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March 19, 2013

Honorable Patti B. Saris

Chair

United States Sentencing Commission

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Suite 2-500

Washington, D.C. 20002-8002

Attn: Public Affairs

Re: NACDL Comments on Proposed Permanent Amendments

Dear Judge Saris:

The National Association of Criminal Defense Lawyers (NACDL) submits this response to the Commission's January 18, 2013, request for comment on the proposed permanent amendments to the United States Sentencing Guidelines. NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. We appreciate the opportunity to provide these comments to the Commission and respectfully urge your utmost consideration.

I. PRE-RETAIL MEDICAL PRODUCTS

The Commission seeks comment on the proposed amendments implementing the newly enacted Safe Doses Act, 18 U.S.C. § 670. NACDL encourages the Commission to take a cautious approach in applying new characteristics, references and adjustments. The Safe Doses Act is duplicative of many existing statutes and touches several related offenses.

NACDL particularly urges the Commission not to adopt the proposed specific offender characteristic enhancement in the proposed

amendment §2B1.1(b)(14). It is unnecessary and duplicative. The proposed specific offender characteristic §2B1.1(b)(14)(C) regarding employees and/or agents in the “supply chain” is of particular concern. The proposal overstates the culpability of entire classes of offenders, especially low and mid-level employees. The current Guidelines and other specific offender characteristics already address the conduct contemplated by the Safe Doses Act.

1. *The Commission seeks comment on the guideline or guidelines to which offenses under section 670, and other offenses covered by the directive, should be referenced.*

A. *The specific characteristics of proposed §2B1.1(b)(14)(A) and (B) are already addressed in the current version of §2B1.1(b)(14)(A) and (B)*

The proposed amendment contemplates an enhancement if “(A) the offense involved the use of (i) violence, force or a threat of violence or force; or (ii) a deadly weapon; (B) the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved...” Essentially this conduct is already covered by the current §2B1.1(b)(14). That guideline already provides an increase to the base offense level if the offense involves “(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...” The proposed language is essentially duplicative. Further, the proposed amendment contemplates referencing to §2A1.4 involuntary manslaughter, which already provides adequately for base level increases for reckless conduct.

B. *The proposed §2B1.1(b)(14)(C) risks overstating the culpability of certain offenders*

The Commission has proposed adding a new specific offense characteristic at §2B1.1(b)(14)(C) where “the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product...” This is entirely too broad. It risks overstating culpability for anyone who is an employee or agent in the “supply chain.” For example, a worker in a warehouse moving a few boxes for a few weeks could risk enhancement for conduct aiding an enterprise even without fully foreseeing all that his conduct and that of others encompasses. The Chapter 3 mitigating role adjustments are too narrow to compensate for such a situation and often would not apply even though an individual’s conduct was far less culpable than others in a larger conspiracy.

2. *The Commission seeks comment on the proposed amendment to §2B1.1, which would provide a new specific offense characteristic if the offense involves a pre-retail medical product [and (A) the offense involved the use of (i) violence, force, or a threat of violence or force; or (ii) a deadly weapon; (B) the offense resulted in serious bodily injury or death, including serious bodily injury or death*

resulting from the use of the medical product involved; or (C) the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product]. In particular:

- A. *If the Commission were to promulgate the proposed amendment, how should the new specific offense characteristic interact with other specific offense characteristics in §2B1.1? In particular, how should it interact with—(i) the specific offense characteristic at §2B1.1(b)(13)(B), which provides a 2-level enhancement and a minimum offense level of 14 if the offense involved an organized scheme to steal or to receive stolen goods or chattels that are part of a cargo shipment; and (ii) the specific offense characteristic currently at §2B1.1(b)(14), which provides a 2-level enhancement and a minimum offense level 14 if the offense involved a risk of death or serious bodily injury or possession of a dangerous weapon? Should the new specific offense characteristic be fully cumulative with these current specific offense characteristics, or should the impact be less than fully cumulative in cases where more than one apply?*

As stated above, the Commission should not adopt the proposed Amendment. Specific offense characteristics are adequately taken into account by the current §2B1.1 and other parts of the Guidelines. If applied, these characteristics would be cumulative and risk overstating criminal culpability. The conduct is already accounted for by the fact that the base offense level takes into account the cost of the goods stolen. §2A addresses conduct that ends in death and §2N1.1 already addresses tampering with consumer products that involve risk of death or bodily injury.

- B. *Does the proposed amendment adequately respond to requirement (2) of the directive that the Commission consider establishing a minimum offense level for offenses covered by the Act? If not, what minimum offense level, if any, should the Commission provide for offenses covered by the Act, and under what circumstances should it apply?*

There should be no minimum offense level. Given the wide range of conduct covered by this very broad statute, a minimum offense level risks overstating culpability and not differentiating between levels of culpability. For example, the statute is so broad that a clerk caught stealing surgical gloves or a stacker in a warehouse moving over-the-counter drugs risks being classed with a defendant stealing insulin or cancer fighting drugs. The range of conduct here is great and judges must be left with considerable discretion to differentiate conduct.

- C. *Does the proposed amendment adequately respond to requirement (3) of the directive that the Commission account for the aggravating and*

mitigating circumstances involved in the offenses covered by the Act? If not, what aggravating and mitigating circumstances should be accounted for, and what new provisions, or changes to existing provisions should be made to account for them?

Aggravating circumstances are already contemplated within the proposed amendment as stated above. NACDL believes, however, that the proposed amendment is severely lacking in that it fails to include mitigating circumstances. Given the significant reach of the statute and the broad swath of conduct it covers, the inclusion of mitigating circumstances in the amendment are absolutely critical to ensuring sentences are proportional to actual culpability. NACDL shares the perspective of the Federal Defenders that there are too few examples of prosecutions involving pre-retail medical products to afford a thorough and comprehensive discussion of those circumstances warranting mitigation.¹ That said, we also agree that the Commission could make-up for some of these statutory deficiencies with the addition of two mitigating factors: one addressing role and one addressing the type of products involved in the theft. We adopt the position of the Federal Defenders that the Commission should reference §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” and provide for a 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.” NACDL is deeply troubled by overly broad reach of the Safe Doses Act and the inherent risk it poses to less culpable, unknowing or even well-intentioned actors. The inclusion of sufficient mitigating circumstances is one way to blunt this risk and increase the likelihood that the punishment fits the crime.

D. Does the proposed amendment adequately respond to the other requirements of the directive, in paragraphs (1), (4), (5), and (6)? If not, what other changes, if any, should the Commission make to the guidelines to respond to the directive?

Again, courts need to be left great discretion to deal with the breadth of conduct this statute encompasses.

3. *Section 670(e) defines the term "pre-retail medical product" to mean "a medical product that has not yet been made available for retail purchase by a consumer." The proposed amendment would adopt this statutory definition. The Commission seeks comment on this definition. Is this definition adequately clear? If not, in what situations is this definition likely to be unclear and what guidance, if any, should the Commission provide to address such situations?*

¹ See Statement of Denise C. Barrett Before the United States Sentencing Commission, Washington, D.C., at 15-16 (March 13, 2013).

As a general comment, the term “pre-retail medical product” is dangerously broad as is the statute itself. The Safe Doses Act and proposed amendment contemplate treating the theft of \$5000 worth of medical gloves in the same manner as \$5000 worth of pharmaceuticals for cancer infusions. The statute is far too broad and addresses conduct that is more adequately addressed at the state level. Organized fraud and theft should not be classed with petty larceny, yet the broad scope of this statute and the definition of “pre-retail medical product” conflate these disparate acts. NACDL encourages the Commission to further delineate what conduct should be punished here. The amendment should bring greater clarity to the definition so that the act of stealing items from a retail facility before they are stocked and shelved is not classed with organized theft.

Does the definition of the term "supply chain" (see 18 U.S.C. § 670(e) (stating that 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")) inform the determination of whether the medical product has been made available for retail purchase by a consumer?

The Commission should explore whether, when and how a “hospital” is in the supply chain as opposed to being a mere customer. Similarly, when reviewing this definition the Commission should be wary of any expansion that would include healthcare institutions and consider delineating those entities that truly constitute “suppliers” from those that are actually customers themselves, such as hospitals and nursing homes, acting as intermediaries between the supplier and the patient.

- 4. The Commission seeks comment on how, if at all, the guidelines should be amended to account for the aggravating factor in section 670 that increases the statutory maximum term of imprisonment if the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product. Is this factor already adequately addressed by existing provisions in the guidelines, such as the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill)? If not, how, if at all, should the Commission amend the guidelines to account for this factor?*

This is more than adequately addressed by §3B1.1

- 5. Finally, the Commission seeks comment on what changes, if any, it should make to the guidelines to which the other offenses covered by the directive are referenced to account for the statutory changes or the directive, or both. For example, if the Commission were to promulgate the proposed amendment to §2B1.1, adding a new specific offense characteristic to that guideline, should the*

Commission provide a similar specific offense characteristic in the other guidelines to which the other offenses covered by the directive are referenced?

The Guidelines in place are adequate.

