier of products from point A to point B. These are easily replaced participants, whose role may be critical to the ultimate success of the theft and eventual distribution of the products, but who are substantially less culpable than persons directly responsible for the theft or those who received sizable profits from the offense. To account for this lesser culpability, the Commission should direct the courts to consider applying §3B1.2 in cases where the defendant had limited knowledge of the scope of the scheme and received little personal gain relative to the loss amount. This would be similar to the provision the Commission made for nominee owners in health care fraud schemes. *See* USSG §3B1.2, cmt. (n. 3(A)).

Second, the Commission should provide for a [2][4] level decrease in offense level if the offense involved the theft of Class I FDA medical devices or the theft of a product that would not require a consumer warning to discard the product. One of the factors the Commission shall consider in promulgating guidelines and policy statements is “the nature and degree of the harm

⁴⁸ FDA, *Inspections, Compliance, Enforcement, and Criminal Investigations, Cargo Thefts*, <http://www.fda.gov/ICECI/CriminalInvestigations/ucm182888.htm>. *See also* FDA *Cargo/Warehouse Letter to Stakeholders* (2010), <http://www.fda.gov/ICECI/CriminalInvestigations/ucm209979.htm>; FDA Staff Manual Guides, Vol IV-Agency Program Directives, General or Multidiscipline, FDA’s Response to Cargo Thefts (March 2012), <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/StaffManualGuides/UCM297208.pdf>.

caused by the offense” as well as aggravating and mitigating circumstances. It is apparent that offenses involving pre-retail medical products do not all present the same potential harm to public safety. Product theft that results in a FDA warning for consumers to discard the product presents a greater harm than theft that does not warrant such a warning.

4. The Proposed Amendment Does Not Adequately Balance out the Competing Considerations in the Directive and the Commission’s Duties under 28 U.S.C. § 994.

Sections (1), (4), (5), and (6) of the Act’s directive require the Commission to consider a variety of factors, including the “need for an effective deterrent and appropriate punishment to prevent such offenses,” and to “ensure that the Federal sentencing guidelines and policy statements adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.” Because we believe that §2B1.1 is fundamentally broken, and the proposed amendment merely adds to its problems, we do not believe the proposal complies with the directives. Section 2B1.1 too often produces sentences that are greater than necessary and this proposed amendment will only exacerbate that problem.⁴⁹

And, as we have discussed in past submissions to the Commission, the empirical evidence has soundly debunked the myth of general deterrence. Harsher sentences do not deter. The increased chance of being apprehended for a crime, *i.e.*, certainty, is more likely to produce a deterrent benefit than the severity of punishment.⁵⁰ The reasons are simple: (1) human beings are not typically “rational actors who consider the consequences of their behavior before deciding to commit a crime,” (2) would-be offenders are rarely aware of the penalties they face or whether penalties have increased; and (3) even if they were rational actors who knew the penalties, “enhancing the severity of punishment will have little impact on people who do not believe they will be apprehended for their actions.”⁵¹ Notwithstanding the overwhelming evidence against the notion that lengthier prison sentences deter, the executive and legislative branches rarely acknowledge the evidence, choosing instead to ratchet up penalties to appear “tough on crime” or to give prosecutors incentives to pursue cases. It is up to this Commission, as an independent expert body, to reject the myth of general deterrence and carry out the duties specified in 28 U.S.C. § 994.

⁴⁹ See Meyers Letter, *supra* note 46, at 7-10; Statement of Kathryn N. Nester Before the U.S. Sentencing Comm’n, Washington, D.C. at 1-6 (March 14, 2012);

⁵⁰ See generally Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* 1 (2010), <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>.

⁵¹ *Id.* at 2-3.

One of the duties, delineated in section 994(c), is to consider whether a number of specified factors, “among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance.” One of the factors that the Commission shall take into account “only to the extent” it has relevance is “the deterrent effect a particular sentence may have on the commission of the offense by others.” 28 U.S.C. § 944(c)(6) (emphasis added). If the empirical evidence shows that sentence length has no deterrent effect on the commission of the offense by others, then the Commission should give little to no weight to general deterrence when fashioning the guidelines and policy statements.

5. The Term “Pre-retail Medical Product” Should Be Defined by Reference to Its Statutory Definition.

The Commission seeks comment on whether it should define “pre-retail” by reference to the statutory definition, whether the definition is adequately clear, and if not, what guidance it should provide, if any, to address situations where it lacks clarity. It also asks whether the definition of “supply chain” informs the determination of whether the medical product has been made available for retail purchase by a consumer.

As to the definition of “pre-retail medical product,” as used in any new guideline, we agree that it should be defined by reference to 18 U.S.C. § 670(e), *i.e.*, “a medical product that has not yet been made available for retail purchase by a consumer.” While the exact parameters of this definition are unclear, particularly as it applies to medical products that are never intended for retail purchase by a consumer or that are taken from the retailer but not available for purchase, we think it better to allow the courts to construe the statutory language in determining the elements of the offense. As the courts interpret the statute, the definition will become more precise.

Defenders do not believe that the definition of the term “supply chain” should inform the determination of whether the “medical product has not yet been made available for retail purchase by a consumer.” Under 18 U.S.C. § 670(e), the term “supply chain” includes “manufacturer, wholesaler, repacker, own-labeled distributor, private-label distributor, jobber, broker, drug trader, transportation company, hospital, pharmacy, or security company.” The reference to “hospital” and “pharmacy” is particularly confusing here. Hospitals and pharmacies can operate as retail and wholesale distributors. *See* 21 C.F.R. § 201.5(g)(3) (defining “wholesale distributor” as, among other entities, “retail pharmacies that conduct wholesale distributions”).⁵² In the case of a retail hospital or pharmacy conducting wholesale distributions,

⁵² *See also* Florida Dep’t of Business and Professional Regulations, *Retail Pharmacy Drug Wholesale Distributor*, <http://www.myfloridalicense.com/dbpr/ddc/RetailPharmacyDrugWholesaleDistributor.html>; National Alliance for Model State Drug Laws, *Drug Pedigree Requirements for Pharmacies and Wholesalers: State Statutes* 114 (2011) (referencing hospital pharmacies that conduct wholesale

the medical products would likely be considered “pre-retail” and covered under 18 U.S.C. § 670.⁵³ In contrast, if that same hospital or pharmacy makes the product available for retail purchase by a consumer, then the product would fall outside the definition of “pre-retail.” Similarly, a chain pharmacy may operate a warehouse, which is responsible for intracompany sales or transfers to local pharmacies where the product is made available for retail purchase by a consumer.⁵⁴ In such a case, products taken from the warehouse would be “pre-retail,” whereas products taken from the local pharmacy likely would not fall within that definition. For these reasons, the term “supply chain” does not inform the definition of pre-retail.

6. No Additional SOC is Necessary to Account for Situations Where the Defendant is An Employee or Agent of an Organization in the Supply Chain for a Pre-retail Medical Product.

The guidelines provide several ways for a court to account for the defendant’s status as an employee or agent of an organization in the supply chain for a pre-retail medical product. In some cases, §3B1.3 will apply. In others, where the defendant did not occupy a position of trust, the court can consider the defendant’s status as an employee or agent in determining where within the range to sentence the defendant. To cover those cases, the Commission could add an application note to §2B1.1 along the following lines:

In determining the sentence within the applicable guideline range, the court may consider whether the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product. Where such factors are present in an extreme form, a departure

distributions), <http://www.namsdl.org/documents/StateStatutoryCompilationJuly2011.pdf>; United States Congress Staff Report: *Shining Light on the “Gray Market”: An Examination of Why Hospitals are Forced to Pay Exorbitant Prices for Prescription Drugs Facing Critical Shortages* 17 (2012) (discussing how some states allow pharmacies to re-sell their inventories to other pharmacies or wholesalers), <http://democrats.oversight.house.gov/images/stories/7.25.12%20Staff%20Report%20Shining%20Light%20on%20the%20Gray%20Market.pdf>.

⁵³ Retail-level pharmacies are allowed to sell a portion of their inventory to distributors. This occurs most often in cases when the drugs will expire within ninety days and the pharmacy does not believe it can dispense them in that timeframe. To put the drug back into the supply chain and prevent it from going to waste, the pharmacy may sell it to a distributor or large wholesaler. See *Short-supply Prescription Drugs: Shining a Light on the Gray Market*, Hearing before the Subcommittee on Commerce, Science, and Transportation, United States Senate, 112th Cong. (July 25, 2012) (statement of Patricia Earl, Industry Analyst, National Coalition of Pharmaceutical Distributors), http://commerce.senate.gov/public/?a=Files.Serve&File_id=8ca3cabd-477c-4f3c-985f-c351067912b4.

⁵⁴ See, e.g., National Alliance for Model State Drug Laws, *Drug Pedigree Requirements for Pharmacies and Wholesalers: State Statutes* 2, 30, 42 (2011), <http://www.namsdl.org/documents/StateStatutoryCompilationJuly2011.pdf>.

from the guidelines may be warranted. See Chapter Five, Part K (Departures).

Such an application note, while not common in the guidelines, is not without precedent. Section 2M5.2 cmt. (n. 2) advises the court that “[i]n determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted.”

7. The Commission Need Not Amend the Guidelines for the Other Offenses Amended by the Safe Doses Act.

The directive to the Commission provides that the Commission shall review and if appropriate amend the guidelines for 18 U.S.C. § 2118 and other offenses amended by the Safe Doses Act. As we discussed above, many of these other offenses are already referenced to §2B1.1 or to guidelines that cross-reference §2B1.1. Thus, if the Commission were to promulgate the proposed amendment to §2B1.1, that amendment would apply to those offenses. As to the other offenses, they start at higher base offense levels than §2B1.1 and will generally result in a substantial guideline range.

Written Statement of Denise C. Barrett

On Behalf of the Federal Public and Community Defenders

**Before the United States Sentencing Commission
Public Hearing on Counterfeit and Adulterated Drugs**

March 13, 2013

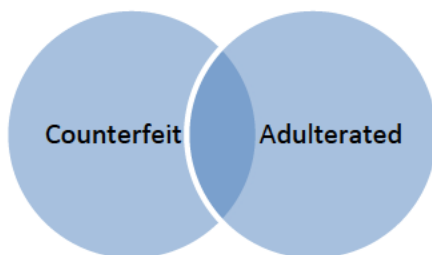
Testimony of Denise C. Barrett
Before the United States Sentencing Commission
Public Hearing on Counterfeit and Adulterated Drugs
March 13, 2013

My name is Denise C. Barrett and I am National Sentencing Resource Counsel with the Federal Public and Community Defenders. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding counterfeit and adulterated drugs.

I. Counterfeit Drug Offenses and the Offense of Intentionally Adulterating Drugs under 21 U.S.C. § 333(b)(7)

Before discussing the details of the Commission’s proposed amendments, we respond to the Commission’s request for comment comparing and contrasting the offense of trafficking in counterfeit drugs, 18 U.S.C. § 2320(a)(4), and the offense of intentionally adulterating drugs such that they have a reasonable probability of causing serious adverse health consequences or death. 21 U.S.C. § 333(b)(7). These two offenses involve two distinct primary harms. The gravamen of the counterfeiting offense at 18 U.S.C. § 2320(a)(4) – a subsection of the general counterfeiting statute – is an infringement of the intellectual property rights of drug companies. The gravamen of the adulterated drug offense is the permanent physical harm¹ or death caused by intentionally and knowingly adulterating drugs in specified ways. Because section 333(b)(7) is an offense that by definition jeopardizes public safety, and targets those who adulterate drugs, it should be deemed more serious than an offense that chiefly threatens a property right, and in only some instances poses any real threat of bodily harm.

This is not to say that some conduct cannot involve both offenses. As illustrated below, the two offenses can sometimes overlap, but not always.



To be considered counterfeit for purposes of section 2320(a)(4), the drug need not be adulterated. Nor must the drug be an inferior product.² To be counterfeit, a drug need only bear

¹ The term “serious adverse health consequence” has a distinct meaning under FDA law. It is a permanent, not temporary or medically reversible condition. *See Discussion, infra.*

² The FDA’s website uses the term “counterfeit” medicine” quite “expansively,” equating it with adulterated drugs, but the legal difference between adulterated and counterfeit is quite clear. *Compare 21*

the “the trademark, trade name, or other identifying mark, imprint, or device, or any likeness thereof, of a drug manufacturer, processor, packer, or distributor other than the person or persons who in fact manufactured, processed, packed, or distributed such drug.” 21 U.S.C. § 321(g)(2). Nor is an adulterated drug necessarily counterfeit.³ Indeed, one of the worst cases of adulterated drugs in recent times – an adulterated steroid that caused meningitis – was not counterfeit.⁴ In some instances, a drug may be both counterfeit and adulterated, *e.g.*, because it bears a trademark of a manufacturer other than the one who made it and lacks an active ingredient. In such a case, the party who adulterated it and trafficked in it would be subject to prosecution under both 21 U.S.C. § 333(b)(7) and 18 U.S.C. § 2320(a)(4) or any of the other provisions prohibiting adulteration, *see* 21 U.S.C. § 331(a)(b), 331(i)(3), and counterfeit drugs, 21 U.S.C. § 331(i)(3).⁵

Prosecutions under the Counterfeit Statutes. Before the enactment of 18 U.S.C. § 2320(a)(4), two statutes covered counterfeit drugs: (1) 18 U.S.C. § 2320(a)(1), which prohibits trafficking in counterfeit goods and services; and (2) 21 U.S.C. § 331(i), which prohibits the “doing of any act which causes a drug to be counterfeit, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit drug.” Section 2320(a)(1) is a felony punishable by not more than ten years imprisonment. Section 331(i) is either a misdemeanor punishable by not more than one year imprisonment or a felony punishable by up to three years imprisonment if the offense was also committed with the intent to defraud or mislead. 21 U.S.C. § 333(a)(1) and (2). Prosecutors use both statutes in counterfeit drug cases, with charging decisions varying from district-to-district and case-to-case.

