

classified as loss, off-balance-sheet items classified as loss, any expenses that are necessary for the institution to record in order to replenish its general valuation allowances to an adequate level, and estimated losses on contingent liabilities. The Board and the OCC expect their supervised institutions to promptly recognize examiner-identified losses, but the requirement is not explicit under their capital rules. Instead, the Board and the OCC apply their supervisory authorities to ensure that their supervised institutions charge off any identified losses.

Subsidiaries of Savings Associations

There are special statutory requirements for the agencies' capital treatment of a savings association's investment in or credit to its subsidiaries as compared with the capital treatment of such transactions between other types of institutions and their subsidiaries. Specifically, the Home Owners' Loan Act (HOLA) distinguishes between subsidiaries of savings associations engaged in activities that are permissible for national banks and those engaged in activities that are not permissible for national banks.¹⁸ When subsidiaries of a savings association are engaged in activities that are not permissible for national banks,¹⁹ the parent savings association generally must deduct the parent's investment in and extensions of credit to these subsidiaries from the capital of the parent savings association. If a subsidiary of a savings association engages solely in activities permissible for national banks, no deduction is required and investments in and loans to that organization may be assigned the risk weight appropriate for the activity.²⁰ As the appropriate federal banking agencies for federal and state savings associations, respectively, the OCC and the FDIC apply this capital treatment to those types of institutions. The Board's regulatory capital framework does not apply to savings associations and therefore does not include this requirement.

Tangible Capital Requirement

Federal statutory law subjects savings associations to a specific tangible capital requirement but does not similarly do so with respect to banks. Under section

5(t)(2)(B) of HOLA, savings associations are required to maintain tangible capital in an amount not less than 1.5 percent of total assets.²¹ The capital rules of the OCC and the FDIC include a requirement that covered savings associations maintain a tangible capital ratio of 1.5 percent.²² This statutory requirement does not apply to banks and, thus, there is no comparable regulatory provision for banks. The distinction is of little practical consequence, however, because under the Prompt Corrective Action (PCA) framework, all institutions are considered critically undercapitalized if their tangible equity falls below 2 percent of total assets.²³ Generally speaking, the appropriate federal banking agency must appoint a receiver within 90 days after an institution becomes critically undercapitalized.²⁴

Enhanced Supplementary Leverage Ratio

The agencies adopted enhanced supplementary leverage ratio standards that take effect beginning on January 1, 2018.²⁵ These standards require certain bank holding companies to exceed a 5 percent supplementary leverage ratio to avoid limitations on distributions and certain discretionary bonus payments and also require the subsidiary institutions of these bank holding companies to meet a 6 percent supplementary leverage ratio to be considered "well capitalized" under the PCA framework.²⁶ The rule text establishing the scope of application for the enhanced supplementary leverage ratio differs among the agencies. However, the distinction is of little practical consequence at this time because the rules of each agency apply the enhanced supplementary leverage ratio to the same set of bank holding companies. The Board applies the enhanced supplementary leverage ratio standards to bank holding companies identified as global systemically important bank holding companies as defined in 12 CFR 217.2 and those bank holding companies' Board-supervised, institution subsidiaries.²⁷ The OCC and the FDIC apply enhanced

supplementary leverage ratio standards to the institution subsidiaries under their supervisory jurisdiction of a top-tier bank holding company that has more than \$700 billion in total assets or more than \$10 trillion in assets under custody.²⁸

Dated: January 11, 2018.

Grace E. Dailey,

Senior Deputy Comptroller and Chief, National Bank Examiner, Office of the Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, January 11, 2018.

Ann E. Misback,

Secretary of the Board.

Dated at Washington, DC, this 19th day of January 2018.

By order of the Board of Directors, Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2018-01434 Filed 1-25-18; 8:45 am]

BILLING CODE 4810-33-P; 6210-01-P; 6714-01-P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth several issues for comment, some of which are set forth together with the proposed amendments, and one of which (regarding retroactive application of proposed amendments) is set forth in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: (1) *Written Public Comment.*—Written public comment regarding the proposed amendments and issues for comment set forth in this notice,

²¹ See 12 U.S.C. 1464(t)(1)(A)(ii) and (t)(2)(B).

²² See 12 CFR 3.10(a)(6) (OCC); 12 CFR 324.10(a)(6) (FDIC). The Board's regulatory capital framework does not apply to savings associations and, therefore, does not include this requirement.