II. TRADE SECRETS

The Commission seeks comments on the directive contained in the Foreign and Economic Espionage Penalty Enhancement Act of 2012 (“the Act”). In particular, the Commission seeks comment on the following:

1. *What offenses, if any, other than sections 1831 and 1832 should the Commission consider in responding to the directive? What guidelines, if any, other than §2B1.1 should the Commission consider amending in response to the directive?*

NACDL believes the Commission need not consider any statutes beyond 18 U.S.C. § 1831, the subject of the Foreign and Economic Espionage Penalty Enhancement Act of 2012 (FEEPEA), and should not amend any guidelines in response to the Congress’ directive. Section 1831 is a broad statute, and much of the conduct prohibited under its terms can also be prosecuted under the interlocking—and sometimes overlapping—net of criminal statutes aimed at intellectual property offenses, economic espionage, export control violations, and cyber crime.² These related offenses, though, range from misdemeanors to capital offenses³ and should

² See, e.g., 18 U.S.C. §§ 207 (“Restrictions on former officers, employees, and elected officials of the executive and legislative branches”); § 470 (“Counterfeit acts committed outside the United States”); § 546 (“Smuggling goods into foreign countries”); § 554 (“Smuggling goods from the United States”); § 792 (“Gathering, transmitting or losing defense information”); § 794 (“Gathering or delivering defense information to aid foreign government”); § 798 (“Disclosure of classified information”); § 1029 (“Fraud and related activity in connection with access devices”); 1030 (“Fraud and related activity in connection with computers”); § 1343 (“Fraud by wire, radio, or television”); § 1905 (“Disclosure of confidential information generally”); § 2339A (“Providing material support to terrorists”); § 2381 (“Treason”); § 2511 (“Interception and disclosure of wire, oral, or electronic communications prohibited”); § 2318 (“Trafficking in counterfeit labels, illicit labels, or counterfeit documentation or packaging”); § 2319 (“Criminal infringement of a copyright”); § 2320 (“Trafficking in counterfeit goods or services”); § 2701 (“Unlawful access to stored communications”); 22 U.S.C. § 2778 (“Control of arms exports and imports”); 50 U.S.C. § 1701 *et seq.* (“International Emergency Economic Powers Act”); 7 U.S.C. § 136h (disclosure by EPA employees). See also F.B.I., *Economic Espionage: Frequently Asked Questions*, available at <http://www.fbi.gov/about-us/investigate/counterintelligence/economic-espionage> (last visited Mar. 1, 2013) (suggesting mail fraud, wire fraud, interstate transportation of stolen property, export control, and misuse of a computer system as potential alternatives to EEA charges); DEPT. OF JUSTICE, *Summary of Major U.S. Export Enforcement, Economic Espionage, Trade Secret and Embargo-Related Criminal Cases (January 2007 to the present: updated Feb. 14, 2013)* (Feb. 2013) available at <http://www.justice.gov/nsd/docs/export-case-fact-sheet.pdf> (last visited Mar. 1, 2013).

³ Compare 18 U.S.C. § 1905 (class A misdemeanor for disclosure of confidential information, including trade secrets, by public employees) with 18 U.S.C. § 2381 (capital offense with punishment not less than 5 years for treason).

not be punished similarly or cross-referenced within the Guidelines. The generally applicable rule that courts should apply the most analogous guideline is sufficient.⁴ Indeed, NACDL is cognizant that federal prosecutors have many options when charging individuals or entities but believes that only if the government proves an offense was committed beyond a reasonable doubt should the referenced guideline for that offense be used.⁵ Given the variety of indictable offenses and their equally varied penalties, NACDL suggests that before any additional enhancements or cross-references are added, a comprehensive review of all such statutes and guidelines must be undertaken. For now, subject to NACDL's previously articulated concerns,⁶ the current version of §2B1.1 and its Specific Offense Characteristics (SOCs) applicable to convictions under § 1831 meet § 3553(a)(2)'s purposes.

Following reports from the counterintelligence community about growing and persistent threats to U.S. security from foreign intelligence services, especially cyber-threats committed via computer network intrusions,⁷ Congress passed FEEPEA, which increased the statutory maximum penalty for violations of § 1831 ("Economic espionage"). The congressional report

⁴ USSG §1B1.2(a).

⁵ For example, 18 U.S.C. § 1030(a)(1) is referenced to USSG §2M3.2 (Gathering National Defense Information) which has base offense levels of 30 and 35, depending on the type of information gathered. *See* USSG §2B1.1, comment. (backg'd.) ("The minimum offense level of level 24 provided in subsection (b)(17)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these factors."); *see also* §2B1.4 ("Insider Trading"); §2B1.5 ("Theft of, Damage to, or Destruction of, Cultural Heritage Resources . . ."); §2B2.3 ("Trespass"); §2B5.3 ("Criminal Infringement of Copyright or Trademark"); §2M3.1 ("Gathering or Transmitting National Defense Information to Aid a Foreign Government"); §2M3.2 ("Gathering National Defense Information"); §2M3.3 ("Transmitting National Defense Information; Disclosure of Classified Cryptographic Information; Unauthorized Disclosure to a Foreign Government . . ."); §2M3.4 ("Losing National Defense Information"); §2M3.5 ("Tampering with Restricted Data Concerning Atomic Energy"); §2H3.1 ("Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information").

⁶ *See, e.g.*, Letter from NACDL to U.S. Sentencing Commission (Mar. 19, 2012) ("NACDL . . . takes the position that the impact of these tables on the ambiguous concept of "loss" does in fact result in disparate sentences frequently detached from culpability."). *Accord* Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT. R. 167, 169, 2008 WL 2201039, at *4 (Feb. 2008) ("[S]ince *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines for cases like these and the fundamental requirement of Section 3553(a) that judges imposes sentences 'sufficient, but not greater than necessary' to comply with its objectives.").

⁷ *See* H.R. REP. NO. 112-610 (2012) (quoting *Foreign Spies Stealing US Economic Secrets in Cyberspace, Report to Congress on Foreign Economic Collection and Industrial Espionage, 2009–2011*, OFFICE OF THE NATIONAL COUNTERINTELLIGENCE EXECUTIVE (Oct. 2011); *Unclassified Statement for the Record on the Worldwide Threat Assessment of the US Intelligence Community for the Senate Select Committee on Intelligence*, James R. Clapper, Director of National Intelligence (Jan. 2012)); *see also Administration Strategy on Mitigating the Theft of U.S. Trade Secrets*, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES (May 2013).

accompanying the legislation⁸ described a perceived need to increase the penalties for economic espionage based on increased threats from foreign intelligence adversaries and services. Significantly, the Act neither altered nor referenced § 1832 (“Theft of trade secrets”). NACDL believes there is and should remain a difference between the conduct punishable under § 1831 and § 1832 and that the Guidelines sufficiently account for these differences. To the extent there is any confusion, the Commission should clarify that the SOC outlined in §2B1.1(5) applies only to defendants convicted under § 1831.⁹

2. *What should the Commission consider in reviewing the seriousness of the offenses described in the directive, the potential and actual harm caused by these offenses, and the need to provide adequate deterrence against such offenses?*

The Administration and Congress’ reports on the problem of trade secret theft describe a growing problem of cyber-espionage but do not provide the Commission with data to suggest that the current Guidelines, especially §2B1.1’s tiered enhancement system tied to “loss,” either insufficiently reflect the harm caused or inadequately deters thieves. The Commission should also consider Congress’ directive within the context of sociological trends, such as evolving perceptions of secrecy,¹⁰ and in terms of how yet another move to increase terms of imprisonment fits into this country’s economic reality.¹¹ There are technological, economic,

⁸ H.R. REP. NO. 112-610 (2012).

⁹ See 142 CONG. REC. S12, 212 (daily ed. Oct. 2, 1996) (Managers’ Statement for H.R. 3723) (“This legislation includes a provision penalizing the theft of trade secrets (Sec. 1832) and a second provision penalizing that theft when it is done to benefit a foreign government, instrumentality, or agent (Sec. 1831). The principal purpose of this second (foreign government) provision is not to punish conventional commercial theft and misappropriation of trade secrets (which is covered by the first provision).”).

¹⁰ See Elizabeth A. Rowe, *A Sociological Approach to Misappropriation*, 58 U. KAN. L. REV. 1 (2009) (suggesting that a sociological analysis of the values, characteristics, and employment expectations of so-called “New Generation Employees” helps explain current trends in trade secret law and should inform efforts to achieve optimal trade secret protection); David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1103 (2012) (“A final factor is the evolving perception of secrecy. IP law is based on the concept of ownership of information, and trade secret law in particular is based on owning confidential information. Generation Y and those even younger, however, came of age in a file-sharing culture where almost any information was free and easily available on the Internet. In 2000, for instance, Napster had approximately ten million users, mostly college students, sharing music in violation of copyright laws. Those college students are now in the workforce, with access to their companies’ trade secrets. Likewise, Facebook now has more than 800 million users, many of whom post private, intimate information about themselves.”).

¹¹ *Rising Prison Costs: Restricting Budgets and Crime Prevention Options: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Sen. Leahy, Chair, Senate Comm. on the Judiciary) (“As more and more people are incarcerated for longer and longer, the resulting costs have placed an enormous strain on Federal, state and local budgets and have at the same time severely limited our ability to enact policies that prevent crimes effectively and efficiently. At a time when our economy has been struggling to recover from the worst recession in the last 75 years and governments’ budgets are limited, we must look at the wasteful spending that occurs with over-incarceration on the Federal and state levels. There is mounting evidence that building more prisons and locking people up for longer and longer -- especially nonviolent offenders -- is not the best use of taxpayer money, and is in

cultural, and geopolitical shifts¹² at play; harsher punishments are not the solution. Moreover, the Commission should decline to increase punishments for individual defendants when experts admit that the greatest problems concerning trade secret theft stem from institutional and state sponsored threats.¹³ Further, NACDL respectfully suggests the following points for the Commission’s consideration:

First, the Commission needs to understand that although the vulnerability of intangible property like trade secrets is part of a global trend, not all trade secrets are created equal. The Administration has acknowledged that trade secrets are neither inherently valuable nor easily valued because “[w]hether or not specific information is regarded as a trade secret is a matter determined by an individual company, not by industry at large. Additionally, for information to be legally protected as a trade secret, businesses need only take reasonable measures to protect the secrecy of such information which may vary by company and by industry.”¹⁴ Consequently, although the term “trade secret” connotes “top secret” information, the development of the law surrounding trade secrets shows the breadth of what is potentially protected—and therefore punishable—as a federal crime:

Real-world examples of this breadth encompass subject matter ranging from Church of Scientology religious texts to a concept for a clickety-clacking railroad toy to standardized tests for ninth graders. The definition of a trade secret is

fact an ineffective means of keeping our communities safe.”). Cf. U.S. Government Accountability Office, *Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure* (Sept. 12, 2012).

¹² *Foreign Spies Stealing US Economic Secrets in Cyberspace, Report to Congress on Foreign Economic Collection and Industrial Espionage, 2009–2011*, OFFICE OF THE NATIONAL COUNTERINTELLIGENCE EXECUTIVE, pp. 6-7 (Oct. 2011) (describing “near certainties” of these “four broad factors which will accelerate the rate of change in information technology and communications technology in ways that are likely to disrupt security procedures and provide new openings for collection of sensitive US economic and technological information”).

¹³ E.g., *Foreign Spies Stealing US Economic Secrets in Cyberspace, Report to Congress on Foreign Economic Collection and Industrial Espionage, 2009–2011*, OFFICE OF THE NATIONAL COUNTERINTELLIGENCE EXECUTIVE, p. 7 (Oct. 2011) (“China will continue to be driven by its longstanding policy of ‘catching up fast and surpassing’ Western powers. An emblematic program in this drive is Project 863, which provides funding and guidance for efforts to clandestinely acquire US technology and sensitive economic information.”); Richard A. Clarke, *How China Steals Our Secrets*, N.Y. TIMES, Apr. 2, 2012, http://www.nytimes.com/2012/04/03/opinion/howchina-steals-our-secrets.html?_r=1.