U.S.C. § 321 (g)(2) (defining counterfeit) *with* 21 U.S.C. § 351 (setting forth circumstances when a drug shall be deemed to be “adulterated”).

³ In other contexts, Congress has recognized a distinction between counterfeit and adulterated drugs. *See* 21 U.S.C. § 331(b) (prohibiting “adulteration or misbranding of any food, drug, device, tobacco product, or cosmetic in interstate commerce); 21 U.S.C. § 331(i)(3) (prohibiting “any act which causes a drug to be a counterfeit drug, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit drug); 21 U.S.C. § 355(e) (directing FDA to develop standards and technologies of “securing the drug supply chain against counterfeit, diverted, subpotent, substandard, adulterated, misbranded, or expired drugs”).

⁴ FDA, *Multistate Outbreak of Fungal Meningitis and other Infections*, <http://www.fda.gov/Drugs/DrugSafety/FungalMeningitis/default.htm>; *see also* CNN Health, *Feds Open Criminal Inquiry Into Firm Linked To Deadly Meningitis Outbreak*, <http://www.cnn.com/2012/10/23/health/massachusetts-outbreak-criminal-investigation>.

⁵ *See, e.g., United States v. George*, 233 Fed. Appx. 402 (5th Cir. 2007) (defendant sentenced to 24 months following convictions for multiple counts of trafficking in counterfeit erectile dysfunction drugs, 18 U.S.C. § 2320(a); causing the counterfeiting of trademarks on drugs, 21 U.S.C. § 331(i), and causing the introduction of adulterated or misbranded drugs with the intent to defraud or mislead, 21 U.S.C. § 331(a)); *United States v. Mark Hughes*, 4:0-cr-00401-HEA-1 (E.D. Mo. 2012) (defendant sentenced to 46 months imprisonment for trafficking in counterfeit erectile dysfunction drugs in violation of 18 U.S.C. § 2320, and concurrent term of 36 months for adulteration/misbranding under 21 U.S.C. § 33).

Our review of counterfeit drug prosecutions shows that a sizable number involve counterfeit erectile dysfunction drugs, including counterfeit Viagra®, Cialis®, and Levitra®. Other counterfeit drugs, such as weight loss drugs, anti-anxiety medications, and anti-depressants, are prosecuted much less frequently. Here are some examples of cases where the court imposed significant terms of imprisonment under the currently applicable guidelines:

- In Texas, a defendant convicted of conspiracy to traffick in counterfeit drugs, misbranding, and counterfeiting of trademarks was sentenced to 78 months imprisonment and ordered to pay \$1,286,060 in restitution to Eli Lilly Corporation and Pfizer Pharmaceuticals.⁶
- In a Houston case prosecuted under both 18 U.S.C. § 2320 and 21 U.S.C. § 331, the 32-year-old owner of a small business received a sentence of 33 months imprisonment following his conviction for conspiring with others in the People’s Republic of China to traffic in counterfeit goods and trafficking in counterfeit and misbranded pharmaceuticals. The case arose out of the discovery at a mail facility in California of two packages containing about 6,500 loose counterfeit Viagra® pills.⁷
- In the Western District of North Carolina, a 56-year-old man was recently sentenced to 24 months imprisonment for selling counterfeit Viagra® and Cialis® at a convenience store in Charlotte, North Carolina. The court also ordered him to pay a \$10,000 fine. The pills had some of the active ingredients of the drugs, but the strength was unknown. He was convicted of conspiracy to violate § 2320(a) and § 331(i) as well as several substantive counts of 18 U.S.C. § 2320(a) and 21 U.S.C. § 331(i).⁸
- In Los Angeles, a 36-year-old “drop shipper” who packaged and shipped more than 160,000 counterfeit drugs, including Viagra®, Cialis®, Valium®, Xanax®, and Lipitor® for a Chinese national living in New Zealand received a sentence of 24 months imprisonment following his conviction for conspiracy to traffic in counterfeit goods, in violation of 18 U.S.C. § 2320. He was also ordered to pay \$324,530 in restitution to the pharmaceutical companies that manufactured the brand name products.⁹
- In Colorado, the government recommended, and the court imposed, a top-of-the-guideline range sentence of 87 months on the defendant who was convicted of trafficking

⁶ *United States v. Kevin Xu*, 4:07-cr-00362-1 (S.D. Tex. 2009).

⁷ *United States v. En Wang*, 4:10-cr-00087-1 (S.D. Tex. 2011).

⁸ *United States v. Awni Shauaib Zayyad*, 3:10-cr-00243-RJC-DCK-1 (W.D.N.C. 2013).

⁹ *United States v. Francis Ortiz Gonzalez*, No. CR-10-136-GW (C.D. Cal. 2013).

in a counterfeit version of the weight loss drug, Alli®. He was also ordered to pay \$507,567.94 in restitution, including \$417,396.39 to Eli Lilly.¹⁰

In other cases, defendants have received shorter below guidelines sentences for similar felony offenses,¹¹ or the government has allowed them to plead to a misdemeanor counterfeit offense under 21 U.S.C. §§ 331, 333.¹²

Intentional Adulteration Likely to Cause Permanent Injury or Death. Because 21 U.S.C. § 333(b)(7) is a new criminal statute, it is too soon to tell what these offenses will entail. Nonetheless, an examination of the elements of the adulteration offense under subsection 333(b)(7), FDA recall practices, and FDA warning letters regarding adulterated drugs give some context to this new offense.

To be convicted of an offense under section 333(b)(7), the defendant must knowingly and intentionally adulterate a drug in a specified way and such that it “has a reasonable probability of causing serious adverse health consequences or death to humans or animals.” For purposes of section 333(b)(7), a drug is adulterated if

- if contains “any filthy, putrid, or decomposed substance”;
- “its strength differs from, or its quality or purity falls below, the standard set forth in an [official] compendium”;
- “its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess”;

¹⁰ *United States v. Shengyang Zhou*, 1:10-cr-00226-PAB-1 (D. Colo. 2011).

¹¹ *See, e.g., United States v. Gregory Bochter*, No. 6:12-cr-60-orl-18KRS (M.D. Fla. 2012) (8 month sentence of imprisonment imposed on drop shipper for trafficking in about 6000 counterfeit erectile dysfunction drugs from China, in violation of 18 U.S.C. § 2320); *United States v. Sarah Knott*, No. 8:11-cr-001100-JFM-1 (D. Md. 2012) (2 years probation for trafficking in over 45, 0000 counterfeit Viagra® tablets, in violation of 18 U.S.C. § 2320); *United States v. Curtis Henry*, No. 6:11-cr-06165-CJS-1 (W.D.N.Y. 2012) (3 years probation for trafficking in 740 counterfeit erectile dysfunction drugs from China); *United States v. Frank Fu Jen Huang*, 2:04-cr-01298-R-1 (C.D. Cal. 2006) (departure/variance from 78-97 months range of imprisonment to six months of home detention, 2,500 hours of community service, and 5 years probation).

¹² *See, e.g., United States v. Ali Jones*, 2:08-cr-00887-JWJ-1 (C.D. Cal. 2008) (2 years probation for sale of counterfeit erectile dysfunction drugs advertised on craigslist; government agreed not to charge the defendant with a felony count under 18 U.S.C. § 2320); *United States v. Jun Huang*, 2:09-cr-01028-CT-1 (C.D. Cal. 2010) (1 year probation for sale of counterfeit drugs in violation of 21 U.S.C. § 331); *United States v. David Srulevitch*, No. 2:04-cr-01559-R-1 (C.D. Cal. 2005) (5 years probation for making about 700,000 counterfeit Viagra®).

- “any substance has been (1) mixed or packed therewith so as to reduce its quality or strength or (2) substituted wholly or in part therefor.”

21 U.S.C. § 351(a)(1), (b), and (c).

In addition to being adulterated in one of these specific ways, the adulterated drug must have a “reasonable probability of causing serious adverse health consequences or death to humans or animals.” 21 U.S.C. § 333(b)(7). The language “serious adverse health consequences or death” is regulatory language the FDA uses to describe a Class I recall.¹³ While the term “serious adverse health consequence” is not defined by statute or regulation, it is essentially a permanent or medically irreversible health consequence.¹⁴ Class I recalls based upon concerns that an adulterated drug may cause serious adverse health consequences are typically voluntary recalls from the manufacturing firm. For example, in December 2012, Qualitest – a generic pharmaceutical manufacturer – recalled 101 lots of hydrocodone bitartrate and acetaminophen tablets 10mg/500mg¹⁵ because of the potential for the tablets to have a higher dosage of acetaminophen than indicated.¹⁶ In another case, vials of a blood thinner – argatroban – were recalled because one vial was reported to have crystalline and fiber particulates.¹⁷ In a much more high profile case that resulted in a criminal investigation, a Class I recall issued for several

¹³ 21 C.F.R. § 7.3(m). FDA has a three-tiered recall classification system, which indicates the “relative degree of health hazard presented by the product being recalled.” *Id.* Class I is discussed in the text. Class II recalls involve a situation where “use of or exposure to the [drug] may cause temporary or medically reversible adverse health consequences or where the probability of serious adverse health consequences is remote.” A Class III recall involves a situation “in which use of or exposure to a [drug] is not likely to cause adverse health consequences.” *Id.* See also FDA, *Safety: Background and Definitions*, <http://www.fda.gov/Safety/Recalls/ucm165546.htm>.

¹⁴ *Cf.* 21 C.F.R. § 7.3 (m)(2) (defining a Class II recall as one where use or exposure to the product may “cause temporary or medically reversible adverse health consequences or where the probability of serious adverse health consequences is remote”).

¹⁵ This is the generic equivalent of the brand name Lortab®.

¹⁶ FDA, *Enforcement Report – Week of February 6, 2013*, http://www.accessdata.fda.gov/scripts/enforcement/enforce_rpt-ProductTabs.cfm?action=select&recall_number=D-138-2013&w=02062013&lang=eng; Qualitest, News Release, <http://www.qualitestrx.com>.

¹⁷ FDA, *Enforcement Report – Week of August 8, 2012*, http://www.accessdata.fda.gov/scripts/enforcement/enforce_rpt-ProductTabs.cfm?action=select&recall_number=D-1429-2012&w=08082012&lang=eng.

different solutions distributed by the New England Compounding Center. The contaminated drugs have been linked to an outbreak of fungal meningitis.¹⁸

In addition to working with manufacturers to recall a drug, the FDA may issue warning letters to pharmaceutical manufacturing and compounding facilities alleging that drugs are adulterated under the provisions of 21 U.S.C. § 351(a)(1), (b), (c), or (d) – the provisions at issue in 21 U.S.C. § 333(b)(7).¹⁹ These warning letters typically set forth violations discovered during FDA inspections, measures that must be taken to correct the violations within a specified time, and consequences for failing to do so.

To our knowledge, most of the problems with adulterated drugs subject to Class I recalls or warning letters are handled through the regulatory process, not criminal prosecutions. The relatively small number of prosecutions for adulteration under 21 U.S.C. § 331(a) and (b) suggest that there will be fewer prosecutions for the more serious offense of intentional adulteration likely to result in permanent physical harm or death. Prior to the enactment of 21 U.S.C. § 333(b)(7), two statutory provisions expressly addressed adulterated drugs. Section 331(a) prohibited “[t]he introduction or delivery for introduction in to interstate commerce of any. . . drug. . . that is adulterated or misbranded.” Section 331(b) prohibited “[t]he adulteration or misbranding of any. . . drug. . . in interstate commerce.” Violations of these provisions are misdemeanor offenses, punishable by a term of imprisonment for not more than one year,²⁰ or felonies, punishable for not more than three years, if the violations were committed with the intent to defraud or mislead or the person had a prior conviction under 21 U.S.C. § 331. *See* 21

¹⁸ FDA, *Multistate Outbreak of Fungal Meningitis and other Infections*, <http://www.fda.gov/Drugs/DrugSafety/FungalMeningitis/default.htm>; *see also* CNN Health, *Feds Open Criminal Inquiry Into Firm Linked To Deadly Meningitis Outbreak*, <http://www.cnn.com/2012/10/23/health/massachusetts-outbreak-criminal-investigation>.

¹⁹ *See, e.g.*, Letter from Emma Singleton, Dir., Public Health Service, Food and Drug Administration, Florida District, to Paul Franck, President and Chief Executive Officer, Franck’s Lab, Inc. (July 9, 2012) (charging adulteration of injection drug product under 21 U.S.C. §351(a)(1) and (c) because of presence of microorganisms and because strength, purity, and quality were different from what it is represented to possess); Letter from Emma Singleton, Dir., Public Health Service, Food and Drug Administration, Florida District, to Dr. Michael Rizo, Infupharma, LLC (July 30, 2012) (alleging that vials of Avastin® – an injectable cancer drug, which contained microorganisms, consisted of “filthy, putrid or decomposed substance”); Letter from Michael M. Levy, Dir. Division of New Drugs and Labeling Compliance, Center for Drug Evaluation and Research, to Eugene Tagazzo, Hopewell Pharmacy and Compounding Center (Sept. 28, 2009) (alleging that injectable STS were not “recognized in official compendium and their strengths differ from, or their quality or purity fall below that which they purport or are represented to possess” and that they “contain a substance [DEGMEE], mixed therewith so as to reduce their quality or strength”).