²³ See 12 U.S.C. 1831o(c)(3); see also 12 CFR 6.4 (OCC); 12 CFR 208.45 (Board); 12 CFR 324.403 (FDIC).

²⁴ 12 U.S.C. 1831o(h)(3)(A).

²⁵ See 79 FR 24528 (May 1, 2014).

²⁶ See 12 CFR 6.4(c)(1)(iv)(B) (OCC); 12 CFR 208.43(b)(1)(iv)(B) (Board); 12 CFR 324.403(b)(1)(v) (FDIC).

²⁷ See 80 FR 49082 (August 14, 2015).

²⁸ See 12 CFR 6.4(c)(1)(iv)(B) (OCC); 12 CFR 324.403(b)(1)(v) (FDIC).

¹⁸ See 12 U.S.C. 1464(t)(5).

¹⁹ Subsidiaries engaged in activities not permissible for national banks are considered non-includable subsidiaries.

²⁰ A deduction from capital is only required to the extent that the savings association's investment exceeds the generally applicable thresholds for deduction of investments in the capital of an unconsolidated financial institution.

including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 6, 2018. Written reply comments, which may only respond to issues raised during the original comment period, should be received by the Commission not later than March 28, 2018. Public comment regarding a proposed amendment received after the close of the comment period, and reply comment received on issues not raised during the original comment period, may not be considered.

(2) *Public Hearing.*—The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its website at www.ussc.gov.

ADDRESSES: All written comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is *PublicComment@ussc.gov*. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle NE, Suite 2–500, Washington, DC 20002–8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502–4500, *pubaffairs@ussc.gov*.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. See USSC Rules of Practice and Procedure 2.2, 4.4. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. See *id.* 2.2; 28 U.S.C. 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In summary, the proposed amendments and issues for comment set forth in this notice are as follows:

(1) A multi-part proposed amendment to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), including (A) amending the Drug Equivalency Tables in § 2D1.1 to (i) set forth a class-based marijuana equivalency applicable to synthetic cathinones (except Schedule III, IV, and V substances) of 1 gram = [200]/[380]/[500] grams of marijuana, bracketing the possibility of making this class-based marijuana equivalency also applicable to methcathinone, and (ii) establish a minimum base offense level of [12] for cases involving synthetic cathinones (except Schedule III, IV, and V substances), and related issues for comment; (B) amending the Drug Equivalency Tables in § 2D1.1 to (i) set forth a class-based marijuana equivalency applicable to synthetic cannabinoids (except Schedule III, IV, and V substances) of 1 gram = [167]/[334]/[500] grams of marijuana, (ii) provide a definition for the term “synthetic cannabinoid,” and (iii) bracket the possibility of establishing a minimum base offense level of [12] for cases involving synthetic cannabinoids (except Schedule III, IV, and V substances), and related issues for comment; and (C) amending § 2D1.1 to (i) provide penalties for offenses involving fentanyl equivalent to the higher penalties currently provided for offenses involving fentanyl analogues, (ii) provide a definition for the term “fentanyl analogue,” set forth a single marijuana equivalency applicable to

any fentanyl analogue of 1 gram = 10 kilograms of marijuana, and specify in the Drug Quantity Table that the penalties relating to “fentanyl” apply to the substance identified as “N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propenamide,” and (iii) provide an enhancement in cases in which fentanyl or a fentanyl analogue is misrepresented or marketed as another substance, and related issues for comment;

(2) a multi-part proposed amendment to § 2L1.2 (Unlawfully Entering or Remaining in the United States) to respond to miscellaneous guidelines application issues, including (A) amending § 2L1.2(b)(2) so that its applicability turns on whether the defendant “engaged in criminal conduct” before he or she was ordered deported or ordered removed from the United States for the first time, rather than whether the defendant sustained the resulting conviction or convictions before that event, and a related issue for comment; and (B) amending Application Note 2 of the Commentary to § 2L1.2 to clarify that, consistent with the meaning of “sentence of imprisonment” under § 4A1.2 (Definitions and Instructions for Computing Criminal History), the phrase “sentence imposed” in § 2L1.2 includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred; and

(3) a proposed amendment to make various technical changes to the *Guidelines Manual*, including (A) technical changes to provide updated references to certain sections in Title 16, United States Code, that were restated, with minor revisions, when Congress enacted a new Title 54; (B) technical changes to reflect the editorial reclassification of certain provisions bearing on crime control and law enforcement, previously scattered throughout various parts of the United States Code, to a new Title 34; and (C) a clerical change to § 8C2.1 (Applicability of Fine Guidelines) to delete an outdated reference to § 2C1.6, which was deleted by consolidation with § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) effective November 1, 2004.

