Summary of 2013 Proposed Amendments to the Sentencing Guidelines
Sentencing Resource Counsel Project, April 12, 2012

On April 10, 2013, the Sentencing Commission voted to promulgate amendments to the guidelines. These amendments will be submitted to Congress by May 1, 2013. Barring congressional action, they will take effect November 1, 2013. This memo contains a brief summary of the most relevant changes. Please be sure to read the actual language of the proposed amendments available on the Commission's website at: http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20130410_UNOFFICIAL_RFP_Amendments.pdf.

I. Acceptance of Responsibility

There are two important changes:

Whether the Court Has Discretion to Deny the Third Level of Reduction. The Commission amended the guidelines by adding a statement in Application Note 6 to §3E1.1: "If the government files such a motion, and the court in deciding whether to grant the motion also determines 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, the court ***should*** grant the motion." (emphasis added).

- In Circuits where, currently, courts do not have discretion to deny the motion, this amendment should not change the practice. The amendment makes clear that the sentencing court "should" grant the motion.

- In Circuits where, currently, courts do have discretion to deny the motion, this amendment will help make the argument that the court "should" grant the motion.

Whether the Government Has Discretion to Withhold a Motion Based on Whether the Defendant Agrees to Waive His or Her Right to Appeal. The Commission amended the guidelines by adding a statement in Application Note 6 to §3E1.1: "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."

- This is helpful in any district where the government withholds the third point to gain appeal waivers, and is broad enough to help in other situations where the government

attempts to withhold the third point for any reason unrelated to saving the government from trial preparation.

II. *Setser*

The amendment adds the following language to the Background of §5G1.3: "Federal courts generally 'have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings.' *See Setser v. United States*, 132 S. Ct. 1463, 1468 (2012); 18 U.S.C. §3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. *See Setser*, 132 S. Ct. at 1468."

In situations where the decision in *Setser* is not alone sufficient to convince a district court that it has the authority to order that the federal sentence run concurrently with an anticipated, but yet-to-be-imposed sentence, with this amendment the guidelines now provide additional support. In cases where it may be to the client's benefit to alert the court to an anticipated state court sentence, attorneys can request an order that the federal sentence run concurrently with the anticipated state court sentence, citing both *Setser* and the guidelines. If the court orders the sentences to run concurrently, attorneys should make sure that is specified in J&C, so that the concurrent nature of the sentences is clear to the BOP.

III. Pre-Retail Medical Products

The SAFE DOSES Act created a new offense at 18 U.S.C. § 670 (theft and related offenses regarding pre-retail medical products). The new offense is referenced to USSG §2B1.1. Section 2B1.1 has been amended to provide for:

(1) the greater of a 2-level increase if the offense involved conduct described in 18 U.S.C. § 670, or a 4-level increase if the offense involved such conduct and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product (if the 4-level increase applies, §3B1.3 for abuse of position of trust does not apply);

(2) an invited upward departure in § 670 cases if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.

This amendment could well result in disproportionate penalty increases based upon an arbitrary distinction between pre-retail and retail medical products. The 4-level increase for the defendant employed in the supply chain is particularly unfair because a low level player in the supply chain of a pre-retail medical product (like a warehouse worker) could get hit harder than a higher level player at the retail level (like a store manager).

IV. Counterfeit and Adulterated Drugs; Counterfeit Military Parts

Proposed amendments to USSG §2B5.3 include:

(1) a 2-level increase if the offense involved a counterfeit drug; and

(2) a 2-level increase with a minimum offense level of 14 "if the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause (A) the disclosure of classified information; (B) impairment of combat operations; or (C) other significant harm to (i) a combat operation, (ii) a member of the Armed Forces, or (iii) national security." The amendment also includes some application notes defining "other significant harm" and a departure provision if the offense resulted in death or serious bodily injury.