²⁰ Even though a single count of conviction carries a maximum of one year imprisonment, prosecutors may pursue multiple counts that yield consecutive sentences.

U.S.C. §§ 331(b) & 333(a). Both of these offenses are referred to USSG §2N2.1, which carries a base offense level of 6, a 4-level enhancement for sustaining a prior conviction under 21 U.S.C. § 331, and a cross-reference to §2B1.1 if the offense involved fraud. In FY 2011, §2N2.1 applied in only 34 cases. It is not clear how many of those cases involved adulterated drugs because subsections 331(a) and (b) cover misbranding, as well as adulteration of non-drug products, including food, tobacco, and cosmetics.²¹

One of the more serious cases of an adulterated drug prosecution under 21 U.S.C. § 331 arose in connection with the distribution of adulterated cancer drugs from foreign countries.²² Some of the drugs, shipped in cold packs, were wet and disintegrated upon receipt. These drugs were adulterated because “the methods of their storage and shipment were not appropriate and did not provide adequate protection against foreseeable external factors in storage and use that can cause deterioration or contamination of these prescription drugs.”²³ The defendant pled guilty to conspiracy to cause the introduction of adulterated prescription drugs into interstate commerce, in violation of 18 U.S.C. § 371 and 21 U.S.C. § 331. His final offense level under §2N1.2 was 20, criminal history category I, with a range of 33 to 41 months. At sentencing, the government sought a 41 month sentence. After careful consideration of all of the 3553(a) factors, the court imposed a below guideline sentence of 24 months imprisonment.²⁴

²¹ Of the 21 U.S.C. §§ 331(a) and (b) prosecutions we were able to discover involving drugs, the charges were often predicated on misbranding, not adulteration. *See, e.g., United States v. Isabelle Martire*, No. 8:11-cr-00373 (D. Md. 2011) (oncologist pled guilty to introducing misbranded drugs into market place when she purchased drugs that had been approved for use in the United Kingdom and Europe but not by the FDA, and then treated her patients with them); *United States v. Nicholas Lundsten*, No. 2009-cr-00283 (D. Minn. 2010) (26 year old charged with misdemeanor misbranding and sentenced to 9 months for selling counterfeit erectile dysfunction drugs; government elected not to pursue a felony count); *United States v. Patrick Barron*, No. 2009-cr-00283 (D. Minn. 2010) (defendant sentenced to nine months imprisonment following misdemeanor conviction for introducing misbranded Xanax and Phentermine from China; the government dropped a felony count to spare the defendant the collateral consequences of a felony conviction).

²² Another high profile case involving adulterated drugs occurred in 2008 when serious injuries and 81 deaths were linked to contaminated heparin manufactured by Baxter HealthCare Corporation, which had obtained the active ingredient from China. The FDA believed that the contamination was deliberate and economically motivated. *See* U.S. Gov’t Accountability Office, *GAO-11-95, FDA Response to Heparin Contamination 1* (2010). Numerous civil suits were filed against Baxter, but we are unaware of any criminal prosecutions.

²³ FDA, U.S. Dep’t of Justice Press Release, August 23, 2012: *California Man Sentenced for Importing Adulterated Cancer Drugs; Forfeits \$1.4 million & Land Rover Automobile*, <http://www.fda.gov/ICECI/CriminalInvestigations/ucm316986.htm>.

²⁴ *United States v. James Newcomb*, No. 4:12-CR-9 RWS (E.D. Mo. 2012) (sentencing transcript). Another defendant in the same case, who helped Newcomb run his business, and who cooperated, received a probationary sentence of five years. *Id.* A doctor who was convicted of misbranding in

In summary, given the nature of adulteration offenses brought under existing law and their relative infrequency, it is difficult to project what kinds of cases will be prosecuted under the provisions of 21 U.S.C. § 333(b)(7), which compared with §§ 331(a) and (b) has a more heightened mens rea requirement, a specific actus reus requirement that the defendant adulterate the drug, a more narrow definition of adulteration, and an additional element that the adulteration have a reasonable probability of causing serious adverse health consequences or death to humans or animals.

II. Proposed Amendments for Counterfeit Drugs

The Commission proposes three options to respond to section 717 of the Food and Drug Administration Safety and Innovation Act (FDASIA), Pub.L. 112-144 (July 9, 2012), which amended section 2320 to add a new subsection (a)(4) that prohibits trafficking in a counterfeit drug, and which carries a twenty year maximum term of imprisonment. The FDASIA also contained a directive to the Commission to, inter alia, “review and amend, *if appropriate*” the guidelines and policy statements “in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by the guidelines and policy statements.” (emphasis added).

Given the range of sentences imposed in counterfeit drug cases, as discussed above, and the ability of the current guidelines to capture aggravating factors that may be associated with 18 U.S.C. § 2320(a)(4) offenses, we encourage the Commission to forego making any amendments to the guidelines other than cross-referencing 18 U.S.C. § 2320(a)(4) to §2B5.3.

If the Commission nonetheless believes that further amendment is necessary, we would encourage it to adopt a variant of Option 2 with a 2-level enhancement and minimum base offense level of 12 if the offense involved a counterfeit drug. We do not believe that the current 2-level, minimum base offense level of 14, enhancement for the “conscious or reckless risk of death or serious bodily injury” should be changed to a 4-level enhancement, as proposed in Option 2.

Offenses under section 2320 are currently referenced to §2B5.3, which has a base offense level of 8 and multiple specific offense characteristics (SOCS), including the following that are especially relevant to counterfeit drug cases:

- multiple level adjustments for the infringement amount, §2B5.3(b)(1);
- a 2-level increase with minimum offense level of 12 for importation, §2B5.3(b)(3);

- a 2-level increase for conscious or reckless risk of death or serious bodily injury with a minimum offense level of 14, §2B5.3(b)(5).

The application note also includes a general departure provision for cases where the offense level “substantially understates or overstates the seriousness of the offense.” USSG §2B5.3, comment. (n.4).

As discussed earlier, defendants convicted of larger-scale trafficking in counterfeit drugs have received significant sentences of imprisonment under these provisions while those engaged in smaller-scale trafficking have received lower sentences, often with the government’s agreement.

While the congressional directive expresses the intent of Congress that penalties for offenses involving counterfeit drugs “be increased in comparison to those currently provided by the guidelines and policy statements,” Pub. L. 112-144, § 717(b), the legislative history of the FDASIA is not clear on whether Congress had an accurate understanding of the penalties imposed in *counterfeit drug* cases as opposed to counterfeit goods cases. The Honorable F. James Sensenbrenner, Jr., cited the following data: “According to the Sentencing Commission, between FY06 and FY10, there were 385 federal prosecutions for counterfeit goods. The median sentence was 17 months. The mean sentence was only 10 months.”²⁵ It does not appear that Congress had before it information regarding the actual penalties imposed in *counterfeit drug cases* prosecuted under the felony provisions of 18 U.S.C. § 2320. Nor does it appear that the data accounted for the number of cases where the government may have moved for a downward departure for cooperation or otherwise agreed to a sentence less than the applicable guideline range.

Defenders do not have access to the data necessary to determine the average penalties imposed in counterfeit drug prosecutions under 18 U.S.C. § 2320, but a review of available cases, discussed above, suggests that the average guideline range could well be over ten months. In those cases where the sentence was less than ten months, the government often agreed to the disposition. Instead of rushing to amend the guidelines, we think the more prudent course of action is to collect the empirical evidence about drug counterfeiting cases prosecuted under 18 U.S.C. §2320 to develop a full picture of the actual sentences imposed and the reasons for the sentences.

²⁵ *Safe Doses Act, The Counterfeit Drug Penalty Enhancement Act of 2011, and the Foreign Counterfeit Prevention Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, 112th Cong. 2 (March 28, 2012) (statement of Honorable F. James Sensenbrenner, Jr.), http://judiciary.house.gov/hearings/printers/112th/112-132_73542.PDF.*

With respect to Congress's suggestion that a ten month sentence is too low for a counterfeit drug offense, the current guideline contains numerous enhancements that will increase the guidelines beyond the 10-16 month range in the typical case. Infringement amount alone can greatly increase a sentence. Indeed, our review of counterfeit drug cases shows infringement amounts leading to increases as high as 8, 10, and 14-levels.

The guidelines also provide for a 2-level enhancement, and a minimum offense level of 12, if the offense involved importation. USSG §2B5.3(b)(3). Because most counterfeit drugs are imported from other countries, that enhancement and minimum offense level already provide for the minimum offense level of 12 that federal agencies are seeking for counterfeit drug offenses.²⁶

A. Comments on Options 1 and 2 of the Proposed Amendment

Option 1 of the proposed amendment would add a [2][4]-level increase if the offense involved a counterfeit drug, with a minimum offense level of 14. Option 2 would add a 2-level increase with a minimum offense level of 12; and increase from 2-levels to 4 the current adjustment for "conscious or reckless risk of death or serious bodily injury" while keeping the minimum offense level of 14. Option 2 would also minimize the cumulative effect of multiple SOCs by limiting their application to the one that results in the "greatest" increase.

Option 2 appears to be based upon recommendations of the Counterfeit Pharmaceutical, Inter-Agency Working Group, which includes the Office of the Intellectual Property Enforcement Coordinator, the Food and Drug Administration, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, the Departments of Justice, State, and Commerce, and the Agency for International Development.²⁷ Those same recommendations are set forth in the Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations.²⁸

While we believe the current guidelines are adequate for counterfeit drug offenses, if the Commission nonetheless wants to proceed with an amendment, we believe the 2-level, minimum offense level of 12, for counterfeit drugs in Option 2 has a better chance of capturing offense

²⁶ See Executive Office of the President of the United States, *Counterfeit Pharmaceutical Inter-Agency Working Group Report to the President of the United States and to Congress* 3, 6-8, 11-14, 17 (March 2011) (discussing problems of importation of counterfeit drugs and recommending minimum offense level of 12 for the sale of counterfeit drugs); *Executive Office of the President of the United States Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations* 8 (March 2011).

²⁷ *Counterfeit Pharmaceutical Interagency Working Group*, *supra* note 26.

²⁸ *Administration's White Paper on Intellectual Property Enforcement*, *supra* note 26.

seriousness than Option 1. We do not, however, believe that the existing 2-level enhancement for conscious of reckless risk of death or serious bodily injury should be increased to 4 levels. A 4-level enhancement would result in disproportionality for a similar offense characteristic across the guidelines. It would also dramatically increase sentences.

1. Minimum Offense Level

A minimum offense level of 12, rather than 14, better captures the range of offense conduct that falls under this guideline. The minimum offense level of 14 in Option 1 significantly overstates the seriousness of the offense. Indeed, the multiple executive branch agencies charged with enforcing the laws against counterfeit drugs have expressed the view that a minimum offense level of 12 is adequate.²⁹

Setting the minimum offense level at 14 would result in disproportionate sentences because it would treat counterfeit drugs like crimes such as aggravated assault, §2A2.2, and criminal sexual abuse of a ward, §2A3.3, which have a base offense level of 14.³⁰ Surely, an offense that at its core involves the theft of intellectual property rights, and that may present a risk to public safety in some, but not all instances, is not as serious as one that actually results in bodily injury to another person.

2. Adjustment for “conscious or reckless risk of death or serious bodily injury”

A 2-level enhancement for “conscious or reckless risk of death or serious bodily injury,” is sufficient, and a 4-level increase is unnecessary and inappropriate. Option 2’s proposed 4-level enhancement is a prime example of how the guidelines have slowly risen over the years, resulting in sentences greater than necessary under 18 U.S.C. § 3553(a). In 2000, the Commission, with urging from the Department of Justice,³¹ amended §2B5.3 to provide for a 2-level enhancement and minimum offense level of 13 if the offense involved the conscious risk of

²⁹ *Administration’s White Paper on Intellectual Property Enforcement*, *supra* note 26, at 8; *Counterfeit Pharmaceutical Interagency Working Group*, *supra* note 26, at 17. Even industry representatives, who in the past have advocated for a “significant” increase in sentences for counterfeit drugs, have only proposed a 2-level increase with a minimum offense level of 13, not 14. Letter from Kendra Martello and Jeffrey Francer, Pharmaceutical Research and Manufacturers of America, to the U.S. Sentencing Comm’n, at 4-5 (March 28, 2008).

³⁰ A minimum offense level of 12 also raises concerns about proportionality because it treats trafficking in counterfeit drugs the same as involuntary manslaughter involving criminally negligent conduct, §2A1.4, and as more serious than assault resulting in bodily injury, which carries an offense level of 11. U.S.S.G. §2A2.3.

³¹ Statement of James K. Robinson, Ass’t Attorney General, Criminal Division, Before the U.S. Sentencing Comm’n, Washington D.C., at 4 (March 23, 2000).

serious bodily injury or possession of a dangerous weapon in connection with the offense. In its reason for amendment, the Commission cited to testimony it had received, which indicated “that the conscious risk or reckless risk of serious bodily injury may occur in some cases involving counterfeit consumer products.”³² The testimony presented to the Commission included counterfeit pharmaceuticals³³ and the staff report envisioned that this enhancement would apply to pharmaceuticals.³⁴ To increase that enhancement again is unnecessary and unwarranted.