In addition, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any proposed amendment published in this notice should be included in subsection (d) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The

Commission lists in § 1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2). The background commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(d). To the extent practicable, public comment should address each of these factors.

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission's website at www.ussc.gov.

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 2.2, 4.3, 4.4.

William H. Pryor, Jr.,
Acting Chair.

Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary

1. Synthetic Drugs

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's multiyear study of offenses involving synthetic cathinones (such as methylone, MDPV, and mephedrone) and synthetic cannabinoids (such as JWH-018 and AM-2201), as well as tetrahydrocannabinol (THC), fentanyl, and fentanyl analogues, and consideration of appropriate guideline amendments, including simplifying the determination of the most closely related controlled substance under Application Note 6 of the Commentary to § 2D1.1. See U.S. Sentencing Comm'n, "Notice of Final Priorities," 82 FR 39949 (Aug. 22, 2017). The proposed amendment contains three parts (Parts A through C). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A of the proposed amendment would amend the Drug Equivalency Tables in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to adopt a class-based approach to account for synthetic cathinones. It sets forth a single marihuana equivalency applicable to synthetic cathinones (except Schedule

III, IV, and V substances) of 1 gram = [200]/[380]/[500] grams of marihuana. Part A of the proposed amendment also brackets the possibility of making this class-based marihuana equivalency also applicable to methcathinone, by deleting the specific reference to this controlled substance in the Drug Equivalency Tables. Finally, Part A of the proposed amendment establishes a minimum base offense level of [12] for cases involving synthetic cathinones (except Schedule III, IV, and V substances). Issues for comment are also provided.

Part B of the proposed amendment would amend the Drug Equivalency Tables in § 2D1.1 to adopt a class-based approach to account for synthetic cannabinoids. It sets forth a single marihuana equivalency applicable to synthetic cannabinoids (except Schedule III, IV, and V substances) of 1 gram = [167]/[334]/[500] grams of marihuana. It also adds a provision defining the term "synthetic cannabinoid." Finally, Part B of the proposed amendment brackets for comment a provision establishing a minimum base offense level of [12] for cases involving synthetic cannabinoids (except Schedule III, IV, and V substances). Issues for comment are also provided.

Part C of the proposed amendment would amend § 2D1.1 in several ways to account for fentanyl and fentanyl analogues. First, it provides penalties for offenses involving fentanyl that are equivalent to the higher penalties currently provided for offenses involving fentanyl analogues. Second, the proposed amendment revises § 2D1.1 to provide a definition of the term "fentanyl analogue," set forth a single marihuana equivalency applicable to any fentanyl analogue of 1 gram = 10 kilograms of marihuana, and specify in the Drug Quantity Table that the penalties relating to "fentanyl" apply to the substance identified as "N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide." Finally, Part C of the proposed amendment amends § 2D1.1 to provide an enhancement in cases in which fentanyl or a fentanyl analogue is misrepresented or marketed as another substance. Issues for comment are also provided.

(A) Synthetic Cathinones

Synopsis of the Proposed Amendment: Synthetic cathinones are human-made drugs chemically related to cathinone, a stimulant found in the khat plant. See National Institute on Drug Abuse, DrugFacts: Synthetic Cathinones ("Bath Salts") (January 2016), available at [https://](https://www.drugabuse.gov/publications/drugfacts/synthetic-cathinones-bath-salts)

www.drugabuse.gov/publications/drugfacts/synthetic-cathinones-bath-salts. According to the National Institute on Drug Abuse, synthetic variants of cathinone can be much stronger than the natural cathinone and, in some cases, very dangerous. *Id.* Abuse of synthetic cathinones, sometimes referred to as "bath salts," has become more prevalent over the last decade.

Currently, § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) specifically lists only one synthetic cathinone, Methcathinone. Because other synthetic cathinones are not specifically listed in either the Drug Quantity Table or the Drug Equivalency Tables in § 2D1.1, cases involving these substances require courts to use Application Note 6 of the Commentary to § 2D1.1 to "determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in [§ 2D1.1]." The Commission has received comment suggesting that questions regarding "the most closely related controlled substance" arise frequently in cases involving synthetic cathinones, and that the Application Note 6 process requires courts to hold extensive hearings to receive expert testimony on behalf of the government and the defendant.