The new offense at 18 U.S.C. § 333(b)(7) for intentionally adulterating drugs is referenced to §2N1.1 (tampering or attempting to tamper involving risk death or bodily injury).

V. Trade Secrets

Responding to a directive from Congress to review the guidelines regarding trade secret offenses, the Commission amended §2B1.1 to increase penalties for certain trade secrets offenses. Under the current guidelines, there is a 2-level enhancement if the offense "involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent." Under the amended guideline that same conduct is now subject to a 4-level enhancement and a floor of 14. The Commission also added a new 2-level enhancement where the defendant knew or intended that the misappropriated trade secret "would be transported or transmitted out of the United States."

VI. Tax Deductions

This amendment addresses a circuit split about calculating loss in tax cases, specifically on whether a court may subtract legitimate but unclaimed deductions. The Commission amended the guidelines to provide that "the court should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled." And, in addition, the court "should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent that (A) the credit, deduction, or exemption was related to the tax offense and could have been claimed at the time the tax offense was committed; (B) the credit, deduction, or exemption is reasonably and practicably ascertainable; and (C) the defendant presents information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy." The amendment also specifies that the burden is on the defendant to "establish any such credit, deduction, or exemption by a preponderance of the evidence," and that no court shall account for payments to

third parties in a manner that "encouraged or facilitated a separate violation of the law (e.g., "under the table" payments…)."

VII. Miscellaneous and Technical

A. Aiming a Laser at an Aircraft

The proposed amendment references 18 U.S.C. § 391 to §2A5.2 (Interference with Flight Crew or Flight Attendant).

B. Violation of A Restraining Order

The proposed amendment references 18 U.S.C. § 1514(c) to §2J1.2 (Obstruction of Justice).

C. Trespassing on Federal Restricted Buildings or Grounds

The proposed amendment references 18 U.S.C. § 1752 to §2A2.4 (Obstructing or Impeding Officers) and §2B2.3 (Trespass). Section 2B2.3(1) is amended to provide for the greater of a 2-level increase if the trespass occurred at any restricted buildings or grounds; or a 4-level increase if the trespass occurred at the White House or its grounds, or the Vice President's official residence or its grounds.

D. Ultralight Aircraft Smuggling Prevention Act

The proposed amendment references 18 U.S.C. § 1590(d)(2) to §2D1.1 and § 1590(d)(1) to §2T3.1.

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

In the Commentary to four of the §2J guidelines (§§2J1.2, 2J1.3, 2J1.6, and 2J1.9) an application note states that Chapter Three, Part C, does not apply unless the defendant obstructed the investigation or trial of the instant offense. Following recent case law questioning whether the Commission really meant that courts should not apply the adjustment in §3C1.3, the Commission decided to narrow the exclusion. With this amendment, the §2J guidelines instruct courts not to apply only §3C1.1, meaning that the guidelines now allow courts to apply the adjustments in §§3C1.2, 3C1.3 and 3C1.4 to these §2J offenses.

F. 18 U.S.C. § 554 Export of Dual Use Goods

The proposed amendment adds a reference for 18 U.S.C. § 554 to USSG §2M5.1 in addition to §§2B1.5, 2M5.2, and 2Q2.1. This new reference was added at the request of the Department of Justice to cover situations where the § 554 offense involves a violation of export controls not involving munitions. Unfortunately, it gives the government greater bargaining

power because in many cases the offense level will be set at 26 under §2M5.1, whereas we were able to argue that the 26 was too high when the offense was referenced to §2M5.2. Helpful cases to keep in mind include: *United States v. Ren*, No. 3:08-cr-185 (D. Conn. 2009) (defendant sent to Taiwan two night vision scopes and a laser aiming sight; government agreed to base offense level of 14 and court sentenced the defendant to 1 day imprisonment and 3 years of supervised release with 3 months of home confinement); *United States v. Lam*, No. 3:05-cr-290 (D. Conn. 2007) (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)); *United States v 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).