A 4-level increase for the “conscious risk of death or serious bodily injury” would also undo the proportionality between USSG §§2B1.1 and 2B5.3 that the Commission has worked to accomplish. Just four years ago, the Commission raised the minimum offense level for §2B5.3(b)(5) from 13 to 14 and added “risk of death” because it believed that “paralleling the fraud guideline would promote proportionality.” USSG App. C, Amend. 735 (Nov. 1, 2009). For the Commission to now provide for a 4-level enhancement for the conscious or reckless risk of death or serious bodily injury would create disproportionality with regard to the exact same SOC at §2B1.1(b)(14), which provides for a 2-level enhancement.³⁵ A 4-level increase also would treat *risk* of harm the same as actual harm. *See, e.g.*, §2A2.2(b)(1) (“permanent or life-threatening bodily injury”); §2A2.2(b)(2) (use of a dangerous weapon in aggravated assault when there is actual serious bodily injury); §2A2.3 (moderate level of bodily injury); §2A2.3 (“substantial bodily injury to a minor under the age of sixteen years”).

3. Limit Cumulative Effect of SOCs

Whether the Commission adopts Option 1, Option 2, or some variant thereof, we encourage the Commission to limit the cumulative effect of multiple specific offense characteristics. As the Commission has observed, and we have discussed repeatedly, factor creep is a problem that plagues certain guidelines.³⁶ The cumulative effect of multiple SOCs results in disproportionate and unduly severe sentences. Here, we are particularly concerned

³² USSG, App. C, Amend. 590 (May 1, 2000).

³³ Statement of David Quam, General Counsel to the International Anti-Counterfeiting Coalition, Inc., before the U.S. Sentencing Comm’n, Washington, D.C., at 2 (March 23, 2000).

³⁴ Staff Report, U.S. Sentencing Comm’n, *No Electronic Theft Act* 36 (1999).

³⁵ If the Commission were to proceed with a 4-level increase, the Department or other stakeholders interested in raising penalties in the future undoubtedly will call upon it to make §2B1.1(b)(14) proportional to §2B5.3 just as happened in 2009 when the Commission decided to make §2B5.3 proportional to §2B1.1.

³⁶ U.S. Sentencing Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 137 (2004); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 8-9 (July 23, 2012).

about the cumulative effect of an increase in offense level because the offense involved a counterfeit drug and the increase for importation under §2B5.3(b)(3)(A).³⁷ Importation occurs in a majority of counterfeit drug case because the drugs are made overseas, mainly in China. So, in all likelihood, a defendant convicted of trafficking in counterfeit drugs would automatically receive multiple enhancements for essentially the same conduct. To further avoid factor creep, if the Commission adopts Option 1, the cumulative effect of the current 2-level adjustment for “conscious or reckless risk of death or serious bodily injury” or “possession of a dangerous weapon” with an adjustment for counterfeit drug offenses should be limited. An application note that the court should not apply both §2B5.3(b)(5) and (b)(6) together should suffice to prevent disproportionate increases that result from the cumulative effect of SOCs.

4. Aggravating and Mitigating Circumstances

The Commission requests comment on what aggravating and mitigating circumstances may be involved in counterfeiting drug offenses that are not already adequately addressed in the guidelines. Defenders have concerns about persons who play low level roles in counterfeit drug cases who are easily replaced and not directly responsible for selling or marketing the drugs to consumers. An example of someone in such a role would be a drop shipper who does nothing more than receive the drugs from overseas and then mail it out to another party in the United States. Such persons, like drug couriers, should typically receive a minor role adjustment. To ensure that courts consider such an adjustment, it would be helpful to add an application note to §2B5.3 stating that §3B1.2 (Mitigating Role) may be relevant in determining the seriousness of the defendant’s offense. As to those rare cases prosecuted under 18 U.S.C. § 2320(a)(4) where the offense resulted in serious bodily injury or death, the application note could reference Chapter Five, Part K (Departures), §5K2.1 (death) and §5K2.2 (physical injury).

B. Comments on Option 3

Option 3 references counterfeit drug offenses under 18 U.S.C. §2320(a)(4) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury), which has a base offense level of 25, with 2- to 4- level SOCs for bodily injury, and cross-references to murder and extortion. This option should be rejected. As discussed previously, the gravamen of trafficking in counterfeit drugs is the theft of intellectual property. Congress treated it as such by placing the new offense in the general counterfeiting statute at 18 U.S.C. § 2320. The

³⁷ Section 2B5.3(b)(3)(A) provides for a 2-level increase and minimum offense level of 12 in 3 specified circumstances – manufacture, importation, or uploading of infringing items. In FY 2011, 56.7% of §2B5.3 cases received a 2-level enhancement. USSC, *Guideline Application Frequencies for Fiscal Year 2011* (2012). Because the offense characteristics are lumped together, however, it is impossible to tell how many cases sentenced under §2B.5. 3 involved importation much less how many involved counterfeit drugs and importation.

Administration's Joint Strategic Plan on Intellectual Property Enforcement treats it the same way.³⁸ The Commission itself has historically treated trafficking in counterfeit pharmaceuticals as an offense involving the criminal infringement of trademark, using the potential dangers associated with counterfeit drugs as justification for the 2-level enhancement at §2B5.3(b)(5)(A) for "conscious risk of death or serious bodily injury."

To treat counterfeit drug offenses the same as tampering with consumer products under §2N1.1 drastically overstates the seriousness of a counterfeit drug offense. The base offense level of 25 in §2N1.1, "reflects that this offense *typically* poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause bodily injury." USSG § 2N1.1, cmt. (n. 1) (emphasis added). Counterfeit drugs do not typically pose such a risk. Nor do the perpetrators of such crimes typically intend to cause bodily injury. Indeed, of the prosecutions we examined for counterfeit drugs under §2B5.3, very few included an enhancement for conscious risk of death or serious bodily injury.³⁹ Hence, the empirical evidence regarding counterfeit drug prosecutions lends no support to this proposal. The absence of upward departures in counterfeit drug cases is also evidence that referencing 18 U.S.C. § 2320(a)(4) to §2N1.1 is unwarranted.

III. Proposed Amendments for Certain Adulterated Drugs under 21 U.S.C. § 333(b)(7)

The Commission has proposed two options to respond to section 716 of the Food and Drug Administration Safety and Innovation Act, which added a new penalty provision to 21 U.S.C. § 333(b)(7). Subsection (b)(7) applies to any person who "knowingly and intentionally adulterates a drug" such that the drug is adulterated under subsection (a)(1), (b), (c), or (d) of 21 U.S.C. § 351 and "has a reasonable probability of causing serious adverse health consequences or death to humans or animals." Option 1 would establish a new alternative base offense level of 14 in §2N2.1. Option 2 would amend Appendix A to reference offenses under 21 U.S.C. § 333(b)(7) to §2N1.1, which has a base offense level of 25.

As we noted earlier, it is difficult to project what kinds of cases will be prosecuted under the provisions of 21 U.S.C. § 333(b)(7). Problems with adulterated drugs are typically handled through the regulatory process of recalls and warning letters. Whether section 333(b)(7) becomes a new tool in FDA's arsenal that supplements the regulatory process remains to be seen. Given the relatively few prosecutions under 21 U.S.C. § 331(b), it is difficult to imagine that section 333(b)(7) will be used very often.

³⁸ See *supra* note 26.

³⁹ From FY2008 to FY2011, §2B5.3 applied in 783 cases. Only two of those cases received an enhancement for the conscious risk of death in serious bodily injury. USSG, *Guideline Application Frequencies for FY2008, FY 2009, FY 2010, FY2011*.

Defenders believe that instead of choosing between two significantly different base offense levels for these offenses, or attempting to ascertain what specific offense characteristic or cross-references might apply, the Commission should reference this statute to §2X5.1.⁴⁰ By declining to set a base offense level or specific offense characteristics for this new offense for which the Commission has no data, the prudent course would be to let the district courts determine the most analogous guideline under §2X5.1. After a sufficient number of cases have been prosecuted and sentenced, the Commission would then have more data available from which to make decisions regarding the appropriate guidelines for the offense.

If the Commission were to amend the guidelines, Defenders believe that the more prudent course of action would be to set the base offense level at 14 as in Option 1. If the cases turn out to be more serious, courts may always depart upwardly and in doing so provide feedback to the Commission for future use. We object to setting the base offense level at 25 because we believe it is likely to be too high for some, if not all, of the cases prosecuted under this new provision, and the history of the guidelines reflects that it is typically easier to raise a guideline than lower it.

⁴⁰ Congress gave no directive to the Commission regarding this offense.

Written Statement of Lisa Hay
Assistant Federal Public Defender
District of Oregon

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission
Public Hearing on Acceptance of Responsibility and *Setser*

March 13, 2013

Testimony of Lisa Hay
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My name is Lisa Hay and I am an Assistant Federal Public Defender in the District of Oregon. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding two of the Commission's proposed amendments: Acceptance of Responsibility and *Setser*.

I. Proposed Amendment: Acceptance of Responsibility

As a result of circuit conflicts regarding the proper interpretation of subsection (b) of § 3E1.1 as amended by Congress in 2003, the Commission proposes amending the commentary to § 3E1.1 and requests comment on two circuit splits.

First, the Commission seeks comment on its proposed amendment to Application Note 6, which adopts the approach of one circuit to suggest that a district court may deny the third-level reduction for acceptance of responsibility under subsection (b) when the government has determined that the defendant's timely guilty plea permitted it to avoid preparing for trial and has filed the requisite motion requesting the reduction. The Commission also requests comment on whether it should adopt a different approach.

Second, the Commission asks whether—and if so, how—it should resolve the circuit conflict regarding whether the government may refrain from making a motion for a third level reduction under § 3E1.1(b), even if the defendant has timely notified the government of an intent to plead guilty, thereby permitting the government to conserve resources by avoiding preparation for trial. 78 Fed. Reg. 4197, 4206-07 (Jan.18, 2013).

Because the vast majority of federal prosecutions end in guilty pleas, the acceptance of responsibility guideline has an effect in almost every case. In fiscal year 2011, § 3E1.1 applied in 95.1 percent of all guideline calculations, affecting 72,529 defendants. *See* U.S. Sent'g Comm'n, *Sourcebook of Federal Sentencing Statistics* tbl.19 (2011). Subsection (b) was applied in nearly 61 percent of cases, affecting 46,350 defendants. *Id.* Consistent application and interpretation of the guideline within and among circuits is critical to ensure equal treatment of defendants and to foster predictability in sentencing.

For the reasons that follow, the Federal Defenders oppose the Commission's proposed commentary and instead urge the Commission to clarify that the reduction in subsection (b) applies whenever (1) the court determines that the defendant qualifies for the two-level reduction under subsection (a); (2) the defendant's offense level before the two-level reduction is 16 or greater; and (3) the government has made a formal motion containing the statement required by the guideline. The Defenders further urge the Commission to clarify that the government is required to move for this additional one-level reduction if the defendant timely notifies authorities of his intention to plead guilty, thereby permitting the government to avoid expending resources on preparing for trial.

These clarifications are consistent with the structure and syntax of §3E1.1(b) as interpreted by every court of appeals before 2003—and which Congress left intact. By reaffirming the link between the third-level reduction and the preservation of trial resources that results from a defendant’s timely decision to plead guilty, these clarifications will appropriately check prosecutors’ use of their authority under subsection (b) to obtain waivers of constitutional and statutory rights, or to withhold the third-level reduction because the defendant exercised such rights, in a manner contrary to the guideline and the statute upon which it is based. The requested clarifications will not alter or amend the amendments made by Congress.

A. Background

At the guidelines’ inception, the Commission’s data showed that defendants who pled not guilty and were convicted at trial received sentences that averaged about 30 to 40 percent higher than defendants who pled guilty.¹ This suggested that some differential in sentences as an incentive for pleading guilty would be helpful to the government and defendants and consistent with past practice. In considering the two-level reduction for accepting responsibility, the original Commission was concerned about the fine line between providing incentives to induce defendants to plead guilty and unconstitutionally punishing those who go to trial. The Commission believed that it had resolved the problem by placing the decision in the hands of the sentencing judge, and by making clear that the reduction was not automatically precluded if the defendant went to trial and did not automatically apply if the defendant pled guilty. *See* USSG § 3E1.1 (1987); U.S. Sent’g Comm’n, Public Hearing on Plea Agreements, at 3-4 (Sept. 23, 1986) (recognizing that the sentencing judge’s discretion provided the critical element to avoid constitutional difficulties).²

The two-level adjustment originally provided under the guideline resulted in average reductions of just 25 percent, significantly less than was typical of past practice. Research conducted by the Commission showed that prosecutors were fashioning incentives for plea bargains, for example, through charge and fact bargaining, in addition to the incentives provided by the guidelines.³ At the same time, the Judicial Conference recommended that the Commission increase the amount of reduction available under the guideline. *See* Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines 1991, at 10, *reprinted in* U.S. Sent’g Comm’n, *Acceptance of Responsibility Working Group Report*, Appendix (1992). It recommended that the Commission consider “increasing the two-level adjustment for acceptance of responsibility and also give

¹ William W. Wilkins, *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 Wake Forest L. Rev. 181, 191 (1988).

² *Id.* at 190-92 & n.64.

³ Stephen J. Schulhofer & Ilene Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231 (1989); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 535, 557 (1992).

consideration to providing that greater adjustments be available for higher offense levels to encourage entries of pleas in cases where defendants who in anticipation of long periods of incarceration may without adequate incentive go to trial.” *Id.* at App’x 10-11.

In 1992, the Commission amended § 3E1.1 to allow for an additional one-level reduction if specified conditions were met. Courts were instructed under new subsection (b) to “decrease the offense level by 1 additional level” if:

- (1) the defendant qualified for the 2-level reduction under subsection (a) for “clearly demonstrating acceptance or responsibility”;
- (2) the offense level before the 2-level reduction under subsection (a) was 16 or greater; and
- (3) the “defendant has assisted authorities in the investigation or prosecution” of his offense by either (a) “timely providing complete information to the government concerning his own involvement in the offense” or (b) “timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.”