¹⁴ *Administration Strategy on Mitigating the Theft of U.S. Trade Secrets*, p. 6 (Feb. 2013). See also *United States v. Yang*, 281 F.3d 534, 545 (6th Cir. 2002) (noting but rejecting as insufficiently explained the district court’s downward departure for defendants’ sentences based on company-victim’s participation in the prosecution: “[T]he [district] court said, ‘In my experience no victim has played a more direct role than Avery in prosecuting a criminal case. . . . With Avery’s participation and the acquiescence of the Government, the criminal case has become a tool for Avery to seek vengeance instead of a pursuit of justice.’ The district court chastised Avery for ‘ha[ving] been an active participant in, and at times, even manipulated, the presentation of the Government’s case to enhance its ability to recoup its losses,’ and for ‘attempting to control the sentence’ through the calculation of the loss suffered as a result of the Defendants’ activities.”).

potentially so broad that the meaning of “trade secret” is often defined by what it is not. Courts use the concept of an employee’s “tool kit,” or her generalized skills, knowledge, training, and experience, to cabin the scope of trade secret law.¹⁵

These examples come from the civil context, but some commentators have noted that the EEA “actually expands the traditional view of trade secrets to allocate control and use of other information.”¹⁶ If, therefore, a “clickety-clacking railroad” toy satisfies the definition for trade secrets contained in 18 U.S.C. § 1839(3), its misappropriation or attempted transfer can be prosecuted. As discussed more fully below, this example explains why there should not be a minimum penalty for violations of § 1831. The broad definition of “trade secret” has survived void-for-vagueness challenges,¹⁷ but given the shaky ground upon which it rests, the Commission should be wary of sanctioning increasingly harsh penalties applicable to *all* trade secret theft convictions.

Second, Congress has not provided for a federal civil claim for trade secret theft,¹⁸ meaning some federal prosecutions are effectively proxies for corporate warfare¹⁹ and lawsuits

¹⁵ David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1108 (2012). *See also Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 724 (7th Cir. 2003) (“Unlike ‘a patentable invention, a trade secret need not be novel or unobvious.’ ‘The idea need not be complicated; it may be intrinsically simple and nevertheless qualify as a secret, unless it is common knowledge and, therefore, within the public domain.’”) (internal citations omitted).

¹⁶ Jonathan Eric Lewis, *The Economic Espionage Act and the Threat of Chinese Espionage in the United States*, 8 CHI.-KENT J. INTELL. PROP. 189, 202-03 (2009) (quoting Leslie G. Berkowitz, *Computer Security and Privacy: The Third Wave of Property Law*, 33 COLO. LAWYER 57 (Feb. 2004)).

¹⁷ *See United States v. Hsu*, 40 F.Supp.2d 623, 630 (E.D. Pa. 1999) (rejecting as-applied vagueness challenge but noting problematic nature of EEA’s “vaporous” terms and its definition of “trade secret”: “Turning specifically to the EEA, it is in many ways more problematic than our [hypothetical] badness statute because, unlike our imagined law, what is ‘generally known’ and ‘reasonably ascertainable’ about ideas, concepts, and technology is constantly evolving in the modern age. With the proliferation of the media of communication on technological subjects, and (still) in so many languages, what is “generally known” or “reasonably ascertainable” to the public at any given time is necessarily never sure.”); *United States v. Howley*, – F.3d –, 2013 WL 399345, Nos. 11–6040, 11–6071, 11–6194 (6th Cir. 2013) (describing trade secret definition as “modest standard”).

¹⁸ An effort in 2011 to add a civil claim failed. *See* David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1093-94 (2012).

¹⁹ *Cf. United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009) (holding conviction for violation of website’s terms of service violated void-for-vagueness doctrine: “Normally, breaches of contract are not the subject of criminal prosecution. Thus, while ‘ordinary people’ might expect to be exposed to civil liabilities for violating a contractual provision, they would not expect criminal penalties.”) (citing *United States v. Handakas*, 286 F.3d 92, 107 (2d Cir. 2002) overruled on other grounds in *United States v. Rybicki*, 354 F.3d 124, 144 (2d Cir. 2003) (en banc)); *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (“We need not decide today whether Congress *could* base criminal liability on violations of a company or website’s computer use restrictions. Instead, we hold that the phrase ‘exceeds authorized access’ in the CFAA does not extend to violations of use restrictions.”).

that might deter foreign-involved trade secret theft are prevented.²⁰ In other words, due to the breadth of the statute, not all trade secret prosecutions vindicate the national interest or our national security. When trade secret information is tied to national interests, more specific statutes can be charged and, if proved, subject the defendant to potentially greater punishment.

Third, there is insufficient data to dismiss the current Guidelines as ineffective.²¹ The relatively few prosecutions under the Economic Espionage Act—either § 1831 or § 1832—mean that generalized conclusions about the efficacy and deterrent effect of the current scheme are premature.²² One measure of the rarity of EEA prosecutions is that since the EEA was enacted in 1996, there have been only three appellate decisions related to defendants convicted of violating § 1831,²³ and only a few more under § 1832.²⁴ With other Guidelines, actual practice and evolving standards (*e.g.*, the growing number of below-Guidelines sentences in high-dollar fraud cases)²⁵ provide data that allows the Commission to amend or remove enhancements. That

²⁰ See Jonathan Eric Lewis, *The Economic Espionage Act and the Threat of Chinese Espionage in the United States*, 8 CHI-KENT J. INTELL. PROP. 189, 222 (2009) (“In order to ensure that public corporations are safeguarding trade secrets from foreign spies, courts should permit shareholders of public corporations to file derivative suits on behalf of those corporations that had trade secrets stolen by persons intending to benefit a foreign power. The potential of a lawsuit would give incentives to corporate directors and officers to make sure that they did proper background checks of all employees and that they had internal reporting mechanisms to properly identify potential espionage. Furthermore, allowing such derivative suits to go forward would cause shareholders of public corporations to be more aware of the threat of economic espionage and to apply pressure upon corporations to ensure that there are adequate internal safeguards for detecting espionage.”); *Administration Strategy on Mitigating the Theft of U.S. Trade Secrets*, p. 6 (Feb. 2013) (“Companies need to consider whether their approaches to protecting trade secrets keeps pace with technology and the evolving techniques to acquire trade secrets enabled by technology. The Administration encourages companies to consider and share with each other practices that can mitigate the risk of trade secret theft. These best practices should encompass a holistic approach to protect trade secrets from theft via a wide array of vulnerabilities.”).

²¹ Cf. Darin W. Snyder et al, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291 (2010) (analyzing federal civil trade secret litigation; noting “death of empirical analysis” on trade secrets, unlike patents, copyrights, and trademarks).

²² Cf. *Report to Congress: Increased Penalties for Cyber Security Offenses*, U.S. SENTENCING COMMISSION (May 2003).

²³ *United States v. Hsu*, 155 F.3d 189 (3rd Cir. 1998); *United States v. Fei Ye*, 436 F.3d 1117 (9th Cir. 2006); *United States v. Chung*, 659 F.3d 815 (9th Cir. 2011).

²⁴ *United States v. Martin*, 228 F.3d 1 (1st Cir. 2000); *United States v. Krumrei*, 281 F.3d 534 (6th Cir. 2002); *United States v. Lange*, 312 F.3d 263 (7th Cir. 2002); *United States v. Williams*, 526 F.3d 1312 (11th Cir. 2008); *United States v. Case*, 309 Fed. App’x 883 (5th Cir. 2009); *United States v. Genovese*, 311 Fed. App’x 465 (2d Cir. 2009); *United States v. Nosal*, 642 F.3d 781 (9th Cir. 2011); *United States v. Aleynikov*, 676 F.3d 71 (2d Cir. 2012); *United States v. Howley*, – F.3d –, 2013 WL 399345, Nos. 11–6040, 11–6071, 11–6194 (6th Cir. 2013).

²⁵ In fiscal year 2011, below-guideline sentences were imposed in 43.1% of all fraud cases, only a portion of which were government sponsored downward departures. See U.S. SENT’G COMM’N, *2011 Sourcebook of Federal Sentencing Statistics*, tbl. 27.

data is unavailable here. In 2010, just 7 cases were adjudicated under the EEA.²⁶ What is known is that “increases in severity of punishments do not yield significant (if any) marginal deterrent effects.”²⁷ This is particularly true of white-collar offenders, though they are presumably the most rational of potential offenders.²⁸

3. *Do the guidelines appropriately account for the simple misappropriation of a trade secret? Is the existing enhancement at §2B1.1(b)(5), which provides a 2-level enhancement “[i]f 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,” sufficient to address the seriousness of the conduct involved in the offenses described in the directive?*

Yes. The new 20-year statutory maximum for violations of § 1831 means the higher base offense level of 7 is triggered, distinguishing it from the base offense level applicable to § 1832 convictions when there is not necessarily proof of foreign involvement; the existing SOC for misappropriated trade secrets benefitting foreign governments, instrumentalities, and agents is (effectively) automatically applicable to violations of § 1831 (and is applicable subject to lower standards of proof at sentencing when a defendant has been convicted under § 1832); other enhancements²⁹ such as §2B1.1(b)(10), which adds 2 levels if the offenses involved sophisticated

²⁶ *Foreign Spies Stealing US Economic Secrets in Cyberspace, Report to Congress on Foreign Economic Collection and Industrial Espionage, 2009–2011*, OFFICE OF THE NATIONAL COUNTERINTELLIGENCE EXECUTIVE, p. 5 (Oct. 2011). See also Mark Motivans, *Intellectual Property Theft, 2002*, Bureau of Justice Statistics (Oct. 2004) (discussing all forms of intellectual property theft, including copyright and trademark infringement, the largest sources of data). By comparison, when the Commission increased penalties for cyber security offenses, it did so based on part on analysis of 116 of the 126 convictions obtained under the relevant statute in 2001 and 2002. U.S. SENT’G COMM’N, REPORT ON INCREASED PENALTIES FOR CYBER SECURITY OFFENSES (2003).

²⁷ Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 28 (2006) (noting “[t]hree National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence”); Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 447-48 (2007) (“[C]ertainty of punishment is empirically known to be a far better deterrent than its severity.”).

²⁸ Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 448-49 (2007) (“[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders.”).