The Commission has also received comment indicating that a large number of synthetic cathinones are currently available on the illicit drug market and that new varieties are regularly developed for illegal trafficking. Given this information, it would likely be difficult and impracticable for the Commission to provide individual marihuana equivalencies for each synthetic cathinone in the *Guidelines Manual*. Testimony received by the Commission indicates that whether a substance is properly classified as a synthetic cathinone is not generally subject to debate, as there appears to be broad agreement that the basic chemical structure of cathinone remains present throughout all synthetic cathinones.

Part A of the proposed amendment would amend the Drug Equivalency Tables in § 2D1.1 to adopt a class-based approach to account for synthetic cathinones. It sets forth a single marihuana equivalency applicable to synthetic cathinones (except Schedule III, IV, and V substances) of 1 gram = [200]/[380]/[500] grams of marihuana. The proposed amendment also establishes a minimum base offense level of [12] for cases involving synthetic cathinones (except Schedule III, IV, and V substances). Finally, the

proposed amendment brackets the possibility of making this class-based marihuana equivalency also applicable to methcathinone, by deleting the specific reference to this controlled substance in the Drug Equivalency Tables.

Issues for comment are also provided.

Proposed Amendment

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 8(D)—

[in the table under the heading “Cocaine and Other Schedule I and II Stimulants (and their immediate precursors) **”, by striking the following:

“1 gm of Methcathinone = 380 gm of marihuana”;

and] by inserting after the table under the heading “Cocaine and Other Schedule I and II Stimulants (and their immediate precursors) **” the following new table:

“*Synthetic Cathinones (except Schedule III, IV, and V Substances)* * 1 gm of a synthetic cathinone (except a Schedule III, IV, or V substance) = [200]/[380]/[500] gm of marihuana

* *Provided*, that the minimum offense level from the Drug Quantity Table for any synthetic cathinone (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level [12].”.

Issues for Comment

1. Part A of the proposed amendment would amend the Drug Equivalency Tables in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to adopt a class-based approach to account for synthetic cathinones. It sets forth a single marihuana equivalency applicable to synthetic cathinones (except Schedule III, IV, and V substances) of 1 gram = [200]/[380]/[500] grams of marihuana. The Commission seeks comment on how, if at all, the guidelines should be amended to account for synthetic cathinones.

Should the Commission provide a class-based approach to account for synthetic cathinones? Are synthetic cathinones sufficiently similar to one another in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms, to support the adoption of a class-based approach for sentencing purposes? Are there any synthetic cathinones that should not be included as part of a class-based approach and for

which the Commission should provide a marihuana equivalency separate from other synthetic cathinones? If so, what equivalency should the Commission provide for each such synthetic cathinone, and why? If the Commission were to provide a different approach to account for synthetic cathinones in the guidelines, what should that different approach be?

Which, if any, of the proposed [1:200]/[1:380]/[1:500] marihuana equivalency ratios is appropriate for synthetic cathinones (except Schedule III, IV, and V substances) as a class? Should the Commission establish a different equivalency applicable to such a class? If so, what equivalency should the Commission provide and on what basis?

2. Part A of the proposed amendment brackets the possibility of making the marihuana equivalency applicable to synthetic cathinones also applicable to methcathinone by deleting the specific reference to this controlled substance in the Drug Equivalency Tables. Is methcathinone sufficiently similar to other synthetic cathinones in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms to be included as part of a class-based approach for synthetic cathinones? Should the Commission instead continue to provide a marihuana equivalency for methcathinone separate from other synthetic cathinones?

3. The Commission seeks comment whether it should amend the Commentary to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide guidance on how to apply the new class-based marihuana equivalency for synthetic cathinones. What guidance, if any, should the Commission provide on the application of the proposed class-based marihuana equivalency? Should the Commission define the term “synthetic cathinone” for purposes of this class-based approach? If so, what definition should the Commission provide for such term? What factors should the Commission account for if it considers providing a definition for “synthetic cathinone”?

(B) Synthetic Cannabinoids

Synopsis of the Proposed Amendment: Synthetic cannabinoids are human-made, mind-altering chemicals developed to mimic the effects of tetrahydrocannabinol (THC), the main psychoactive chemical found in the marihuana plant. Like THC, synthetic cannabinoids act as an agonist

at a specific part of the central nervous system known as the cannabinoid receptors, binding to and activating these receptors to produce psychoactive effects. However, the available scientific literature on this subject suggests that some synthetic cannabinoids bind more strongly to cell receptors affected by THC, and may produce stronger effects. See National Institute of Drug Abuse, DrugFacts: Synthetic Cannabinoids (Revised November 2015) available at <https://www.drugabuse.gov/publications/drugfacts/synthetic-cannabinoids>.