USSG § 3E1.1(b) (1992). The Commission also added background commentary stating that a defendant who has “taken one or more of the steps specified in subsection (b) . . . has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction.” *Id.*; *see* USSG § 3E1.1 backg’d cmt.

In 2003, as part of the PROTECT Act, Congress directly amended subsection (b) by striking the two-pronged third condition and replacing it with the following single-pronged condition: The government has made a motion “stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.” PROTECT Act, Pub. L. No. 108-21, § 410(g)(1) (2003). And it added a sentence to the end of Application Note 6 to state:

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.

Id. § 401(g)(2). Congress otherwise retained the structure of the guideline, which instructs courts to “decrease the offense level by 1 additional point” when all three conditions are met. And it retained the background commentary stating that a defendant “merit[s]” the additional level if he has “taken the steps specified in subsection (b).” USSG § 3E1.1 backg’d cmt. At the same time, Congress directed that the Commission may “at no time . . . alter or repeal the amendments” made by Congress to § 3E1.1. *Id.* § 401(j)(4). The Commission immediately

implemented these amendments by incorporating them in the guideline as written. USSG App. C, amend. 649 (Apr. 30, 2003).

As Defenders explained during the Commission’s regional hearings in 2009, prosecutors in some districts have successfully invoked the government motion requirement under subsection (b) to obtain concessions well beyond timely guilty pleas and to impose a cost for the exercise of constitutional rights. This application of subsection (b) strays far from the terms of the guideline and the underlying statute, upsetting the Commission’s resolution of the fine line between reward and potentially unconstitutional punishment, and creating hidden, unreviewable, and unwarranted disparity.⁴ The practice is widespread and ill-advised, and for that reason, we address it first.

B. The Commission Should Clarify That the Government May Not Refuse To Move for the Third Level of Reduction If the Defendant Timely Notifies the Government of an Intent To Plead Guilty, Thereby Allowing the Government To Avoid Preparing for Trial.

Prosecutors routinely invoke the government motion requirement under subsection (b) to induce defendants to waive constitutional or statutory rights or to impose a cost for exercise of those rights, even though courts could not have conditioned the third level on the loss of these rights under the pre-2003 guideline and to do so now is likewise contrary to the current guideline. The guideline and the statute upon which it is based contemplate that the government must file the motion when the defendant spares the government the need to prepare for trial by giving timely notice of his intention to plead guilty. The Commission should clarify that the government’s discretion under subsection (b) is not unfettered; it is limited by the specific terms of the guideline.

1. Routine misuse of the adjustment for purposes not intended by Congress or the Commission.

It is well-established that when prosecutors misuse their charging discretion or convert guideline adjustments into bargaining levers that have no relation to their intended purposes—and when judges are prevented from checking such practices—the fairness and proper functioning of plea negotiations is negatively affected.⁵ The guideline system strives for honesty

⁴ See Statement of Alan Dubois & Nicole Kaplan, Public Hr’g Before the Sent’g Comm’n, Atlanta, Ga., at 32-33 (Feb. 10, 2009); Statement of Thomas W. Hillier III & Davina Chen, Public Hr’g Before the Sent’g Commission, Stanford, Calif., at 18 (May 27, 2009); Statement of Julia O’Connell, Public Hr’g Before the Sent’g Comm’n, Austin, Tex. at 16-17 (Nov. 19, 2009).

⁵ See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471, 1476 (1993) (describing how, with plea bargaining unconstrained by judicial control in the mandatory guidelines era, prosecutors exercised a monopoly to control sentences, while using structural incentives to exploit their power, act in bad faith, or bargain in a discriminatory fashion); Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 Am. Crim. L. Rev. 137 (1995) (describing how, during the mandatory guidelines era, the traditional adversarial system declined and was replaced by an “administrative” system dominated by the bureaucratic interests of the Department of Justice); Margareth Etienne, *The Declining Utility of the Right*

and transparency in sentencing, but this goal is thwarted when pleas reflect hidden negotiations or agendas that determine the guideline range.⁶ When incentives intended for a limited purpose are converted by some prosecutors in some districts to other uses, unfairness and disparity in sentencing results.

The one-level adjustment under subsection (b) was intended by Congress and the Commission as an incentive to encourage defendants to give timely notice of their intention to plead guilty, in order to spare the government the cost of needlessly preparing for a trial that will not occur. Because the government is in the best position to know if in fact trial preparation was averted by the defendant's timely notice, Congress wrote a guideline delegating to the government the authority and responsibility to file a motion requesting the one-level adjustment. Prosecutors in some districts, however, misuse their responsibility under subsection (b), wielding it as an offensive tool to impose a cost on defendants for the filing of pretrial motions, sentencing challenges, appeals, or any other legal challenge that might require time or effort. Defendants who proceed with legal challenges despite contrary direction from a prosecutor will be denied the one-level reduction for acceptance of responsibility, if the case reaches sentencing. For example, based on a survey of Federal Public and Community Defenders, prosecutors have invoked their authority under subsection (b) to induce concessions by threatening to withhold, and to unfairly withhold, the third-level reduction for defendants who engage or would otherwise engage in a broad array of constitutionally or statutorily protected conduct:

to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines, 92 Cal. L. Rev. 425, 429-30, 455-56, 468-70 (2004) (documenting negative effects of mandatory guidelines and mandatory minimums—with their structural transfer of control to prosecutors and chilling effect on defense advocacy—on the adversarial system); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 99-100 (2003) (“[T]ogether the Sentencing Guidelines and plea bargaining provide a dangerous mix that the judiciary has little power to check. . . . When plea bargaining takes place in the shadow of this regime, fewer defendants will take the risk of a trial. Instead, they will accept just about whatever bargain they can get from the prosecutor, as long as the ultimate deal leaves them better off than they would be going to trial.”); *see also* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1425 (2008) (in the mandatory guidelines era, prosecutors were provided with “indecent power relative to both defendants and judges, in large part because of prosecutors’ ability to threaten full application of the severe Sentencing Guidelines”); Erik Luna, *The Curious Case of Corporate Criminality*, 46 Am. Crim. L. Rev. 1507, 1513 (2009) (“Today, it is scarcely debatable that prosecutors exercise vast and largely unchecked discretion at each stage of the criminal process. Likewise, most agree that this discretion is subject to outrageous abuses, due to the belligerent nature of American adversarialism, the politicization of the criminal justice system, and the self-interests of prosecutors, whose success and career prospects are often measured by the quantity and notoriety of their convictions.”); Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 Ohio St. L. J. Crim. L. 369, 373-90 (2009).

⁶ *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n.25 (2005) (documenting that the Department of Justice seeks harsher penalties to enhance their bargaining power and “make prosecutors’ jobs easier,” not because it believes the harsher penalty is appropriate for the crime).

- Refusing to agree to a broad waiver of the right to appeal
- Refusing to sign a plea agreement stipulating how the guidelines will apply
- Refusing to waive the right to collaterally attack conviction
- Refusing to agree to the truth of a stipulation that must be entered at or near the time of arraignment
- Filing or litigating a motion to suppress evidence
- Filing a motion challenging the voluntariness of a confession
- Litigating a discovery issue, resulting in the government having to redact documents
- Entering a conditional guilty plea in order to appeal a denial of a motion to suppress
- Objecting to a sentencing enhancement
- Requiring the government to prepare for a hearing to resolve contested sentencing issues
- Refusing to waive the right to present evidence at sentencing
- Refusing to waive a challenge to a guideline computation
- Failure to agree to victim restitution in a child pornography case
- Violating state probation by picking up a new misdemeanor charge while on pretrial release
- Not pleading guilty until after indictment, thereby requiring the government to go to the grand jury with a single witness
- Requesting laboratory testing of alleged controlled substances
- Requiring the government to reweigh drug evidence at an independent laboratory

The government’s practice has had a pervasive and chilling effect on pretrial motion practice and appeals. When a tax is imposed on motions to suppress, motions to compel discovery, or motions for a hearing on the voluntariness of a confession, constitutional violations remain hidden from judicial scrutiny. When appeals are too costly for a defendant, reasoned development of the law cannot take place—leaving legal errors uncorrected and legal questions unresolved.

Of course, not all prosecutors believe that their authority under subsection (b) can or should be exercised in this manner. Instead, government practice varies across and within districts, and even among similar cases in the same districts. This lack of a consistent interpretation and application of the guideline creates hidden and unwarranted disparities. For example, in the District of Arizona, the government has announced as a general policy that it will not move for the third-level reduction unless the defendant waives appellate rights. In the Eastern District of Oklahoma, the policy of the U.S. Attorney’s office is to refuse to file a motion for the third level if the defendant files any pretrial motion requiring a hearing. In the District of Utah, it is “a matter of policy for [the U.S. Attorney’s] office not to move for § 3E1.1(b) departures if a defendant’s guilty plea requires further expenditure of government resources” of any kind, “such as reweighing” drugs. *See United States v. Blanco*, 466 F.3d 916, 918 (10th Cir. 2006) (internal quotation marks omitted). In other districts, prosecutors do not threaten to withhold the motion for the third-level reduction if the defendant litigates a suppression motion, refuses to waive appellate rights, or challenges evidence, and the motion is routinely made and granted despite significant pre-plea litigation. In some districts, such as the Middle District of Tennessee, where prevailing law permits a prosecutor to refuse to file the motion when the

defendant litigates a suppression issue, prosecutors generally do not exercise or threaten to exercise that power, though a few do on rare occasions. In one case in that district in which the prosecutor actually withheld the motion because the defendant litigated a clearly nonfrivolous suppression issue, the district court did not award the third level, noted the unfairness of the government's approach, and varied downward to a sentence of probation by relying on 18 U.S.C. § 3553(a).

In short, the government's use of its authority under subsection (b) is not governed by a uniform and predictable policy tied to the specific interest recognized by the guideline, but by hidden and disparate forces tied to district culture and the bargaining decisions of individual prosecutors. While some district courts may exercise their discretion to remedy what they see as disparate treatment by granting a variance under § 3553(a), many do not, leading to further disparity.

2. *The law before the 2003 amendment*

Before Congress amended § 3E1.1(b) in 2003, every court of appeals read the operative clause of § 3E1.1 ("decrease the offense level by 1 additional level") as mandatory once the court determined that the conditions were met. Thus, once the court found that the defendant had timely notified the authorities of his intention to plead guilty, it had no discretion to deny the additional point. In the leading case, the Fifth Circuit carefully parsed § 3E1.1 and its background commentary and determined that its final clause is written in the "imperative," allowing the district court no discretion to deny the third point if the conditions were met. *See United States v. Tello*, 9 F.3d 1119, 1128 (5th Cir. 1993) ("The final clause of [§ 3E1.1(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.") (emphasis in original); *id.* at 1126 (the background commentary likewise informs the court that "a defendant who has satisfied all three elements of subsection (b)'s tripartite test is entitled to—and shall be afforded—an additional 1-level reduction").

All other courts of appeals to consider the question reached the same conclusion. *See, e.g., United States v. Talladino*, 38 F.3d 1255, 1264 (1st Cir. 1994) ("Nothing in the language of [] § 3E1.1 makes any reference, veiled or otherwise, to judicial power to withhold the one-level reduction 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."); *United States v. Townsend*, 73 F.3d 747, 755 (7th Cir. 1996) ("The guideline directs rather than allows the sentencing court to reduce the defendant's offense level if the qualifying conditions are met. . . . The language of § 3E1.1 is mandatory, not permissive."); *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. 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. Savin*, 349 F.3d 27, 38 (2d Cir. 2003) ("The logical structure of the Guideline ('if A, then B') clearly commands that a definite result . . . must follow the occurrence of a stated conditional event."); *United States v. Price*, 409 F.3d 436, 443-44 (D.C. Cir. 2005) (once the stated conditions were met, the

plain language of § 3E1.1 provided that the defendant was “entitled” to the third level of reduction); *United States v. Marquez*, 337 F.3d 1203, 1212-13 (10th Cir. 2003) (where defendant timely notified the government of his intention to plead guilty, defendant was “entitled” to the third level of reduction); *United States v. Johnson*, 581 F.3d 994, 1011 (9th Cir. 2009) (Smith, J. concurring) (recognizing that under the pre-2003 guideline, once a defendant’s plea satisfied the “pertinent plain terms” of subsection (b), “this determination would have ended our inquiry, and [the defendant] would have been entitled to the downward adjustment”).

The operative inquiry was whether the defendant’s notice of his intent to plead guilty permitted the government to avoid preparing for trial and the court to schedule its calendar efficiently. USSG § 3E1.1 cmt. (n.6) (2002). Thus, for example, courts of appeals held that it was error for a district court to deny the reduction where the defendant timely pled guilty but the defendant litigated a motion to suppress. *See, e.g., United States v. Price*, 409 F.3d 436, 443-44 (D.C. Cir. 2005) (“While the Government did have to prepare for a suppression hearing, the Government does not dispute that it never had to prepare for trial.”); *United States v. Marquez*, 337 F.3d 1203, 1212 (10th Cir. 2003) (“[P]reparation for a motion to suppress is not the same as preparation for a trial. Even where, as here, there is substantial overlap between the issues that will be raised at the suppression hearing and those that will be raised at trial, preparation for a motion to suppress would not require the preparation of voir dire questions, opening statements, closing arguments, and proposed jury instructions, to name just a few examples.”); *United States v. Vance*, 62 F.3d 1152, 1157 (1995) (holding that a defendant’s motion to suppress evidence is not a valid reason for refusing to grant the third level). In *United States v. Marroquin*, 136 F.3d 220 (1st Cir. 1998), the First Circuit held that a defendant who filed eight “appropriate” pre-trial motions, including a motion to suppress and a motion to sever, which required the government to inspect evidence and do research, was entitled to the third level of reduction. *Id.* at 225 (no evidence government was required to prepare for trial).