²⁹ Of the 18 SOCs in §2B1.1, many could arguably be used to enhance a sentence for violating § 1831, depending on the particular circumstances of the case. See USSG § 2B1.1(b)(1) (loss); §2B1.1(b)(2) (number of victims; term defined broadly in Application note 1); §2B1.1(b)(3) (theft from the person of another); §2B1.1(b)(4) (person in the business of receiving and selling stolen property); §2B1.1(b)(5) (theft of trade secret); §2B1.1(b)(7) (email addresses); §2B1.1(b)(10) (moved scheme to another jurisdiction, substantial part of scheme outside US, sophisticated means); §2B1.1(b)(11) (device making equipment or authentication feature); §2B1.1(b)(13) (vehicles or goods part of cargo shipment); §2B1.1(b)(14) (risk of death or serious bodily; possession of weapon); §2B1.1(b)(15)(A)-(D) (gross receipts from financial institution; jeopardizing solvency of financial security of an institution or 100 or more victims). Others are related and, depending on the charges, could also be applied. See

means or was committed in substantial part outside the United States and sets a level-12 floor, could be triggered in appropriate cases; “loss,” the SOC which generally drives sentences calculated under §2B1.1, is defined to include “intended loss” and may be estimated according to the cost of developing that information;³⁰ adjustments in Chapter 3 can further enhance a sentence;³¹ and, finally, courts may depart or vary upward in truly egregious cases.

That said, NACDL continues to believe that §2B1.1 creates disparate sentencing results because it is primarily based on the ambiguous concept of “loss” which increases the offense level quickly and disproportionately to the harm in most cases. Section 2B1.1(b)(1) does not adequately consider other factors such as gain to the defendant, the defendant’s scienter, or other external factors affecting the loss. After having added SOCs, increased the base offense level, and expanded loss levels in 1989 (Savings & Loan), 2001 (Economic Crimes Package), and 2003 (Sarbanes-Oxley)—and points in between³²—the Commission should not add additional SOCs which are themselves non-correlative with culpability. Finally, Amendment 726 which added note 3(C) to §2B1.1 only became effective in November 2009, and there has not been enough time or prosecutions to see whether it is or is not sufficient to calculate loss that encompasses the relevant harm in trade secret cases.

4. *Should the Commission provide one or more additional enhancements to account for (A) the transmission or attempted transmission of a stolen trade secret outside of the United States; and (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? If so, under what circumstances should such an enhancement apply, and what level of enhancement should apply?*

USSG §2B1.1(b)(16) (violation of § 1030 for personal info); §2B1.1(b)(17) (violation of § 1030 ‘an offense involved a computer system used to maintain or operate a critical infrastructure’; “critical infrastructure defined in USSG §2B1.1, comment. (n.13(A)))). *See also* USSG §2B1.1, comment. (n.19(A)(iv)); USSG §2B1.1, comment. (n.19(A)(v)); USSG §2B1.1, comment. (n.19(B)).

³⁰ USSG §2B1.1, comment. (n. 3).

³¹ *E.g.*, USSG §3B1.1 (Aggravating role); §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

³² *See* USSG §2B1.1 Historical Note (citing approx. 44 amendments since 1987). The following amendments are in response to Congressional directives: Amend. No. 156 (Nov. 1, 1989); Amend. No. 317 (Nov. 1, 1990); Amend. No. 364 (Nov. 1, 1991); Amend. No. 513 (Nov. 1, 1995); Amend. No. 551 (Nov. 1, 1997) (adding 2-level enhancement for offenses involving trade secret thefts benefitting foreign government, instrumentality, or agents); Amend. No. 587 (Nov. 1, 1998); Amend. No. 596 (Nov. 1, 2000); Amend. No. 617 (Nov. 1, 2001); Amend. No. 637 (Nov. 1, 2002); Amend. No. 647 (Jan. 25, 2003); Amend. No. 654 (Nov. 1, 2003); Amend. No. 665 (Nov. 1, 2004); Amend. No. 699 (Nov. 1, 2007); Amend. No. 714 (Feb. 6, 2008); Amend. No. 719 (Nov. 1, 2008); Amend. No. 726 (Nov. 1, 2009)

No additional enhancements are necessary, and NACDL objects to any further enhancement to §2B1.1 based on the transmission or attempted transmission of the trade secret. NACDL has previously supported a comprehensive review of §2B1.1, suggesting that the Commission should obtain empirical evidence about the efficacy of the SOCs before further complicating the Guidelines. Simply adding enhancements will further exacerbate what many agree is an already unworkable and ineffective approach to sentencing in fraud cases.³³ Indeed, it would be more appropriate to provide for one or more multi-level reductions for defendants who, for example, gain nothing or little from the offense, in order to treat similarly situated defendants similarly regardless of the scale of the fraud.³⁴ As the Commission recently explained, in fraud cases, “the influence of the guidelines appear[] to have diminished over time in several measurable ways, including decreasing rates of non-government sponsored below ranges sentences”³⁵ The previous sections’ explanations are reasserted in support of NACDL’s position on this question.

5. *Should the Commission restructure the existing 2-level enhancement in subsection (b)(5) into a tiered enhancement that directs the court to apply the greatest of the following: (A) an enhancement of 2 levels if the offense involved the simple misappropriation of a trade secret; (B) an enhancement of 4 levels if the defendant transmitted or attempted to transmit the stolen trade secret outside of the United States; and (C) an enhancement of [5][6] levels if the defendant committed economic espionage, i.e., the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent?*

No. There is no empirical data to support further enhancement of the Guidelines in economic espionage cases. The “crime du jour” status of § 1831 does not justify harsher punishments than other frauds, and the benefit to a foreign government, instrumentality or agent is already an enhancement. Additional enhancement factors would merely pile on penalties already ungrounded in sentencing policy. No empirical evidence has been presented to justify these additional enhancements, nor can it. For example, in 2010, there were only 7 prosecutions brought under the EEA.³⁶ The Commission’s recent report confirms the effect of repeated

³³ Justice Breyer warned, “There is little, if anything, to be gained in terms of punishment’s classical objectives by trying to use highly detailed offense characteristics to distinguish finely among similar offenders. And there is much to be lost, both in terms of Guideline workability and even in terms of fairness (recall the Guidelines’ logarithmic numerical scales). . . . The precision is false.” See, e.g., Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent’g Rep. 180, 1999 WL 730985 (1999).

³⁴ See also USSG §3B1.2 (reduction for minor role).

³⁵ U.S. SENT’G COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, at Part A pp. 3, 67 (2013); U.S. SENT’G COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, at Part C: Fraud Offenses (2013).

³⁶ H.R. REP. NO. 112-610, at 5.

ratcheting up of fraud penalties: courts seeking to impose sufficient, but not greater than necessary, sentences compels them to sentence defendants *below* the recommended guideline sentences. “Average sentences for fraud offenses have nearly doubled between the *Koon* and *Gall* periods, increasing from 13 months during the *Koon* period to 25 months during the *Gall* period. This was due in part to changes to the guidelines that increased penalties, and in part to changes in the seriousness of fraud offenses, at least as measured by loss amount.”³⁷ To ensure the continued validity of the Guidelines and its proportionate and uniform goals, no unsupported SOCs should be added, tiered or otherwise. As it stands, the legislative history of FEEPEA merely consists of descriptions of the phenomenon of trade secret theft, not data-supported descriptions of the insufficiencies of the current Guidelines under which the perpetrators would be punished.

6. *Should the Commission 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?*

No. Any distinct aggravating circumstances are already adequately punished by enhancements, adjustments, and guided departures available to sentencing judges. If anything, the Commission should consider providing guidance regarding the importance of considering a defendant’s conduct in the context of the larger shifts (technological, economic, cultural, and geopolitical). In sum, the current scheme is sufficient to continue the problematic trend of placing more defendants in prison for longer periods of time.³⁸

It is worth noting that the directives to the Commission were amended in the Senate Judiciary Committee.³⁹ The original Senate bill instructed the Commission to consider amending the 2-level enhancement for economic espionage to apply to the simple misappropriation of a trade secret and add additional 2- and 3-level enhancements and a minimum offense level. The final directive contains no such explicit instructions, and the

³⁷ U.S. SENT’G COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, at Part C p. 1(2013). *Accord See* Alan Ellis, John R. Steer, Mark Allenbaugh, *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, 25 CRIM. JUST. 34, 37 (2011) (“the loss table often overstates the actual harm suffered by the victim,” and “[m]ultiple, overlapping enhancements also have the effect of ‘double counting’ in some cases,” while “the guidelines fail to take into account important mitigating offense and offender characteristics”).

³⁸ U.S. SENT’G COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, at Part A p. 59 (2013) (“The number of federal offenders and the percentage sentenced to imprisonment without any alternative to incarceration, such as home detention or community confinement, has increased over the periods studied in this report. In fiscal year 1996, there were 37,091 federal offenders, compared to 76,216 in fiscal year 2011. In fiscal year 2011, 87.8 percent of federal offenders were sentenced to serve a term of imprisonment without any alternative to incarceration, an increase from 76.9 percent in fiscal year 1996.³⁹² As a result of these trends, the number of inmates housed by the federal Bureau of Prisons has more than doubled, from just below 100,000 in 1996, to more than 200,000 in 2011.”).

³⁹ *Compare* S. 678, 112th Cong. § 1 (2011) (Introduced in Senate) with S. 678 (Reported in Senate).

Commission should therefore use the latitude Congress gave it to give effect to the principle of parsimony, the overarching instruction of 18 U.S.C. § 3553(a) that a sentence must be sufficient, but not greater than necessary to achieve statutory sentencing purposes. After all, even when there has been no “actual loss,” the Guidelines permit courts to estimate intended loss, ensuring that no defendants, even first-time offenders, will receive a non-prison sentence unless the court departs or varies downward. And, lest we forget, the EEA represents the federal government’s protection of private property rights through criminal prosecutions;⁴⁰ if national security interests are at issue, there are other statutes to vindicate the transgression.

Trade secrets come in many varieties, and the import of each trade secret to our nation’s interests is equally unique.⁴¹ Likewise, the circumstances of their misappropriation are equally context-driven.⁴² A minimum offense level removes sentencing courts’ discretion and ability to judge each defendant’s culpability and, within the rubric of the Guidelines, determine the appropriate sentence. A minimum offense level will encourage sentencing outside the Guidelines and undermine the goal of uniform, proportional sentencing.