The Commission has received comment indicating that the synthetic cannabinoids encountered on the illicit market are predominantly potent cannabinoid agonists that are pharmacologically similar to THC, but may cause a more severe toxicity and more serious adverse effects than THC. According to commenters, THC is only a partial agonist at type 1 cannabinoid receptors (CB₁ receptors) and produces 30 to 50 percent (or less) of the highest possible response in receptor activation. Synthetic cannabinoids are full agonists at CB₁ receptors that elicit close to 100 percent response in receptor activation. Some commenters have argued that this high activation response may contribute to the increased toxicity and more severe adverse effects of synthetic cannabinoids when compared with THC. According to commenters, some of the adverse effects of synthetic cannabinoids are more prevalent or more severe than those produced by marihuana and THC, and may be produced at lower doses. The Commission was also informed by commenters that drug discrimination data is available on at least 26 different synthetic cannabinoids. JWH-018, one of the substances included in the Commission’s study, was shown in the drug discrimination assay to be approximately three times as potent as THC. Another substance included in the Commission’s study, AM-2201, was shown to be approximately five times as potent as THC using the same assay. Newer synthetic cannabinoids have been shown to be even more potent than these substances. According to the Drug Enforcement Administration, on rare occasions synthetic cannabinoids have been shown to be less potent than THC, as substances with a lower potency are often abandoned by manufacturers following negative user reports relating to their effects.

Currently, § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) specifically lists

only one synthetic cannabinoid, synthetic THC. Synthetic THC has a marihuana equivalency of 1 gram = 167 grams of marihuana. Because other synthetic cannabinoids are not specifically listed in either the Drug Quantity Table or the Drug Equivalency Tables in § 2D1.1, cases involving these substances require courts to use Application Note 6 of the Commentary to § 2D1.1 to “determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in [§ 2D1.1].” Although courts often rely on the synthetic THC equivalency in cases involving synthetic cannabinoids, the Commission has received comment suggesting that questions regarding “the most closely related controlled substance” arise frequently in such cases, and that the Application Note 6 process requires courts to hold extensive hearings to receive expert testimony on behalf of the government and the defendant.

The Commission has also received comment suggesting that, like synthetic cathinones, a large number of synthetic cannabinoids are currently available on the illicit drug market and new varieties are regularly developed for illegal trafficking. Given this information, it would likely be difficult and impracticable for the Commission to provide individual marihuana equivalencies for each synthetic cannabinoid in the *Guidelines Manual*. Unlike synthetic cathinones, synthetic cannabinoids cannot be defined as a single class based on a common chemical structure. Synthetic cannabinoids regularly developed for illegal trafficking come from several different structural classes. However, the Commission received testimony from experts indicating that, while synthetic cannabinoids may differ in chemical structure, these substances all produce the same pharmacological effects: They act as an agonist at type 1 cannabinoid receptors (CB₁ receptors).

Part B of the proposed amendment would amend the Drug Equivalency Tables in § 2D1.1 to adopt a class-based approach to account for synthetic cannabinoids. It sets forth a single marihuana equivalency applicable to synthetic cannabinoids (except Schedule III, IV, and V substances) of 1 gram = [167]/[334]/[500] grams of marihuana. The proposed amendment would also add a provision defining “synthetic cannabinoid” as “any synthetic substance (other than synthetic tetrahydrocannabinol) that [acts as an agonist at]/[binds to and activates] type 1 cannabinoid receptors (CB₁ receptors).”

Finally, Part B of the proposed amendment brackets for comment a provision establishing a minimum base offense level of [12] for cases involving synthetic cannabinoids (except Schedule III, IV, and V substances).

Issues for comment are also provided.

Proposed Amendment

The Commentary to § 2D1.1 captioned “Application Notes” is amended in Note 8(D) by inserting after the table under the heading “Schedule I Marihuana” the following new table:

“*Synthetic Cannabinoids (except Schedule III, IV, and V Substances)*[*]

1 gm of a synthetic cannabinoid (except a Schedule III, IV, or V substance) = [167]/[334]/[500] gm of marihuana

[**Provided*, that the minimum offense level from the Drug Quantity Table for any synthetic cannabinoid (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level [12].] “Synthetic cannabinoid,” for purposes of this guideline, means any synthetic substance (other than synthetic tetrahydrocannabinol) that [acts as an agonist at]/[binds to and activates] type 1 cannabinoid receptors (CB₁ receptors).”.