These courts recognized that defendants may not be punished for acting to protect their constitutional rights. *See United States v. Kimple*, 27 F.3d 1409 (9th Cir. 1994) (if the guilty plea is otherwise timely, a district court may not deny the one-level adjustment under § 3E1.1(b) solely because the defendant has acted to protect his constitutional rights through the filing of pretrial motions); *id.* at 1413 (“The denial of a reduction under subsection (b)(2) is impermissible if it penalizes a defendant who has exercised his constitutional rights.”). As the First Circuit put it, “the Guidelines do not force a defendant to forgo the filing of routine pre-trial motions as the price of receiving a one-step decrease [under § 3E1.1(b)(2)].” *Marroquin*, 136 F.3d at 225; *see also Marquez*, 337 F.3d 1203, 1211 (10th Cir. 2003) (observing that “[a] defendant, of course, is entitled to bring a motion to suppress to protect his or her constitutional rights” and agreeing that the guidelines do not force the defendant to forgo filing routine pre-trial motions in order to receive the third level of reduction).

Courts also held that it was error to deny the third level of reduction for other reasons not related to timeliness or the exercise of a constitutional right, such as when the defendant timely pled guilty but “falsely denied relevant conduct,” *Townsend*, 73 F.3d at 750, 755; or obstructed justice in a manner that did not affect the timeliness determination, *e.g., Tello*, 9 F.3d at 1128; *Talladino*, 38 F.3d at 1266; or allegedly escaped, not affecting any determination of timeliness, *United States v. McPhee*, 108 F.3d 287, 289-90 (11th Cir. 1997). And a district court had no

discretion to deny the third level where the defendant timely pled guilty but contested matters solely related to sentencing. *United States v. Cunningham*, 201 F.3d 20, 24 (1st Cir. 2000).

3. *The 2003 amendment*

When Congress amended the guideline in 2003, it changed only two relevant aspects of the existing guideline. First, it transferred the responsibility from the court to the government to determine whether the defendant met the condition for the third level. Second, it made a minor alteration in the condition itself with the underlined words: “the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.” Congress also added commentary stating that the government is to “determine whether the defendant has assisted authorities in a manner *that avoids preparing for trial.*” USSG § 3E1.1 cmt. (n.6) (emphasis added). It left intact the background commentary stating that a defendant who has “taken the steps specified in subsection (b) . . . has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately *meriting* an additional reduction.” USSG § 3E1.1 backg’d cmt. (emphasis added).

4. *The current circuit split*

The circuits have now split regarding the scope of the government’s power to refuse to file a motion under subsection (b). Consistent with the established interpretation of the structure and syntax of the guideline before the 2003 amendment, the Second and Fourth Circuits have held that the government abuses its power if it withholds the motion after a defendant has “timely” notified authorities of his intention to plead guilty, and *by that means*, permitted the government to avoid preparing for trial and the government and the court to efficiently allocate their resources.

In *United States v. Lee*, 653 F.3d 170 (2d Cir. 2011), the Second Circuit held that “the government abuses its authority by refusing to move for a third point reduction under § 3E1.1(b) on the grounds that the defendant has invoked his right to a *Fatico* hearing” to resolve contested sentencing issues. *Id.* at 174-75. The Court determined that “the plain language of § 3E1.1(b) refers only to the prosecution resources saved when the defendant’s timely guilty plea ‘permit[s] the government to avoid preparing *for trial.*’” *Id.* at 174 (emphasis added).

In *United States v. Divens*, 650 F.3d 343 (4th Cir. 2011), the Fourth Circuit held that the government may refuse to move for the additional reduction “only on the basis of an interest recognized by the guideline itself,” which is whether the defendant has saved resources by relieving the government of preparing for trial. *Id.* at 346-47. As a result, the government abused its power when it did not contend that the defendant failed to timely plead guilty, but withheld the motion because the defendant refused to sign a plea agreement waiving his right to appeal. The court remanded the case for further proceedings, directing that “[i]f the Government cannot provide a valid reason for refusing to move for an additional one-level reduction under U.S.S.G. § 3E1.1(b) and continues to refuse to move for such a reduction, the district court should order the Government to file the motion.” *Id.* at 350.

These courts hold that the power conferred on the government under subsection (b) continues to turn on the defendant's assistance to the government (and the court) in the form of a timely guilty plea and resources thereby saved, as plainly stated in the guideline, and does not include the power to "withhold a motion for a one-level reduction because the defendant has declined to do some other task to assist the Government." *Divens*, 650 F.3d at 348; *Lee*, 653 F.3d at 175 (quoting *Divens*). As the Second Circuit put it, for the government to withhold the motion because the defendant forced the government to prepare for a hearing on contested sentencing issues is "unlawful and grounds for reproach because it ignores the language of the guideline, its purpose, and the intent of Congress." *Lee*, 653 F.3d at 174 (internal quotation marks omitted).

In contrast, several other circuits have held that, just as with motions for substantial assistance under USSG § 5K1.1, the government enjoys nearly unfettered discretion and may refuse to file a motion under § 3E1.1(b) so long as its decision is rationally related to "any legitimate governmental interest" and is not animated by an unconstitutional motive. *See, e.g., United States v. Collins*, 683 F.3d 697, 704-08 (6th Cir. 2012); *United States v. Deberry*, 576 F.3d 708 (7th Cir. 2009); *United States v. Johnson*, 581 F.3d 994, 1001 (9th Cir. 2009); *United States v. Beatty*, 538 F.3d 8, 14 (1st Cir. 2008); *United States v. Newson*, 515 F.3d 374 (5th Cir. 2008); *United States v. Blanco*, 466 F.3d 916, 918-19 (10th Cir. 2006). In *Blanco*, for example, the Tenth Circuit upheld the government's refusal to move for the third level because it accommodated the defendant's request that drug evidence, including crack, be reweighed at an independent laboratory, in a case in which drug quantity could trigger a five-year mandatory minimum. 466 F.3d at 918-19. In *Newson*, 515 F.3d at 377, the Fifth Circuit upheld the government's refusal to move for the third level "solely because [the defendant] would not accept the appellate waiver provision in its proposed plea agreement." In *Johnson*, the Ninth Circuit held that, although the defendant had otherwise timely entered a conditional guilty plea, the government's allocation of resources for purposes of defending an appeal of a denial of a motion to suppress "is a rational basis for declining to move for the third reduction point." 581 F.3d at 1002.

In addition to relying on caselaw interpreting the government's power under § 5K1.1, these courts reason that Congress's 2003 amendment "materially altered § 3E1.1(b)" because it "expressly inserted consideration of the government's resources into the calculus" by adding that a defendant's timely guilty plea "thereby permit[s] *the government* . . . to allocate [its] resources efficiently." *Johnson*, 581 F.3d at 1005-06 (emphasis in original); *see also Collins*, 683 F.3d at 706. They reason that "if the government were *required* to move for the third-level reduction when the defendant enters a timely plea, thereby saving the government the expense of trial preparation, the amended language requiring that the government file a motion would be a nullity." *Beatty*, 538 F.3d at 15; *see also Johnson*, 581 F.3d at 1006 n.9; *Collins*, 683 F.3d at 706.

5. *What the Commission should do*

The Defenders urge the Commission to adopt the approach of the Second and Fourth Circuits by clarifying that the government may not refuse to move for the third level under subsection (b) when a defendant's timely notice of his intention to plead guilty permitted the government to avoid expending resources to prepare for trial. As the Fourth Circuit noted, a

statutory grant of discretion is “not a roving license to ignore the statutory text” but is instead a “direction to exercise discretion within defined statutory limits.” *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007), *quoted in Divens*, 650 F.3d at 347. Congress is presumed to legislate in light of prevailing law, *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979), and so is presumed to have known that, when it left unchanged the structure, syntax, and use of the imperative in subsection (b), it thereby incorporated the courts of appeals’ limiting interpretation of the discretion granted by subsection (b), which did not permit a district court to deny the motion once it determined that the defendant had timely given notice of his intention to plead guilty, thus permitting the government to avoid preparing for trial and the court to allocate its resources efficiently. Thus, while Congress clearly transferred to the government the authority to decide *whether* the defendant has met the requirements under subsection (b), it transferred the authority as already interpreted by the courts of appeal, which required that it be exercised by reference to the specific terms and purpose of the guideline.

The fact that Congress added the consideration that the defendant’s timely guilty plea has “thereby” permitted the government, in addition to the court, to allocate resources efficiently does not alter the analysis. As the Fourth Circuit recognized, “the syntax of the guideline dictates that the furtherance of the[] interests [of resource allocation and trial avoidance] must . . . derive from the same single source: the defendant’s timely noti[fication of] authorities of his intention to enter a plea of guilty.” *Divens*, 650 F.3d at 348 (alteration in the original). It is “by *that means*”—*i.e.*, the means of timely pleading guilty—that the defendant has assisted the government in avoiding preparing for trial and in allocating its resources efficiently. *Id.* (emphasis in original). A defendant who requires the government to prepare for a suppression hearing, prepare for a hearing on contested sentencing issues, or defend a conviction or sentence on appeal, has not required it to expend resources *preparing for trial*. See *Johnson*, 581 F.3d at 1011 (“[T]he only ‘resources’ that may be considered in gauging the defendant’s satisfaction of the guideline are those resources devoted to trial preparation.”) (Smith, J., concurring).

Moreover, circuit courts have erred in relying on an analogy to government discretion under § 5K1.1 as they interpreted the scope of § 3E1.1, because the terms and structure of § 3E1.1 and § 5K1.1 are materially distinguishable. Section 3E1.1 is a *guideline* that, by its terms and historical interpretation, mandates the third-level adjustment to the guideline calculation when the defendant has taken the requisite steps and the government has filed the requisite motion. Section 5K1.1 is a *policy statement* that gives the government wide discretion to decide whether to file a motion for a *departure* for substantial assistance, which the sentencing judge “may” grant. In commentary, the Commission states that a defendant’s substantial assistance under § 5K1.1 “may justify” a sentence below the mandatory minimum; and in background commentary, the Commission states that “[l]atitude” is afforded to the sentencing judge. USSG § 5K1.1 cmt. (n.1) & backg’d cmt.

Rather than amend the commentary to § 3E1.1 to conform with the government’s discretion under § 5K1.1 to decide whether to move for a departure for substantial assistance, Congress left unchanged the background commentary to § 3E1.1—which has no analogue under § 5K1.1—which states that a defendant who has taken the steps specified in subsection (b) “merit[s]” the reduction. At the same time, Congress inserted language in Application Note 6 making clear that the government’s discretion is limited to determining “whether the defendant

has assisted authorities in a manner that avoids preparing for trial.” *See Divens*, 650 F.3d at 346, 347. Under the guideline and its commentary as rendered by Congress, a defendant who has timely notified authorities of his intention to plead guilty and thereby relieved the government of expending resources in preparing for trial, has taken the only step specified in the guideline that is within his power to take, and thus “merit[s]” a reduction.

This reading does not render the motion requirement a “nullity.” *Cf. Beatty*, 538 F.3d at 15. The government retains the discretion to determine *whether* the defendant’s guilty plea permitted it to avoid trial preparation and its attendant expenditure of resources. As before the 2003 amendment, the question of timeliness is a factual determination to be made on a case-by-case basis, *see, e.g., United States v. McConaghy*, 23 F.3d 351, 353 (11th Cir. 1994); USSG § 3E1.1(b) cmt. (n.6), and the government may well determine, as courts were previously empowered to do, that because it expended resources *preparing for trial*, it will not move for the third level.

Notably, the government itself has recognized that a defendant who challenges a legal issue but otherwise pleads guilty “before the commencement of trial”—including one who enters a conditional guilty plea in order to appeal the denial of a motion to suppress or other purely “legal” issue—may properly be viewed as having accepted responsibility. Statement of Paul L. Malony, Dep. Ass’t Attorney Gen., Crim. Div., U.S. Dep’t of Justice, Before the Sent’g Comm’n (Mar. 15, 1990) (addressing § 3E1.1). Indeed, it took the position that the conditional plea is the *proper vehicle* for accepting responsibility while preserving the right to challenge constitutional issues and avoiding trial. *Id.* (“[S]uch a defendant could have availed himself of the conditional plea and thereby have manifested an acceptance of responsibility for the acts charged, subject to the resolution of the legal issue.”). *Id.* It recommended that the guideline “require the defendant to enter a plea or conditional plea . . . prior to the commencement of trial to be eligible for the guideline reduction based on acceptance of responsibility.” *Id.*⁷ While the government took this position in 1990 and in the context of asking the Commission to limit the application of the two-level adjustment only to those who evidence an intent to plead guilty before trial begins, it clearly recognized that the question whether a defendant has timely pled guilty is not measured by the fact that a defendant has litigated or plans to litigate a legal or factual issue before trial, at sentencing, or on appeal, or has entered a conditional guilty plea, but by whether the government has avoided trial. The later amendments by the Commission and Congress are entirely consistent with the government’s previous position, while the current practice of some U.S. Attorney’s Offices and some prosecutors is starkly inconsistent with it.