Finally, apart from any periods of imprisonment and supervised release, a defendant convicted of a felony like § 1832 will face lifelong collateral consequences. Depending on the defendant’s professional field, such consequences may include debarment or loss of license. For all of the foregoing reasons, NACDL opposes any amendments to the Guidelines which would increase enhancements applicable to trade secret cases.

III. COUNTERFEIT AND ADULTERATED DRUGS; COUNTERFEIT MILITARY PARTS

The Commission is tasked with responding to recent legislation amending 18 U.S.C. § 2320 (trafficking in counterfeit goods and services) and 21 U.S.C. § 333 (penalties for violations of the Federal Food, Drug, and Cosmetics Act). NACDL offers the following comments in

⁴⁰ See Gerald J. Mossinghoff et al, *The Economic Espionage Act: A New Federal Regime of Trade Secret Protection*, 79 J. PAT. & TRADEMARK OFF. SOC’Y 191, 191 (1997) (“With the enactment [of the EEA], the Federal Government is set to move aggressively into the protection of private property rights in trade secrets.”).

⁴¹ See DEPT. OF JUSTICE, *Summary of Major U.S. Export Enforcement, Economic Espionage, Trade Secret and Embargo-Related Criminal Cases (January 2007 to the present: updated Feb. 14, 2013)* (Feb. 2013) available at <http://www.justice.gov/nsd/docs/export-case-fact-sheet.pdf> (last visited Mar. 1, 2013) (describing cases such as (pp. 13-14) “Military Technical Data and Trade Secrets to China” from 2012 in which defendant convicted of stealing files which detailed the performance and design of guidance systems for missiles, rockets, target locators, and unmanned aerial vehicles and (p.22) “Trade Secrets to Competitors in China” from 2012 in which defendants were indicted for stealing sales and proprietary pricing information related to an irrigation system).

⁴² Although guilty of the offense, some defendants may have potentially acted under duress or coercion. Cf. *Foreign Spies Stealing US Economic Secrets in Cyberspace, Report to Congress on Foreign Economic Collection and Industrial Espionage, 2009–2011*, OFFICE OF THE NATIONAL COUNTERINTELLIGENCE EXECUTIVE, p.5 (Oct. 2011) (“China’s intelligence services, as well as private companies and other entities, frequently seek to exploit Chinese citizens or persons with family ties to China who can use their insider access to corporate networks to steal trade secrets using removable media devices or e-mail.”).

response to the proposed amendments to the Sentencing Guidelines regarding counterfeit and adulterated drugs and counterfeit military parts:

1. *Offenses Under 18 U.S.C. § 2320 Involving Counterfeit Military Goods and Services*

In Part A of the proposed amendment, the Commission presents four options; three options each add a new specific offense characteristic to §2B5.3 while the fourth option references offenses under 18 U.S.C. § 2320(a)(3) to §2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities) or §2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities). After reviewing the options proposed by the Commission, NACDL recommends the Commission adopt Option 3. Although similar to Option 1, Option 3 is most appropriate because it limits its application to actual involvement by the defendant and requires the defendant's knowledge of the character of the good or service involved in the offense. Option 1, conversely, permits the general application of the proposed guideline to a defendant whose involvement in or knowledge of such offenses has not been established.

However, the Commission should avoid adding enhancements to this guideline. There does not appear to be a statistical basis for the increase in offense levels selected by the Commission. There is no evidence to demonstrate that existing Guidelines sentences are insufficient to meet legitimate purposes of sentencing. Absent such evidence, the Commission should refrain from adding enhancements to this guideline. Similarly, to avoid disproportionate stacking of enhancements in cases where the new specific offense characteristic and the existing one at §2B5.3(b)(5) both apply, those enhancements should not be cumulative.

NACDL opposes Option 2 because it does not contain sufficient particularity for the sentencing court to determine its application. Moreover, we reject Option 4 because it would risk disparity in sentences for 18 U.S.C. § 2320 offenses.

Regardless, NACDL is troubled by the multitude of undefined terms (*e.g.*, classified information, combat operations, significant harm, etc.) in both the statute and all of the options proposed by the Commission. To the extent the Commission fails to provide specific definition to these terms, that definition will be left to the sentencing court and risks disparate results. NACDL is also concerned with the sweeping language in those terms that are defined and encourages the Commission to consider narrowing the definitions to provide more specificity and guidance for defendants, prosecutors and judges alike.

2. *Offenses Under 18 U.S.C. § 2320 Involving Counterfeit Drugs (and Response to Directive)*

The Commission seeks comment on offenses under Title 18 U.S.C. § 2320 involving counterfeit drugs. Specifically the Commission seeks comment on the following:

- A. *Option 1 of the proposed amendments would provide a new specific offense characteristic in Section 2B5.3 for offenses involving counterfeit drugs. If the Commission were to adopt Option 1, how should this new specific offense characteristic interact with other specific offense characteristics in 2B5.3?*

NACDL urges the Commission to reject Option 1. Option 1 provides that any offense involving a counterfeit drug be increased to a 14-level offense irrespective of whether there was a risk of bodily injury or death or whether the offense involved a dangerous weapon. This is not consistent with the directive. Although the directive does consider an increase in penalties for offenses involving risk of serious bodily injury or death, a blanket increase to a minimum level 14 on all offenses involving counterfeit drugs, regardless of whether there are any aggravating factors present, is excessive and unnecessary.

- B. *How should it interact with the specific offense characteristic currently at 2B5.3 (b)(5), which provides a 2-level enhancement and a minimum offense level of 14 if the offense involved a risk of death or serious bodily injury or possession of a dangerous weapon? Should the new specific offense characteristic be fully cumulative with the current one, or should they be less than fully cumulative in cases where both apply?*

If the Commission selects Option 1, NACDL believes that the new specific offense should be less than fully cumulative and not include a minimum offense level increase to 14. It should only provide for an increase of two levels for offenses that involve counterfeit drugs because an increase of 4-levels or a minimum of level 14 is unwarranted. If the specific offense characteristics are fully cumulative, then an offense involving a counterfeit drug would be punished with the same severity as one involving a deadly weapon or a risk of bodily injury or death, irrespective of the latter's more serious nature.

- C. *If the Commission were to adopt Option 3, what changes, if any, should the Commission make to that guideline to better account for such offenses?*

NACDL does not recommend the adoption of Option 3 because it inappropriately ties the offense to a guideline that, by its own title, assumes the conduct involves a risk of death or bodily injury and carries a base offense level of 25. This will undoubtedly result in excessive and disproportionate punishment. The other options proposed by the Commission contemplate, at most, a base offense level of 14, with increases for conduct involving the possession of a deadly weapon or the risk of death or bodily injury. Option 3, however, would tie the trafficking of counterfeit drugs to §2N1.1 (Tampering or Attempting to Tamper Involving Risk or Death or Bodily Injury), carrying a base offense level of 25, even where the trafficking *does not* involve a deadly weapon or risk of bodily injury or death. These options present incredibly disparate

punishment levels—14 versus 25—for the exact same conduct and without any apparent justification. Although NACDL disagrees with establishing any minimum offense level for this conduct, should the Commission pursue such a mandate, NACDL urges the Commission to reject the excessive punishment scheme presented in Option 3 in favor of the more reasonable approach provided by Option 1.

D. What actual and potential harms to the public do such offenses pose?

An offense involving a counterfeit drug could result in something as serious as death or could result in something as minor as economic loss. For this reason, it is important that the other specific offense characteristics deal with the aggravating factors separately, thereby ensuring increases are proportionate to conduct severity, and not cumulatively.

E. What aggravating and mitigating circumstances may be involved in such offenses that are not already adequately addressed in the guidelines? For example, if death or serious bodily injury resulted from the offense, should that circumstance be addressed by a departure provision, by a specific offense characteristic, by a cross-reference to another guideline or in some other manner?

With regards to further enhancement for an offense resulting in death, NACDL does not recommend adding any further references under §2B5.3. NACDL recommends that the resulting death be addressed via a departure pursuant to §5K2.1. With respect to mitigating circumstances, we would recommend that the Commission retrofit the language found in §2D1.1 (b)(15)(A)(B)(C).

F. Does the new specific offense characteristic in Option 1, or the revised specific offense characteristic in Option 2, adequately respond to the directive? If not, what changes, if any, should the Commission make to 2B5.3 to better account for offenses under section 2320(a)(4) and the factors identified in the directive?

We recommend that Section 2B5.3 be amended to include the language provided in Option 2. We believe that this option better accounts for aggravating circumstances when sentencing an individual who was convicted of 18 U.S.C. § 2320(a)(4), Trafficking of Counterfeit Drugs. Option 2 provides for an increase of 4-levels if the offense involved a conscious or reckless risk of death or serious bodily injury versus the original 2-level increase which raises the overall offense level. This is consistent with the directive because it allocates a higher offense level to an offense that involves the ultimate risk of seriously bodily injury or death. Option 2 distinguishes offenses involving risk of death or bodily injury and offenses involving possession of a deadly weapon by allowing offenses involving possession of deadly weapons to remain at the current two-level increase. We agree that it is appropriate to

distinguish offenses that involve a risk to human life from those merely involving possession of a deadly weapon.

- G. *Does Option 3 of the proposed amendment -- referencing offenses involving counterfeit drugs to Section 2N1.1 -- adequately respond to the directive? If not, what changes, if any, should the Commission make to 2N1.1 to better account for offenses under 2320(a)(4) and the factors identified in the directive?*

As previously mentioned, Option 3 provides for an extremely excessive penalty level. While this may be responsive to the directive in that it increases the penalty, NACDL believes that an increase of that magnitude is unwarranted.

3. *Offenses Under 21 U.S.C. § 333(b)(7) Involving Intentionally Adulterated Drugs*

The Commission also seeks comments to offenses under 21 U.S.C. § 333(b)(7). Specifically, the Commission seeks comment to the following:

- A. *If the Commission were to reference offenses under section 333(b)(7) to Section 2N1.1, as the proposed amendment in Option 2 provides, what changes if any, should the Commission make to Section 2N1.1 to better account for offenses under Section 333(b)(7)?*

NACDL does not recommend the adoption of Option 2. As previously discussed the application of §2N1.1 under these circumstances is excessive. The statutory language in 21 U.S.C. § 333(b)(7) already allows for a maximum sentence of 20 years. Should the facts of a particular case warrant that severe of a penalty, it should be at the discretion of the judge.