Issues for Comment

1. Part B of the proposed amendment would amend the Drug Equivalency Tables in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to adopt a class-based approach to account for synthetic cannabinoids. It sets forth a single marihuana equivalency applicable to synthetic cannabinoids (except Schedule III, IV, and V substances) of 1 gram of such a synthetic cannabinoid = [167]/[334]/[500] grams of marihuana. The Commission seeks comment on how, if at all, the guidelines should be amended to account for synthetic cannabinoids.

Should the Commission provide a class-based approach to account for synthetic cannabinoids? Are synthetic cannabinoids sufficiently similar to one another in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms to support the adoption of a class-based approach for sentencing purposes? Are there any synthetic cannabinoids that should not be included as part of a class-based

approach and for which the Commission should provide a marihuana equivalency separate from other synthetic cannabinoids? If so, what equivalency should the Commission provide for each such synthetic cannabinoid, and why? If the Commission were to provide a different approach to account for synthetic cannabinoids in the guidelines, what should that different approach be?

Which, if any, of the proposed [1:167]/[1:334]/[1:500] marihuana equivalency ratios is appropriate for synthetic cannabinoids (except Schedule III, IV, and V substances) as a class? Should the Commission establish a different equivalency applicable to such a class? If so, what equivalency should the Commission provide and on what basis?

2. The Commission seeks comment on whether the Commission should make a distinction between a synthetic cannabinoid in “actual” form (*i.e.*, as a powder or crystalline substance) and a synthetic cannabinoid as part of a mixture (*e.g.*, sprayed on or soaked into a plant or other base material, or otherwise mixed with other substances), by establishing a different marihuana equivalency for each of these forms in which synthetic cannabinoids are trafficked. If so, what equivalencies should the Commission provide and on what basis? Are there differences in terms of pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms between the various forms in which synthetic cannabinoids are trafficked that would support this distinction? Is the use of the term “actual” appropriate in cases involving synthetic cannabinoids? If not, what term should the Commission use to refer to a synthetic cannabinoid as a powder or crystalline substance that has not been mixed with other substances (*e.g.*, sprayed on or soaked into a plant or other base material)?

3. Part B of the proposed amendment would include in the Commentary to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) a provision defining the term “synthetic cannabinoid” as “any synthetic substance (other than synthetic tetrahydrocannabinol) that [acts as an agonist at]/[binds to and activates] type 1 cannabinoid receptors (CB₁ receptors).” Is this definition appropriate? If not, what definition, if any, should the Commission provide? Are there any synthetic cannabinoids that would not be included under this definition but should be? Are there any

substances that would be included in this definition but should not be? What factors should the Commission take into account in defining “synthetic cannabinoid”? What additional guidance, if any, should the Commission provide on how to apply the proposed class-based marijuana equivalency for synthetic cannabinoids?

4. Part B of the proposed amendment brackets the possibility of establishing a minimum base offense level of [12] for cases involving synthetic cannabinoids (except Schedule III, IV, and V substances) individually, or in combination with another substance. Should the Commission provide a minimum base offense level for such cases? What minimum base offense level, if any, should the Commission provide for cases involving synthetic cannabinoids, and under what circumstances should it apply?

5. The Commission seeks comment on whether, if the Commission were to adopt a 1:167 equivalency ratio for synthetic cannabinoids, this class-based marijuana equivalency should also be applicable to synthetic tetrahydrocannabinol (THC). If so, should the Commission delete the specific reference to this controlled substance in the Drug Equivalency Tables and expand the proposed definition of “synthetic cannabinoid” to include “any synthetic substance that [acts as an agonist at][binds to and activates] type 1 cannabinoid receptors (CB₁ receptors)”? Is synthetic THC covered by this definition of “synthetic cannabinoid”? Is synthetic THC sufficiently similar to other synthetic cannabinoids in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms, to be included as part of a class-based approach for synthetic cannabinoids? Should the Commission instead continue to provide a marijuana equivalency for synthetic THC separate from other synthetic cannabinoids?