Finally, to require the government to adhere to the terms of the guideline will ensure that the incentive intended by Congress will work in a predictable and effective manner. Congress gave the government the power to “determine whether the defendant has assisted authorities in a manner that avoids preparing for trial” in order to ensure that the reduction was used as an

⁷ Again in 1992, when the government opposed amending the guidelines to explicitly provide the two-level reduction for a defendant who goes to trial only to preserve a legal or other issue not related to factual guilt, the government took the position that the proper avenue for a reduction for acceptance of responsibility is a conditional guilty plea. *See* Letter from Paul L. Maloney, Senior Counsel for Policy, U.S. Dep’t of Justice, to Hon. William W. Wilkins, Jr., at 20 (Mar. 16, 1990) (“Such defendant should enter or at least seek to enter conditional plea . . .”).

incentive for early pleas and not for unrelated reasons. By providing that the third level “may only be granted upon a formal motion by the government,” Congress meant only to ensure that the reduction would be granted if, and only if, doing so would achieve its intended purpose. Given the prevailing law at the time, Congress could not have meant to give the government *carte blanche* to refuse to move for the reduction even when the defendant timely pled guilty and saved it from expending resources preparing for trial.

To bring consistency and clarity back to the circuits’ interpretations of this subsection, and consistent with the language and purpose of subsection (b), the Commission should clarify that if the defendant qualifies for a reduction under subsection (a) and has an offense level of 16 or greater before that reduction, and if the defendant timely notifies the government of an intent to plead guilty and thereby saves the government from expending resources on trial preparation, the government must file a motion for the third-level reduction under subsection (b). In the alternative, the Commission should invite district courts to depart downward by one level if the government has declined to move for the additional level but there is no evidence that the government was required to expend resources preparing for trial.

C. The Commission Should Clarify That, For Purposes of Correctly Calculating the Guideline Range, the Court Must Apply the Third Level of Reduction When the Defendant Qualifies for the Two-Level Reduction and the Government Has Filed the Requisite Motion with the Requisite Statement.

1. The law before the 2003 amendment

As set forth above, before Congress amended § 3E1.1(b) in 2003, every court of appeals read the operative clause of § 3E1.1 (“decrease the offense level by 1 additional level”) as mandatory once the court determined that the conditions were met. In the leading case, *United States v. Tello*, 9 F.3d 1119 (5th Cir. 1993), the Fifth Circuit carefully examined the structure and syntax of the guideline and found that the final clause is in the “imperative” and “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.” *Id.* at 1128 (emphasis in the original); *id.* at 1126 (“[A] defendant who has satisfied all three elements of subsection (b)’s tripartite test is entitled to—and shall be afforded—an additional 1-level reduction”). All other courts of appeal followed suit.

2. The current circuit conflict

In 2010, the Fifth Circuit considered a case in which the defendant originally proceeded to trial and was found guilty by the jury, but the judgment of conviction was overturned because the jury selection was tainted by race-based preemptory challenges, in violation of the Due Process Clause of the Fifth Amendment. *United States v. Williamson*, 533 F.3d 269, 277 (5th Cir. 2008). On remand, the government charged the defendant with a lesser offense, and the defendant pled guilty pursuant to a written plea agreement. *United States v. Williamson*, 598 F.3d 227, 228 (5th Cir. 2010). The government moved for the third level of reduction, based on its determination that the defendant had permitted it to avoid preparing for retrial and thereby save resources. *Id.* The district court refused to apply the third level of reduction because the

case initially went to trial and “it would not have taken many resources to prepare for a retrial.” *Id.* at 230.

The Fifth Circuit affirmed, holding that, under subsection (b) as amended by Congress, the district court has the discretionary power to deny the third level of reduction even when all three conditions set forth in the guideline are met. *Id.* at 229-30. The Fifth Circuit did not rely on the language of the guideline itself, which it curiously described as an “isolated passage” and “not a model of clarity.” Nor did the Fifth Circuit acknowledge or address its own earlier analysis of the imperative structure of the guideline in *Tello*. Instead, it relied primarily on the fact that there is “no additional language [in the guideline] precluding a role for the court” in making the determination of timeliness. *Id.* at 229. It further relied on the language Congress added to Application Note 6, which states that the third level of reduction “*may* only be granted upon formal motion of the government” (emphasis added), describing it as “permissive” and indicative of the court’s retained discretion to withhold the reduction. *Id.* And it relied on the absence of any language limiting the reach of Application Note 5, which refers to the deference to be accorded to the court’s determination whether the defendant has accepted responsibility, which the court admitted might arguably be “more applicable to” subsection (a). *Id.*

In 2012, the Seventh Circuit considered the same question and came to the opposite conclusion. It held that once the sentencing court has determined that the first two conditions are met and the government has made the required motion, the additional level of reduction is not discretionary with the court, but must be awarded as part of the correct calculation of the applicable guideline range. *United States v. Mount*, 675 F.3d 1052 (7th Cir. 2012). It relied on the fact that Congress’s 2003 amendment “left intact” the “command to ‘decrease the offense level by 1 additional level’ if all the subsection (b) conditions were met.” *Id.* at 1056-57. It noted that Congress itself chose to reaffirm this operative command, and that its interpretation was consistent with the universal interpretation of § 3E1.1(b) before the 2003 amendment, including the Fifth Circuit’s, and consistent with the universal interpretation of the analogous obstruction of justice enhancement at § 3C1.1, “which tells sentencing courts to ‘increase the offense level by 2 levels’ if the criteria for finding obstruction of justice are met.” *Id.* at 1057. It found that Application Notes 5 and 6 were “inconclusive at best,” and thus not controlling. *Id.* The Seventh Circuit emphasized that the district court’s lack of discretion under subsection (b) is strictly a matter of correctly calculating the guideline range, and that the sentencing court otherwise has discretion under § 3553(a) to “take proper account of the sentencing considerations outlined in § 3553(a)” and to “choose a proper sentence.” *Id.* at 1055, 1058, 1059.

3. *What the Commission should do*

The Commission proposes to adopt the Fifth Circuit’s approach by adding a sentence to the end of Application Note 6 to suggest that the district court may deny the government’s motion and refuse to award the third level of reduction if the court determines that the condition set forth in subsection (b)—which the government has determined were met—were not met. Under the proposed amendment, the court “may grant” the government’s motion if the court “determines that the defendant . . . timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.” 78 Fed. Reg. 4197, 4207 (Jan.

18, 2013). The Commission also requests comment on whether it should resolve this conflict in a different manner. We think it should, and that it should adopt the Seventh Circuit’s approach.

The proposed amendment to Application Note 6 (and the Fifth Circuit’s approach) is inconsistent with the plain language of the guideline itself. As before the 2003 amendment, and now as written by Congress, subsection (b) unambiguously instructs the sentencing court to “decrease the offense level by 1 additional point” when the court determines that the defendant qualifies under subsection (a), the offense level is 16 or greater, and the government makes the motion under subsection (b). Congress has directed that the third condition is met once the government “state[s]” by formal motion “that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.” By its terms, subsection (b) leaves no room for the court to refuse to award the third level of reduction when the first two conditions are met and the government has made the requisite motion “stating” the requisite conditions.

Congress is presumed to legislate in light of prevailing law, *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979), so it is presumed to have been aware of prevailing law regarding the non-discretionary nature of the final clause—“decrease the offense level by 1 additional level”—once the conditions are met. As the Seventh Circuit recognized, *see Mount*, 675 F.3d at 1056-57, Congress did not amend the final clause, but affirmatively retained it, and thus incorporated the prevailing law regarding its non-discretionary nature for purposes of calculating the guideline range. And although the Seventh Circuit suggested that it “would defer to the application notes to the guideline if they shed some light on this,” *Mount*, 675 F.3d at 1057, guideline commentary is authoritative only if it is not “inconsistent with, or a plainly erroneous reading of” the guideline and does not violate a statute. *See Stinson v. United States*, 508 U.S. 36, 38, 45, 47 (1993) (commentary that is inconsistent with a guideline or statute is invalid). Because the Commission’s proposed commentary is inconsistent with the guideline as written by Congress, it would not control the application of § 3E1.1(b) and thus would not efficiently resolve the circuit conflict.

The Commission provides no reason for adopting the Fifth Circuit’s approach, which ignores the text of the guideline, its history, and the Fifth Circuit’s own previous analysis of the identical guideline structure. *See Mount*, 675 F.3d at 1058 (noting that the Fifth Circuit’s analysis is “in considerable tension with other cases from that circuit”). In addition, encouraging judges to deny the third level when the government has made the motion would undermine Congress’s intent for the incentive to work in a predictable and effective manner. If defendants come to doubt that their timely plea of guilty will result in an additional one-level reduction, the anticipated reward of a timely plea may be outweighed for some defendants by the hoped-for benefits of delay.

If the Commission believes as a matter of policy, as it did at the guidelines’ inception, that judges should be the final arbiter of whether the defendant has met the criteria for timeliness under subsection (b), and if the Commission would prefer this power be exercised within the framework of the guidelines, it should ask Congress to remove the government motion

requirement. Meanwhile, the Commission should reject the Fifth Circuit’s approach and adopt the Seventh Circuit’s approach by clarifying that Application Note 5 applies only to the court’s determination whether to grant the two levels under subsection (a), and amending Application Note 6 to clarify that the third level of reduction applies when all three conditions are met.

D. Recommendations

For the reasons stated above, we urge the Commission to amend the commentary to add the following clarifying language (suggested changes in *italics*):

Application Note 6

* * *

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. *See* section 401(g)(2)(B) of Pub. L. 108-21. *If the defendant timely notifies authorities of his intention to plead guilty and thereby permits the government to avoid preparing for trial, the government shall make such formal motion. Upon the government’s motion stating that the defendant qualifies for the additional level as required by subsection (b), and if the court has determined that the defendant qualifies for the two-level decrease under subsection (a) and that the defendant’s offense level before the two-level reduction is 16 or greater, the court shall decrease the offense level by one additional level.*

II. Proposed Amendment: *Setser*

The Commission proposes amending the language of USSG §5G1.3 to recommend that federal district court judges treat anticipated terms of imprisonment as they do undischarged terms of imprisonment. Thus, the proposed amendment recommends that a district court order the instant sentence to run concurrently with an anticipated term of imprisonment where the conduct underlying the anticipated sentence is relevant conduct to the instant offense and resulted in an increase in the Chapter Two or Three offense level. When the conduct underlying an anticipated sentence is not relevant conduct that increased the offense level, the proposed amendment recommends that the district court order the instant sentence to run concurrently, partially concurrently, or consecutively to the anticipated term of imprisonment.

This proposed amendment states that it responds to the Supreme Court’s decision in *Setser v. United States*, 132 S. Ct. 1463 (2012). In *Setser*, the Court held that the decision whether a federal sentence is to be served consecutively to or concurrently with a state sentence that has not yet been imposed is a judicial function at sentencing, and not a decision for the Bureau of Prisons (“BOP”). *Setser*, 132 S. Ct. at 1471 n.5 (“[W]e are simply left with the question whether judges or the Bureau of Prisons is responsible for [yet-to-be-imposed sentences]. For the reasons we have given, we think it is judges.”). Thus, at sentencing, federal district courts have the authority to order that the instant federal sentence be served consecutively

to, or concurrently with, a state sentence that has not yet been imposed. *Id.* at 1468, 1470, 1473. Importantly, simply because a federal district court has the authority to so order, does not mean that it must, or that it should. Instead, “a district court should exercise the power to impose anticipatory consecutive (or concurrent) sentences intelligently. In some situations, a district court may have inadequate information, and may forbear, but in other situations, that will not be the case.” *Id.* at 1472 n.6.

The Court’s holding turned on its interpretation of two statutes, 18 U.S.C §§ 3584 and 3621(b). Section 5G1.3 of the sentencing guidelines was not at issue in the case. Thus, there is no need for the Commission to amend the guideline to respond to *Setser*. Federal courts have signaled no desire or need for any guidance from the guidelines on anticipated, but yet-to-be-imposed state sentences. The proposed amendment ignores critical aspects of *Setser*, and reaches far beyond its holding. In so doing, the proposed amendment will only complicate an already confusing area of sentencing,⁸ and inject, rather than relieve, unwarranted disparity.⁹ For these reasons, and others discussed below, the Defenders oppose the proposed amendment.

A. The Proposed Amendment Injects Unnecessary Complexity and May Result In Unwarranted Disparity Because it Fails to Acknowledge a Critical Component of *Setser*.

The proposed amendment requires a district court in every case where there is an anticipated term of imprisonment to determine whether the sentence for the instant offense will run concurrently with or consecutively to that anticipated sentence. In so doing, the proposed amendment fails to incorporate forbearance, even though this is a critical component of the decision in *Setser*.¹⁰ As a result, the proposed amendment adds unnecessary complexity to the guidelines, and may increase unwarranted disparity between sentences.

In *Setser*, the Court specifically advised that “a district court should exercise the power to impose anticipatory consecutive (or concurrent) sentences intelligently. In some situations, a

⁸ In a memorandum detailing how the BOP computes federal sentences when a defendant is under the primary custodial jurisdiction of state authorities, Regional Counsel for the BOP described this as “probably the single most confusing and least understood sentencing issue in the Federal system.” Henry J. Sadowski, *Interaction of Federal and State Sentences When the Federal Defendant is Under State Primary Jurisdiction*, at 1 (July 7, 2011), <http://www.bop.gov/news/ifss.pdf>.

⁹ Unwarranted disparity occurs both when there is “different treatment of individual offenders who are similar in relevant ways,” and “similar treatment of individual offenders who differ in characteristics that are relevant to the purposes of sentencing.” USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113 (2004) (emphases omitted).