- B. *If offenses under section 333(b)(7) are to be sentenced under section 2N2.1, what changes, if any should the Commission make to Section 2N2.1? For example should the Commission adopt Option 1, which would provide an alternative base offense level of 14 if the defendant was convicted under section 333(b)(7)? Should the Commission provide a different alternative base offense level instead? Or should the Commission provide additional specific offense characteristics, additional cross references, or a combination of such provisions to better account for offenses under Section 333(b)(7)? If so what provisions should the Commission provide?*

NACDL does not recommend adopting Option 1. We do not recommend providing an alternative base offense level or additional specific offense characteristics, cross references or a combination of the two. The statutory language already allows for a penalty to be imposed of up

to 20 years and already addresses the specific offense characteristic of risk of bodily injury and death.

- C. *How do offenses under 333(b)(7) and 2320(a)(4) compare to each other in terms of conduct involved in the offense, the culpability of the offenders, the actual and potential harms posed by the offense and other factors relevant to sentencing?*

Offenses under 21 U.S.C. § 333(b)(7) and 18 U.S.C. § 2320(a)(4) both potentially pose similar risks of harm or loss *i.e.* risks of bodily harm, death etc. or minimal economic loss consequences. Offenses under § 333(b)(7) involve a greater risk of harm because the very definition of an adulterated drug is that it contain or be made up of a substance that is poisonous, hazardous, unsanitary etc. Whereas under § 2320(a)(4), trafficking in counterfeit drugs, a harmless placebo sugar pill could be considered a counterfeit drug.

- D. *Which offenses should be treated more seriously under the guidelines and which should be treated less seriously?*

Offenses under 21 U.S.C. § 333(b)(7) are already treated more severely than offenses under 18 U.S.C. § 2320 (a)(4) because of the inherent risk in intentionally adulterating a drug that could later be consumed by a human or animal. NACDL does not believe additional enhancements are appropriate or necessary.

IV. TAX DEDUCTIONS

The Commission seeks comments on the three options it has presented for amending the Commentary to §2T1.1 of the Guidelines to resolve a circuit conflict over whether a sentencing court, in computing tax loss, may consider unclaimed credits, deductions, or exemptions that a defendant legitimately could have claimed if he or she had filed an accurate tax return. Because the amount of tax loss is the primary factor driving the advisory Guidelines sentence in a tax case, the resolution of this issue will have a significant impact on sentencing in criminal tax cases.

NACDL strongly supports Option 1, which provides that “the determination of the tax loss shall account for any credit, deduction, or exemption to which the defendant was entitled, whether or not the defendant claimed the deduction at the time the tax offense was committed,” and strongly objects to Option 2, which provides to the contrary that “the determination of the tax loss shall not account for any credit, deduction, or exemption, unless the defendant was entitled to the credit, deduction, or exemption and claimed [it] at the time the tax offense was committed.” As the Commission is well aware, the Second and Tenth Circuits have already

adopted an approach similar to Option 1, and NACDL agrees for the most part with their reasons for doing so.⁴³

As the Tenth Circuit has recognized, “[n]othing in the Guidelines prohibits a sentencing court from considering evidence of unclaimed deductions in analyzing a defendant’s estimate of the tax loss suffered by the government.”⁴⁴ In fact, Option 1 is consistent with §2T1.1(c)(1)’s instruction that the tax loss shall be equal to 28% of unreported gross income, 28% of improperly claimed deductions or exemptions, and 100% of false credits claimed against tax, “*unless a more accurate determination of the tax loss can be made.*” (Emphasis added.)⁴⁵ If a defendant can prove that he or she was entitled to an unclaimed credit, deduction, or exemption, then a sentencing court can make a more accurate determination of the *actual* tax loss to the government, and there is no logical reason why it should not do so in fashioning an appropriate and fair sentence.

Further, the government “cannot claim to have lost revenue it never would have collected had the defendant not evaded his taxes,” and it should “not . . . reap windfall gains as a result of tax evasion.”⁴⁶ It is perhaps for these reasons that restitution in a criminal tax case is “based on the amount of the [tax] loss *actually* caused by the defendant,” which includes any unclaimed credits, deductions, or exemptions to which the defendant was entitled.⁴⁷ Courts that have refused to consider unclaimed credits, deductions, or exemptions for sentencing purposes because they believe that such unclaimed items may be difficult to compute ignore the fact that similar adjustments are considered, and often agreed to by the parties, for purposes of computing restitution. There is no persuasive reason to allow calculation of actual loss in the determination of restitution and not in the determination of the applicable Guidelines range. Option 1 would resolve such discrepancy, while Option 2 would only perpetuate it.

Adopting Option 1 would be another step in the evolution of §2T1.1’s language – from the pre-1991 version of §2T1.1 that prohibited consideration of unclaimed credits, deductions, or exemptions, to the current version of §2T1.1 that does not prohibit, but instead encourages, consideration of such unclaimed items.⁴⁸ Indeed, although the Department of Justice’s official

⁴³ See *United States v. Hoskins*, 654 F.3d 1086, 1094-96 (10th Cir. 2011); *United States v. Gordon*, 291 F.3d 181, 187 (2d Cir. 2002); *United States v. Martinez-Rios*, 143 F.3d 662, 671 (2d Cir. 1998).

⁴⁴ *Hoskins*, 654 F.3d at 1094.

⁴⁵ See *Martinez-Rios*, 143 F.3d at 671 (under § 2T1.1(c)(1)(A), “the sentencing court need not base its tax loss calculation on gross unreported income if it can make ‘a more accurate determination’ of the intended loss and that determination of the tax loss involves giving the defendant the benefit of legitimate but unclaimed deductions”).

⁴⁶ *Hoskins*, 654 F.3d at 1095.

⁴⁷ *United States v. Psihos*, 683 F.3d 777, 782 (7th Cir. 2012) (emphasis added).

⁴⁸ *Hoskins*, 654 F.3d at 1096.

position is that a sentencing court should not consider unclaimed items in computing tax loss, it recently deviated from this position in a published case,⁴⁹ and the Chief of the Tax Division in the United States Attorney's Office for Central District of California also recently stated that "where there is legitimate evidence of unclaimed deductions, we're not necessarily going to walk away from that," as "we do want to get to the right number."⁵⁰

To the extent that the Commission refuses to adopt Option 1, NACDL strongly encourages the Commission to adopt Option 3, which provides that "the determination of the tax loss shall not account for any unclaimed credit, deduction, or exemption, unless the defendant demonstrated by contemporaneous documentation that the defendant was entitled to the credit, deduction, or exemption." NACDL does not understand the need for a "contemporaneous documentation" requirement where a defendant can otherwise prove that he or she was entitled to an unclaimed credit, deduction, or exemption. Sentencing courts do not require contemporaneous documentation in order to consider unclaimed credits, deductions, or exemptions for restitution purposes, and there obviously is no general requirement in the tax laws that a taxpayer have contemporaneous documentation in order to claim a credit, deduction, or exemption. Nevertheless, Option 3 is a more reasoned and fairer approach than Option 2 because it allows for some consideration of the actual tax loss suffered by the government.

NACDL's responses to the Commission's specific issues for comment are set forth below:

1. *If the Commission were to adopt Option 1 or 3, what requirements, if any, should be met before an unclaimed deduction is counted, other than the requirement that the unclaimed deduction be legitimate? In particular:*
 - A. *Should a legitimate but unclaimed deduction be counted only if the defendant establishes that the deduction would have been claimed if an accurate return had been filed? If so, should this determination be a subjective one (e.g., this particular defendant would have claimed the deduction) or an objective one (e.g., a reasonable taxpayer in the defendant's position would have claimed the deduction)?*

NACDL strongly favors an objective determination that allows for the consideration of unclaimed credits, deductions, or exemptions that a defendant could have claimed if he or she

⁴⁹ See *United States v. Tilga*, 824 F. Supp. 2d 1295, 1321 (D.N.M. 2011) (noting that, contrary to its "official position," the government argued that the court "should consider" the Tenth Circuit's holding in *Hoskins* "that a sentencing court does not abuse its discretion in considering well-supported but unclaimed tax deductions when calculating tax loss for purposes of USSG § 2T1.1").

⁵⁰ Jeremiah Coder, "ABA Meeting: DOJ Officials Discuss Calculating Tax Loss for Restitution and Sentencing," *Tax Analysts* (May 15, 2004).

filed an accurate return. Such an approach is the only way to measure the true and actual tax loss to the government, which is the difference between the taxes due if an accurate return, including all legitimate credits, deductions, and exemptions, had been filed, less the amount actually paid by the defendant. Computing such an amount should be the foremost objective in determining a defendant's sentence in a tax case.

NACDL opposes a subjective determination because it would be difficult for a defendant to prove (other than through testimony that could be interpreted as self-serving) that he or she personally would have claimed a credit, deduction, or exemption. In other words, a subjective determination would effectively gut Option 1 or 3 and, in most cases, would prevent courts from computing the actual tax loss to the government.

B. Should a legitimate but unclaimed deduction be counted only if it is related to the offense? See United States v. Hoskins, 654 F.3d 1086, 1095 n.9 (10th Cir. 2011) (“We must emphasize, however, that §2T1.1 does not permit a defendant to benefit from deductions unrelated to the offense at issue.”); see also United States v. Yip, 592 F.3d 1035, 1040 (9th Cir. 2010) (“[D]eductions are not permissible if they are unintentionally created or are unrelated to the tax violation, because such deductions are not part of the ‘object of the offense’ or intended loss.”).

NACDL disagrees with the Tenth Circuit's position in *Hopkins* that, to be considered, an unclaimed credit, deduction, or exemption must be related to the defendant's tax offense, and notes that the Second Circuit has not adopted such a requirement. As previously discussed, for sentencing purposes the tax loss should be the actual loss to the government – the difference between the taxes due if an accurate return, with all legitimate credits, deductions, and exemptions, had been filed, less the amount actually paid by the defendant. There is no logical reason for requiring that an unclaimed credit, deduction, or exemption be related to the offense. As the dissenting opinion in *Hoskins* aptly noted, it “makes more sense to permit unrelated deductions precisely because they are unrelated to the offense and, thus, not part of the tax evasion scheme to be addressed at sentencing.”⁵¹

C. Are there differences among the various types of tax offenses that would make it appropriate to have different rules on the use of unclaimed deductions? If so, what types of tax offenses warrant different rules, and what should those different rules be? Additionally, are there certain cases in which the legitimacy of the deductions, credits, or exemptions and the likelihood that the defendant would have claimed them had an accurate return been filed is evident by the nature of the crime? For example, if a

⁵¹ *Hoskins*, 654 F.3d at 1103 (Briscoe, C.J., concurring in part and dissenting in part).

restaurant owner failed to report some gross receipts and made some payments to employees or vendors in cash, but actually keeps two sets of books (one accurate and one fraudulent), should the unclaimed deductions reflected in the accurate set of books be counted?