(C) Fentanyl and Fentanyl Analogues

Synopsis of Proposed Amendment: Fentanyl is a powerful synthetic opioid analgesic that is similar to morphine but 50 to 100 times more potent. See National Institute on Drug Abuse, DrugFacts: Fentanyl (June 2016), available at <https://www.drugabuse.gov/publications/drugfacts/fentanyl>. Fentanyl is a prescription drug that can be diverted for illicit use. Fentanyl and analogues of fentanyl are also produced in clandestine laboratories for illicit use. See, e.g., U.N. Office on Drugs & Crime, *Fentanyl and Its Analogues—50 Years On*, Global Smart Update 17 (March

2017), available at https://www.unodc.org/documents/scientific/Global_SMART_Update_17_web.pdf. These substances are sold on the illicit drug market as powder, pills, absorbed on blotter paper, mixed with or substituted for heroin, or as tablets that may mimic the appearance of prescription opioids. While most fentanyl analogues are typically about as potent as fentanyl itself, some analogues, such as sufentanil and carfentanil, are reported to be many times more potent than fentanyl.

The Statutory and Guidelines Framework

The Controlled Substances Act (21 U.S.C. 801 *et seq.*) classifies fentanyl as a Schedule II controlled substance, along with other opiates. While there is no other specific reference to the term “fentanyl” in Title 21, United States Code, a subsequent section establishes a mandatory minimum penalty for a substance identified as “N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide.” 21 U.S.C. 841(b)(1)(A)(vi). A Department of Justice regulation explains that N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide is the substance “commonly known as fentanyl.” 28 CFR 50.21(d)(4)(vii). The Controlled Substances Act prescribes a mandatory minimum penalty of five years for trafficking 40 or more grams of the substance, or ten or more grams of an analogue of the substance. 21 U.S.C. 841(b)(1)(A)(vi); (b)(1)(B)(vi).

The Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) contains entries for both “fentanyl” and “fentanyl analogue,” at severity levels that reflect the mandatory minimum penalty structure. The Drug Equivalency Tables in the Commentary to § 2D1.1 clearly identify fentanyl with the specific substance associated with the statutory minimum penalty by providing a marijuana equivalency for 1 gm of “Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)” equal to 2.5 kg of marijuana (*i.e.*, a 1:2,500 ratio). The Drug Equivalency Tables also set forth the marijuana equivalencies for two other substances, alpha-methylfentanyl and 3-methylfentanyl. Both substances have the same marijuana equivalency ratio, 1:10,000, which corresponds with the penalties for fentanyl analogues. Alpha-methylfentanyl and 3-methylfentanyl are pharmaceutical analogues of fentanyl that were developed in the 1960s or 1970s. See,

e.g., T.J. Gillespie, *et al.*, *Identification and Quantification of Alpha-Methylfentanyl in Post Mortem Specimens*, 6(3) J. of Analytical Toxicology 139 (May–June 1982).

Higher Penalties for Offenses Involving Fentanyl

First, Part C of the proposed amendment would revise § 2D1.1 to increase penalties for offenses involving fentanyl. The Commission has received comment indicating that the proliferation and ease of availability of multiple varieties of fentanyl and fentanyl analogues has resulted in an increased number of deaths from overdoses. Commenters have argued that § 2D1.1 does not adequately reflect the serious dangers posed by fentanyl and its analogues, including their high potential for abuse and addiction. Public health data shows that the harms associated with abuse of fentanyl and fentanyl analogues far exceed those associated with other opioid analgesics.

Part C of the proposed amendment would amend § 2D1.1 to provide penalties for fentanyl that are equivalent to the higher penalties currently provided for fentanyl analogues. The proposed amendment would accomplish this objective by changing the base offense levels for fentanyl in the Drug Quantity Table at § 2D1.1(c) to parallel the base offense levels established for fentanyl analogues. It would also amend the Drug Equivalency Tables in the Commentary to § 2D1.1 to change the marijuana equivalency ratio for fentanyl to the same ratio, 1:10,000, provided for fentanyl analogues.

Issues Relating to “Fentanyl Analogues”

Second, Part C of the proposed amendment would revise § 2D1.1 to address several issues relating to offenses involving fentanyl analogues. The Commission has received comment that the penalty for “fentanyl analogue” set forth in the guidelines interacts in a potentially confusing way with the guideline definition of the term “analogue.” Although the term “fentanyl analogue” is not defined by the guidelines, Application Note 6 states that, for purposes of § 2D1.1, “analogue” has the meaning given the term “controlled substance analogue” in 21 U.S.C. 802(32). Section 802(32) defines “controlled substance analogue” to exclude “a controlled substance”—that is, a substance that has been scheduled. Thus, once the Drug Enforcement Administration (or Congress) schedules a substance that is a “fentanyl analogue” in the scientific sense, that substance may not qualify as a “fentanyl analogue” for purposes of the Drug

Quantity Table. Hence, in cases involving a scheduled “fentanyl analogue” other than the two fentanyl analogues listed by name in the Drug Equivalency Tables, courts would be required by Application Note 6 of the Commentary to § 2D1.1 to “determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in [§ 2D1.1].”