¹⁰ Both the majority and the dissent in *Setser* endorse forbearance. The dissent would have it be the only option because it does not read the statute to authorize anything else. *Setser*, 132 S. Ct. at 1474 (Breyer, J., dissenting). The dissent’s interpretation of the statute is based in part on the practical reality that federal district courts typically lack sufficient information about anticipated state court sentences, and that premature rulings risk mistakes that could lead to sentencing disparity. *Id.* at 1476-77 (Breyer, J. dissenting).

district court may have inadequate information and may forbear.” *Setser*, 132 S. Ct. at 1472 n.6. Although “nothing in the Sentencing Reform Act, or in any other provision of law... foreclose[s]” a district court from ordering that a sentence run concurrently with or consecutively to an anticipated state court sentence, *id.* at 1468, district court judges are not required to exercise this power in every case.¹¹ Under *Setser*, a federal district court may, but need not, and in some instances should not, enter an order regarding the anticipated state sentence.¹²

The Commission’s proposed amendment to §5G1.3 breaks from *Setser*, and recommends that district courts make a decision in *every* case about whether the federal sentence should be served concurrently with or consecutively to an anticipated state sentence. The proposed amendment makes it an either/or proposition and excludes the important option of forbearance. This is inconsistent with *Setser* and a grave mistake.

There is good reason for forbearance in some circumstances. One “fact about the world” is that “the initial sentencing judge typically lacks important sentencing-related information about a second sentence that has not yet been imposed.” *Id.* at 1477 (Breyer, J., dissenting).¹³ This is particularly true because the term “anticipated term of imprisonment” is broad enough to apply where there has not yet been a conviction in state court.¹⁴ In *Setser*, for example, at the time of the federal sentencing, Mr. Setser had not yet pled guilty to the pending state drug charges, and the state had not yet revoked his probation. When a defendant’s conviction is not certain, or when it is unclear “what factors the state court w[ill] use in sentencing him,” the federal court may decide that “an opinion on whether the sentences [a]re to be concurrent or

¹¹ See, e.g., *Hudson v. United States*, 2012 WL 3257522, *2 (N.D. Ind., Aug. 7, 2012) (acknowledging forbearance is an option under *Setser*); *Kirk v. United States*, 2012 WL 5837588, *3 (W.D. Pa., Nov. 16, 2012) (“Even now, assuming the power to order a federal sentence to run concurrently or consecutively with a not-yet-imposed state sentence does lie within the court’s discretion following *Setser*, we find no authority *requiring* the exercise of such power.”).

¹² This does not mean that the decision on whether the sentences will be served concurrently or consecutively will be left to the BOP. That would be contrary to *Setser*. The core of *Setser* is that judges, not the BOP, decide whether the sentences they impose run consecutively to or concurrently with other sentences. When a federal court makes the decision to forbear, it does so knowing that the state court, which will have the benefit of “all of the information before it when it acts,” *Setser*, 132 S. Ct. at 1471, could order the sentence to run consecutively to or concurrently with the federal sentence. If neither court specifies the relationship between the two sentences, the statute provides the default rules. See 18 U.S.C. § 3584(a).

¹³ The majority and dissent in *Setser* both agree that there will be times when the federal district court lacks sufficient information to make an intelligent decision. On this issue the only disagreement appears to be regarding the frequency with which this will occur. While the dissent believes federal courts will “normally”, “typically”, and “often” lack sufficient information, the majority takes a more neutral position on frequency, noting that in “some situations” the courts will lack sufficient information and in “other situations, that will not be the case.” Compare *Setser*, 132 S. Ct. at 1476, 1477 (Breyer, J., dissenting) with *id.* at 1472 n.6.

¹⁴ It is possible some may argue the term even applies when there has not yet been an arrest. Should that occur, Defenders anticipate litigation regarding the parameters of the term.

consecutive [i]s premature.” *See, e.g., Hudson v. United States*, 2012 WL 3257522, *2 (N.D. Ind., Aug. 7, 2012) (no error where the “court had inadequate information and forbore.”).

The list of questions that cannot be answered, and information that will not be available, at the initial federal sentencing about the anticipated state sentence, is long. A few examples include:

- Did the defendant cooperate?
- Is the defendant guilty of the charges pending in state court?
- What if the defendant is charged in state court with 20 counts at the time of the federal sentencing, but eventually only pleads to, or is convicted of, one of those counts or a lesser included offense? Of the range of charged conduct, which conduct is the basis of the conviction and sentence?
- What if the state adjudication is deferred?¹⁵
- Did the defendant receive a deferred sentence to participate in drug treatment?¹⁶ Did the defendant complete the drug treatment?
- Was the defendant’s sentence suspended in state court?
- Did the defendant receive a term of shock probation in state court?¹⁷
- Are there complex legal issues to be argued at sentencing in state court, such as the effect on sentencing of an imperfect coercion defense?
- Did the defendant receive an enhanced penalty in state court? What conduct provided the basis for the enhancement?
- Did the defendant, who was exposed to an enhanced penalty in state court, negotiate a non-enhanced penalty?

¹⁵ *See, e.g.*, Md. Code Ann., Crim. Proc. § 6-220 (probation before judgment) (following a plea of guilty or nolo contendere, or a finding of guilt, the court can stay the judgment, put the defendant on probation and, once the conditions of probation are fulfilled, discharge the defendant from probation without a judgment of conviction); Iowa Code §907.3 (Deferred judgment, deferred sentence, or suspended sentence) (upon a plea of guilty or verdict of guilty a court may defer judgment, place the defendant on probation, and once the conditions of probation are fulfilled, discharge the defendant from probation without judgment); Cal. Pen. Code § 1000 et seq. (following a guilty plea to certain controlled substance offenses, a court may defer judgment and order the defendant to participate in programs related to education, treatment and rehabilitation, and upon successful completion of the program, the court will dismiss the charges).

¹⁶ *See, e.g.*, Washington’s Drug Offender Sentencing Alternative, Wash. Rev. Code §9.94A.660.

¹⁷ *See, e.g.*, Tex. Crim. Proc. Code Ann. § 42.12(6)(a).

By recommending that courts always press forward and attempt to make a decision when much may be unknown about the anticipated state sentence at the time of the initial federal sentencing, the proposed amendment injects unnecessary complexity and confusion into federal sentencing.¹⁸

The current guideline has already generated significant confusion, debate and litigation about whether an undischarged sentence is for an offense that is relevant conduct that increased the offense level for purposes of §5G1.3(b). Defenders believe this would only get worse when parties and the court attempt to apply this provision to anticipated sentences that have not yet been imposed. Often charging documents and the plea proceedings refer to a broad range of conduct, and no one in the federal proceeding will know which, if any, of that conduct will ultimately be the basis for a sentence in state court (or in pre-conviction settings, the basis of the conviction). The parties will surely debate whether this yet-to-be imposed sentence, or yet-to-be imposed conviction, will be based on relevant conduct that is the basis for an increased offense level in the federal proceeding, or not. And the district court will have to make a guess.

For example, imagine a scenario where the police pull over a defendant on the highway and find in his car contraband drugs, a stolen firearm, and stolen auto parts. He is charged in state court with theft over \$500 and carrying a firearm without a permit. He is charged in federal court with possession with intent to distribute controlled substances. In calculating the guidelines in federal court, if the court increases the offense level by 2 levels under §2D1.1(b)(1) for possession of a dangerous weapon, it may be that under the proposed amendment the state and federal sentence should be concurrent because the anticipated sentence is relevant conduct to the instant offense. If the defendant is convicted and sentenced in state court just for carrying a firearm without a permit, the application of the proposed amendment is relatively straightforward: the federal district court should order the federal sentence to run concurrently with the anticipated state sentence because the conduct in the state offense is relevant conduct to the instant offense that increased the offense level under Chapter Two. USSG §5G1.3(b).

Assume, however, that at the time of the federal sentencing, the defendant has been convicted for theft, and the firearm without a permit charge has been dismissed. Because the state court has not yet imposed a sentence on the theft conviction, the federal court will not know whether the state sentence will be based on the theft of the firearm, the auto parts or both. That issue may still be litigated in the state sentencing. But under the proposed amendment, the answers are important. If the theft is for the firearm only, the proposed amendment recommends that the federal sentence be concurrent with the anticipated sentence. USSG §5G1.3(b). If the theft is for only auto parts or auto parts and the firearm, the proposed amendment indicates the court may choose whether the sentence is to run “concurrently, partially concurrently, or

¹⁸ In applying the proposed guideline, it may be difficult for courts to comply with the Rules of Criminal Procedure, including Rule 32’s requirement that courts must “for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.” Fed. R. Crim. P. 32(i)(3). In some circumstances, it may not be possible for courts to make the rulings required by Rule 32 about proceedings that have not yet occurred.

consecutively.” USSG §5G1.3(c) & cmt. (n. 2). The district court may have insufficient information to make this decision.

Additional problems arise if state charges are pending but the defendant has not yet been convicted. How does the federal court know whether the state conviction will be for all of the charged conduct or some of it? What if the state court conviction is only for theft? What if the theft is based on the stolen firearm? What if the theft is based on the stolen firearm and the stolen auto parts? What if the theft is based just on the stolen auto parts? Despite these questions the proposed amendment would nevertheless recommend that the district court make a decision on the relationship between the federal and state sentence.

Guesswork about what will happen in the future will “risk confusion and error.” *Setser*, 132 S. Ct. at 1477 (Breyer, J., dissenting). As Justice Breyer noted, “[a] sentencing judge who believes... that the future conviction will be based upon different relevant conduct (and consequently orders a consecutive sentence) could discover that the second conviction rests upon the same relevant conduct (warranting a concurrent sentence).” *Id.* The mistakes that may occur are troubling for a variety of reasons. First, they directly affect individual liberty. The amount of time a person spends in prison should not be based on speculation about what will happen in a future sentencing proceeding. Second, these kinds of mistakes are detrimental to the system because they increase the risk of unwarranted disparity – similarly situated individuals will be treated differently, and individuals who are dissimilarly situated will be treated similarly. Such mistakes do not serve the goals the Commission itself has set for the guidelines, including “assur[ing] that different individuals who engage in the same criminal behavior will typically receive roughly comparable sentences.” *Setser*, 132 S. Ct. at 1476 (Breyer, J., dissenting); 28 U.S.C. § 991(b)(1)(B).

Defenders believe that there will be fewer mistakes, and less unwarranted disparity, if §5G1.3 remains in its current form, without amendment. Although the Supreme Court has clarified that federal courts have the authority to issue orders about anticipated state court sentences, courts may choose not to exercise that authority or may do so sparingly.

B. The Proposed Amendment May Create Confusion and Unwarranted Disparity By Reaching Beyond the Holding in *Setser*.

In *Setser*, the Court only addressed a federal court’s authority to order a sentence to run consecutively to or concurrently with an anticipated state sentence. In contrast, the proposed amendment uses language that would apply to *all* anticipated sentences – both state and federal. By extending *Setser*, the proposed amendment adds confusion to the sentencing process, and may increase unwarranted disparity between sentences.

In *Setser*, the Court specifically declined to address whether one federal district court may order a sentence be served consecutively to, or concurrently with, an anticipated *federal* sentence. *Setser*, 132 S. Ct. at 1471 n.4 (“It suffices to say... that this question is not before us.”). Moreover, the Court noted an argument “that § 3584(a) impliedly prohibits such an order because it gives that decision to the federal court that sentences the defendant when the other sentence is ‘already’ imposed.” *Id.* That is, because the statute explicitly gives authority to the second federal court to make the concurrent/consecutive decision for an undischarged sentence

that has “already” been imposed, it arguably does not give authority to the first federal court to make that decision when the anticipated sentence is a federal one.

The problems that would arise if both a first and second federal court were authorized to decide whether the two sentences were to run consecutively to or concurrently with one another are not difficult to imagine. For example, what happens if the first court orders the sentence to run concurrently with an unadjudicated federal case, and the second court decides the second sentence should run consecutively to the first? And what of the opposite situation, where the second court, faced with a statutorily mandated minimum sentence wants the sentence to run concurrently with the previous sentence because of intervening cooperation or other unconsidered mitigation, but the first court has already ordered that the sentences are to run consecutively? In light of these inevitable tensions, and because the Supreme Court both expressly identified this as an unresolved issue and offered an argument as to why federal courts do *not* have authority under 18 U.S.C §3584 to order that a sentence run consecutively to or concurrently with a yet-to-be-imposed federal sentence, it is almost certain the issue will be litigated in the near future. Accordingly, Defenders believe it would be premature for the Commission to promulgate an amendment that purports to interpret the statutory authority of one federal court to run a sentence consecutively to or concurrently with a yet-to-be-imposed sentence from another federal court.

Revising the proposed amendment to refer to anticipated *state* sentences would address this particular problem, but would aggravate the complexity beyond that discussed above, and would further contribute to unwarranted disparity by treating similarly situated individuals differently based solely on the jurisdiction (state or federal) of the second sentence. Questions of comity and disparate treatment among sovereigns would also be raised. For all of these reasons, Defenders oppose the proposed amendment.

Although Defenders believe that no change is needed to §5G1.3, the Commission could choose to acknowledge the *Setser* decision in the commentary or background notes to §5G1.3. For example, a new note 5 or a new sentence in the background section could state: Nothing in this guideline alters a court’s authority as described in *Setser v. United States*, 132 S. Ct. 1463 (2012), to specify whether a federal sentence should run concurrently with or consecutively to an unimposed but anticipated state sentence, when the circumstances warrant.