There should be no differences between the various types of tax offenses for purposes of considering unclaimed credits, deductions, or exemptions. The tax loss should be the actual loss to the government regardless of the type of tax offense at issue. While it may be easier for a defendant convicted of certain types of tax offenses to prove that he or she was entitled to an unclaimed credit, deduction, or exemption, it would be unfair from a policy perspective not to allow defendants who are convicted of other types of tax offenses to prove the same.

2. *The proposed amendment presents options for resolving the circuit conflict, each of which is based on whether a defendant's tax loss may be reduced by unclaimed "credits, deductions, or exemptions." The Commission seeks comment regarding whether this list of potential offsets provides sufficient clarity as to what the court may or may not consider depending on which option is chosen. In particular, should the Commission expand the language to clarify that the list includes any type of deduction? See, e.g., United States v. Psihos, 683 F.3d 777, 781-82 (7th Cir. 2012) (noting a dispute between the parties regarding whether the unclaimed cash payments at issue were to be used in computing adjusted gross income (an "above-the-line" deduction) or to be used in computing taxable income (a "below-the-line" deduction)).*

NACDL interprets the language in Options 1 and 3 that a sentencing court may consider any unclaimed credit, deduction, or exemption as applying to any type of credit, deduction, or exemption. To the extent that the Commission or others submitting comments believes otherwise, NACDL does not oppose additional language to further clarify that either option applies to any type of credit, deduction, or exemption.

V. ACCEPTANCE OF RESPONSIBILITY

1. *Whether the District Court Has Discretion to Deny the Third Level of Reduction*

The Commission proposes amending the acceptance of responsibility guideline, USSG §3E1.1, to grant the district court "discretion to deny the third level of reduction."⁵² NACDL opposes the proposed amendment as contrary to a specific directive of Congress and the rulings of all circuits but one to address this issue. To inject the concept of discretion into this determination would improperly conflate a factual finding with the district court's responsibility to impose a reasonable sentence under 18 U.S.C. § 3553(a). To the extent any amendment is

⁵² Fed. Reg. Notice at 55.

necessary, the commentary to USSG §3E1.1 should be amended to clarify that the sentencing court has no discretion to deny a government motion authorizing the third level reduction.

In its current form, which incorporates specific amendments mandated by Congress in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (the “PROTECT Act”), §3E1.1(b) directs the district court to decrease the offense level by one additional level when three conditions are met: (a) the defendant has qualified for a two-level decrease under USSG §3E1.1(a) (requiring that he “has clearly demonstrate[d] acceptance of responsibility for his offense”); (b) the offense level is 16 or greater; and (c) the government has made a motion for the reduction, stating that the defendant has “timely” notified authorities of his intention to plead, thereby avoiding the expense of trial preparation.⁵³ The word “decrease” is used in the guideline in the imperative tense and without precatory verbs, thus indicating that the reduction *must* be applied once these three criteria are satisfied. The active verb denotes a ministerial not a discretionary function.⁵⁴ The Seventh Circuit’s conclusion in *Mount* is consistent with all other circuits but one that have addressed the issue.⁵⁵ It is also consistent with

⁵³ The specific language of the guideline provides as follows:

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government 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, *decrease the offense level by 1 additional level.*

USSG §3E1.1 (emphasis added).

⁵⁴ See *United States v. Mount*, 657 F.3d 1052, 1057 (7th Cir. 2012) (the language of §3E1.1(b) is mandatory; “subsection (b) ‘directs rather than allows the sentencing court to reduce the defendant’s offense level if the qualifying conditions are met’”) (quoting *United States v. Townsend*, 73 F.3d 747, 755 (7th Cir. 1996)).

⁵⁵ See *United States v. Divens*, 650 F.3d 343, 346 (4th Cir. 2011) (“once the Government has exercised that discretion and determined that a defendant has in fact alleviated the burden of trial preparation, the defendant merits an additional reduction”); *United States v. Mackety*, 650 F.3d 621, 627 (6th Cir. 2011) (noting that it was “Congress’ intent that the Government make the decision whether to move for the additional one-level reduction under § 3E1.1(b)”); *United States v. Johnson*, 581 F.3d 994, 1001 n.5 (9th Cir. 2009) (“the purpose of the 2003 amendments to § 3E1.1(b) . . . was to assign control of the availability of the additional reduction point to the prosecution”); *United States v. Stacey*, 531 F.3d 565, 567 (8th Cir. 2008) (“[t]he 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”) (quoting *United States v. Rice*, 184 F.3d 740, 742 (8th Cir.1999)). Cf., *United States v. Williamson*, 598 F.3d 227 (5th Cir. 2010) (“no reason to conclude that, by making a government motion a prerequisite, Congress divested the sentencing court of its independent authority to determine whether § 3E1.1(b) has been satisfied”); see also *Mount*, 657 F.3d at 1058 (noting that *Williamson* is in considerable tension with prior cases from the Fifth circuit, including *United States v. Tello*, 9 F.3d 1119, 1124 (5th Cir.1993)).

all circuits that addressed the predecessor of the current version of §3E1.1, which contained identical mandatory language.⁵⁶

Notably, when Congress reviewed this guideline in 2003 and amended it directly to add the requirement of a government motion,⁵⁷ Congress chose to maintain the imperative language of the existing guideline.⁵⁸ Needless to say, Congress knows how to confer discretionary authority, and in this context, elected not to do so. This was no oversight. Congress' overall purpose in making this and other amendments to the Sentencing Guidelines in the PROTECT Act was to *limit*, not expand, judicial discretion. As the Conference Report accompanying the amendments explains, the goal of these amendments to the Guidelines was to address the "longstanding problem of downward departures" in cases involving "sexual abuse."⁵⁹ Moreover, in delegating to the government the decision to determine whether the defendant's guilty plea was "timely," Congress made clear that this was because the government was in the best position

⁵⁶ See, e.g., *United States v. Rood*, 281 F.3d 353, 357 (2d Cir.2002) ("granting the additional one-level decrease in Section 3E1.1(b) is not discretionary where defendant satisfies the guideline's criteria"); *United States v. McPhee*, 108 F.3d 287, 289-90 (11th Cir.1997); *United States v. Talladino*, 38 F.3d 1255, 1264 (1st Cir.1994) (§ 3E1.1 "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. Tello*, 9 F.3d 1119, 1128 (5th Cir.1993) ("any fair and reasonable reading of [the text and commentary of section 3E1.1] . . . demonstrates" that these provisions "eschew any court discretion to deny the one-level reduction").

⁵⁷ Section 401(g) of the PROTECT Act provides as follows:

REFORM OF GUIDELINES GOVERNING ACCEPTANCE OF RESPONSIBILITY.--Subject to subsection (J), the Guidelines Manual promulgated by the Sentencing Commission pursuant to section 994(a) of title 28, United States Code, is amended-

(1) in section 3E1.1(b)- (A) by inserting "upon motion of the government stating that" immediately before "the defendant has assisted authorities" and (B) by striking "taking one or more" and all that follows through and including "additional level" and insert "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid pre-paring for trial and permitting the government and the court to allocate their resources efficiently, *decrease the offense level by 1 additional level*"

(2) in the Application Notes to the Commentary to section 3E1.1, by amending Application Note 6-(A) by striking "one or both of"; and (B) by adding the following new sentence at the end: "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."; and (3) in the Background to section 3E1.1, by striking "one or more of".

PROTECT Act, Pub. L. No. 108-21, Title IV, § 401(g) (emphasis added).

⁵⁸ See PROTECT Act, § 401(g) (inserting the prerequisite of a government motion, but expressly keeping intact the directive "decrease by 1 additional level"); see *Divens*, 650 F.3d at 346 n.1 ("Congress's decision to amend the commentary in 2003 but leave intact the existing mandatory language provides additional evidence of congressional approval of the mandatory language").

⁵⁹ H.R. Rep. 108-66 at 58, 2003 U.S.C.C.A.C. 683 (2003).

to determine if it had been required to expend resources preparing for trial.⁶⁰ The Commission's proposal, therefore, to super-impose a discretionary component to the district court's analysis of the applicability of §3E1.1 would contradict the specific congressional mandate in the PROTECT Act that the court "decrease" the offense level by one point if the three criteria for the reduction have been met.⁶¹

Without explanation, the Commission proposes adopting the Fifth Circuit's conclusion in *United States v. Williamson*, 598 F.3d 227, 230 (5th Cir.2010), that the decision to grant a third level reduction belongs to the district court, not the government. The Fifth Circuit is an outlier on this issue and its reasoning is flawed on several grounds. First, it asserted that no language in §3E1.1(b) *precluded* a role for the district court in determining whether the defendant's plea had permitted the government to avoid preparing for trial.⁶² The mandatory language of §3E1.1(b), however, "instructing the district court how to calculate the offense level when the government has made the necessary motion . . . is a textual argument that cuts against the Fifth Circuit's approach."⁶³ Second, the court relied on commentary to the guideline that highlighted the sentencing court's unique position to assess acceptance of responsibility.⁶⁴ This note, however, relates to the court's assessment of the defendant's eligibility for the two-level adjustment under §3E1.1(a), which is a pre-requisite to a finding that a reduction under §3E1.1(b) is applicable, but sheds no light on the district court's role with respect to §3E1.1(b).⁶⁵ Finally, the *Williamson* court relied on the Guideline commentary inserted by Congress in the PROTECT Act to the effect that the third level "may only" be granted upon motion of the government.⁶⁶ The Fifth Circuit deemed the use of the word "may" to indicate that the court's power to grant the third level reduction was "permissive."⁶⁷ The word "may," however can be permissive or mandatory,

⁶⁰ See PROTECT Act, § 401(g)(2)(B) ("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 also *United States v. Smith*, 429 F.3d 620, 628 (6th Cir.2005) ("Congress made clear its purpose in amending § 3E1.1 (b) to require a government motion: The government is in the best position to know whether it has conserved resources").

⁶¹ See *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (Commission "must bow to the specific directives of Congress").

⁶² *Williamson* at 229.

⁶³ *Mount*, 657 F.3d at 1059.

⁶⁴ See § 3E1.1, n.5.

⁶⁵ See *Mount*, 675 F.3d at 1057-58.

⁶⁶ See PROTECT Act, § 401(g)(2).

⁶⁷ *Williamson*, 598 F.3d at 230.

depending on the context.⁶⁸ Here, when the word “may” is viewed in conjunction with its following word “only,” it is clear that Congress is not granting permissive authority, but simply setting forth the conditions under which the decrease may be given.⁶⁹

In sum, the congressional directive and precedent dictate that when the three prerequisites for a §3E1.1(b) reduction are met, the district court has no discretion to deny the government’s motion in support of it. The Guidelines are, of course, advisory, and the district court is always free to take into account any non-invidious factors – including facts relating to the defendant’s timely acceptance of responsibility – in fashioning a sentence that is “sufficient, but not greater than necessary” under 18 USC § 3553(a).⁷⁰

2. *Whether the Government May Withhold a § 3E1.1(b) for Reasons Other Than Trial Preparation?*

The Commission also seeks comment on “whether the government has discretion to withhold making a motion under subsection (b) when there is no evidence that the government was required to prepare for trial.”⁷¹ NACDL proposes that the commentary to §3E1.1(b) be amended to clarify that the government may only withhold the motion if it has been required to prepare for trial, and not for any other reason, such as the preparation of a hearing, or the anticipation of an appeal. This position is consistent with the congressional directive in the PROTECT Act, which in amending the guideline and its related commentary in 2003, focused on the timeliness of the defendant’s guilty plea and thus the efficient allocation of trial resources.

First, the plain language of the amended guideline clearly limits the grounds of the government’s motion to one form of assistance from the defendant: “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.” USSG §3E1.1(b). Thus, entry of a timely guilty plea is the only action required of a defendant to qualify for a one-level reduction.⁷² The guideline makes no mention of preparing for any

⁶⁸ See *United States v. Rodgers*, 461 U.S. 677, 706 (1983) (although the word “may” in a statute “usually implies some degree of discretion[, t]his common-sense principle of statutory construction ... can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute”).

⁶⁹ See *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 166 (2004) (natural meaning of word “may” in the context at issue was that it authorized a particular action upon establishment of certain conditions).

⁷⁰ See *Mount*, 657 F.3d at 1059 (“the correct computation of the advisory guideline range” is an entirely separate matter from “the district court’s duty to evaluate the outcome of that computation and then to impose . . . a reasonable sentence”).

⁷¹ Fed. Reg. Notice at 58.

⁷² See *Divens*, 650 F.3d at 348 (“ ‘timely’ entry of a ‘plea of guilty’ . . . entails only an unqualified ‘confession of guilt in open court’”) (*quoting* Black’s Law Dictionary 1152 (6th ed.1990)); see also *Johnson*, 581 F.3d at 1008

other kind of hearing; nor does it make any mention of an appeal. As the court in *Divens* elaborates, “the text of § 3E1.1(b) reveals a concern for the efficient allocation of *trial* resources, not *appellate* resources . . . Had Congress also intended to conserve appellate court resources, it would have referred to ‘courts,’ not ‘the ‘court.’”⁷³

Second, had Congress intended to grant more expansive discretion to the government to withhold its motion on any rational interest, as some circuits have held,⁷⁴ it could have done so, but it did not. Congress adopted the mandatory language of the original guideline commentary, which explains that “[s]ubsection (b) *provides* an additional 1–level decrease in offense level for a defendant . . . who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b).”⁷⁵ The background commentary adds “that “[s]uch a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, *thereby* appropriately *meriting* an additional reduction.” (emphasis added). These comments make clear that the government’s discretion to make a motion pursuant to §3E1.1(b) is limited to the determination of whether the defendant has avoided the allocation of resources associated with trial preparation by timely making known his intention to plead.⁷⁶

Third, this conclusion is reinforced by Congress’ justification for the motion requirement. As Congress clarified, “[b]ecause 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.”⁷⁷ Thus, the stated purpose of adding the motion requirement makes clear that

(Smith, J., concurring) (“the section contemplates that the means by which the defendant both saves trial preparation and permits efficient resource allocation, is through a timely guilty plea”).

⁷³ 650 F.3d at 348 (emphasis in the original); *see also United States v. Lee*, 653 F.3d 170, 174 n.1 (2d Cir. 2011) (noting that while the amended language of §3E1.1(b) “requires a government motion, it still refers to ‘permitting the government to avoid preparing *for trial*’” not a *Fatico* hearing) (emphasis in the original).

⁷⁴ *See, e.g., United States v. Deberry*, 576 F.3d 708 (7th Cir.2009); *United States v. Johnson*, 581 F.3d 994 (9th Cir.2009); *United States v. Beatty*, 538 F.3d 8 (1st Cir.2008); *United States v. Newson*, 515 F.3d 374 (5th Cir.2008).

⁷⁵ §3E1.1(b), cmt. 6 (emphasis added).

⁷⁶ *See Divens*, 650 F.3d at 347 (noting that Congress could have amended the §3E1.1(b) commentary to conform it to the wider discretion afforded the government under §5K1.1 but “instead left unchanged §3E1.1(b)’s mandatory commentary and inserted language suggesting that the Government’s newfound discretion applies only to the question of ‘whether the defendant has assisted authorities in a manner that avoids preparing for trial’”).

⁷⁷ §3E1.1(b), cmt. 6 (added by Congress in PROTECT Act, Pub.L. No. 108–21, § 401(g)) (emphasis added).

this decision was being delegated to the government so that it could make a determination about the allocation of trial resources.⁷⁸

Finally, there are strong policy grounds for confining the government's authority to withhold a §3E1.1(b) motion to situations where the defendant's untimely plea notice forced the government to prepare for trial. As the Supreme Court acknowledged last year, the criminal process is "a system of pleas, not a system of trials."⁷⁹ With 97% of federal cases ending in a guilty plea, errors in this "system of pleas" are not remedied by the guarantee of a fair trial, because most defendants are deterred from exercising that right by the longer sentence that will inevitably be imposed after trial. Indeed, "the longer sentences exist on the books largely for bargaining purposes."⁸⁰ Errors are therefore addressed in other ways: through effective representation; through procedural hearings where the government's conclusions and/or evidence is challenged; and through appeals. To permit the government to condition the point for timely acceptance on hearing or appellate waivers further diminishes the transparency of this "system of pleas" and increases the risk of wrongful conviction.⁸¹

In sum, neither the text of, nor the commentary to, §3E1.1(b), as amended by Congress, permits the government to withhold a §3E1.1(b) motion on the basis of any interest other than avoiding preparing for trial. Policy concerns also militate in favor of limiting the government's discretion in this context. To the extent courts have held otherwise, the commentary should be amended to make this interpretation clear.

VI. SETSER

The Sentencing Commission has proposed amending USSG §5G1.3 to incorporate the recent case of *Setser v. United States*, 132 S.Ct. 1463 (2012). The proposed amendment expands USSG §5G1.3(b) and (c) to apply to "anticipated" sentences in addition to "undischarged" sentences. NACDL proposes that this amendment be confined to the circumstances presented in *Setser*: sentences anticipated due to the revocation of parole, probation or supervised release.

⁷⁸ See *Stinson v. United States*, 508 U.S. 36, 38 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or [is] a plainly erroneous reading of, that guideline").

⁷⁹ *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012); *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (quoting *Lafler*, 132 S.Ct. at 1388)).

⁸⁰ *Frye*, 132 S.Ct. at 1407 (quoting Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L.Rev. 989, 1034 (2006)); see also *Lafler*, 132 S.Ct. at 1397 ("plea-bargaining a-plenty . . . presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense") (Scalia, J., dissenting).

⁸¹ See, e.g., Findley & Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 291-92 (2006) (noting that DNA exonerations "have challenged the traditional assumption that the criminal justice system does all it can to accurately determine guilt, and that erroneous conviction of the innocent is . . . 'extremely rare'") (citation omitted).

In *Setser*, the Court held that a district court has discretion to order a federal sentence to run “consecutively to [an] anticipated state sentence in the [defendant’s] probation revocation proceeding.”⁸² The sentence was reasonably “anticipated” in that situation, because the federal conviction violated Setser’s probation. The district court also ordered the federal sentence to run concurrently to any sentence imposed in connection with new drug charges pending against Setser in state court. This portion of the sentence was not appealed, and thus, the Court did not have occasion to address whether a district court could order consecutive or concurrent sentencing with respect to a sentence that is simply a theoretical possibility. Important differences exist between a sentence anticipated in the context of a revocation proceeding, and a potential sentence in a criminal proceeding where no finding of guilt has occurred. When a defendant, like Setser, has a pending petition for revocation and is being sentenced on unrelated charges in federal court, a sentence from the revocation is almost inevitable, and thus reasonably anticipated. The defendant has already been found guilty of the underlying crime, and the state need only prove the basis for the revocation by a preponderance of the evidence. By contrast, a defendant with new charges that have not been adjudicated still has the benefit of the higher reasonable doubt standard, presumption of innocence, and his Fifth Amendment right against self-incrimination, among other rights guaranteed a person charged of a crime. No sentence can be anticipated, because no finding of guilt has been made.

Accordingly, NACDL recommends that any incorporation of the *Setser* case into the Guidelines be limited to the specific holding in that case: anticipated sentences from a revocation of probation, parole, or supervised release. It would therefore not apply, for example, to a defendant with an outstanding arrest or pending state charges, who is presumed innocent and whose conviction and sentence is subject to the government proving the case beyond a reasonable doubt. Allowing a district court to order a federal sentence to run consecutive to an “anticipated sentence,” when no finding of guilt has even been made by the other tribunal, interferes with the defendant’s presumption of innocence and requires the defendant to litigate the pending charges as part of the federal sentencing, potentially jeopardizing his defense and Fifth Amendment rights in the pending proceeding. In sum, *Setser*’s holding should be limited to cases of revocation of parole, probation, and supervised release, in which the district court can reasonably expect a subsequent sentence to be issued by the other tribunal because the federal charges alone likely would be a basis to support the revocation. Expanding it beyond anticipated sentences of revocation goes beyond the Court’s holding and interferes with the defendant’s right in the anticipated but yet unresolved case.

⁸² *Id.* at 1473.

CONCLUSION

We are grateful for the opportunity to submit public comment on behalf of our membership and respectfully urge your utmost consideration. Thank you.

Respectfully,

A handwritten signature in black ink, appearing to read 'SDB', with a stylized flourish extending to the right.

Steven D. Benjamin

President, National Association of Criminal Defense Lawyers