The Commission has received comment suggesting that the Application Note 6 process requires courts to hold extensive hearings to receive expert testimony on behalf of the government and the defendant. This process is likely to determine that fentanyl, rather than one of the two listed variants in the guideline, is the most closely related controlled substance to a scheduled “fentanyl analogue.” This will result in a substance that would scientifically be considered a fentanyl analogue being punished under the 1:2,500 fentanyl ratio, rather than the 1:10,000 “fentanyl analogue” ratio.

Part C of the proposed amendment would address this situation by revising § 2D1.1 to define “fentanyl analogue” as “any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is [substantially] similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).” It would also amend the Drug Equivalency Tables in § 2D1.1 to provide a single marihuana equivalency applicable to any fentanyl analogue of 1 gram = 10 kilograms of marihuana. The proposed amendment brackets the possibility of making this new marihuana equivalency also applicable to alpha-methylfentanyl and 3-methylfentanyl by deleting the specific references to these controlled substances in the Drug Equivalency Tables. In addition, the proposed amendment would amend the Drug Quantity Table to specify that the penalties relating to “fentanyl” apply to the substance identified in the statute as “N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide.”

Increased Penalties for Offenses Involving Fentanyl and Fentanyl Analogues Misrepresented as Another Substance

Finally, Part C of the proposed amendment would amend § 2D1.1 to address cases involving fentanyl and fentanyl analogues misrepresented as another substance. The Commission has received comment that fentanyl and fentanyl analogues are being mixed with, and in some instances substituted

for, other drugs, such as heroin and cocaine. According to commenters, fentanyl and fentanyl analogues are also being pressed into pills that resemble prescription opioids, such as oxycodone and hydrocodone. Commenters have also suggested that the harms associated with the use of fentanyl and fentanyl analogues are heightened by the fact that users may unknowingly consume fentanyl or fentanyl analogues in products misrepresented or sold as other substances, such as heroin or counterfeit prescription pills. Because such users may be unaware that what they believe to be a certain substance, such as heroin, is either fentanyl or has been laced with fentanyl, they may not mitigate against the added risks of use, including overdose.

Part C of the proposed amendment would add a new specific offense characteristic at § 2D1.1(b)(13) providing an enhancement of [2][4] levels to address these cases. It provides two alternatives for such an enhancement. Under the first alternative, the enhancement would apply if the offense involved a mixture or substance containing a detectable amount of fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue that was misrepresented or marketed as another substance. Under the second alternative, the enhancement would apply if the offense involved a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue and the defendant knowingly misrepresented or knowingly marketed that mixture or substance as another substance.

Issues for comment are also provided. Proposed Amendment

Section 2D1.1(b) is amended by redesignating paragraphs (13) through (17) as paragraphs (14) through (18), respectively, and by inserting the following new paragraph (13):

“(13) [If the offense involved a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue that was misrepresented or marketed as another substance][If the offense involved a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue and the defendant knowingly misrepresented or knowingly marketed that mixture or substance as another substance], increase by [2][4] levels.”

Section 2D1.1(c)(1) is amended by striking “36 KG or more of Fentanyl;” and inserting the following: “[9] KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(2) is amended by striking “At least 12 KG but less than 36 KG of Fentanyl;” and inserting the following: “At least [3] KG but less than [9] KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(3) is amended by striking “At least 4 KG but less than 12 KG of Fentanyl;” and inserting the following: “At least [1] KG but less than [3] KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(4) is amended by striking “At least 1.2 KG but less than 4 KG of Fentanyl;” and inserting the following: “At least [300] G but less than [1] KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(5) is amended by striking “At least 400 G but less than 1.2 KG of Fentanyl;” and inserting the following: “At least [100] G but less than [300] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(6) is amended by striking “At least 280 G but less than 400 G of Fentanyl;” and inserting the following: “At least [70] G but less than [100] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(7) is amended by striking “At least 160 G but less than 280 G of Fentanyl;” and inserting the following:

“At least [40] G but less than [70] G of Fentanyl ((N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(8) is amended by striking “At least 40 G but less than 160 G of Fentanyl;” and inserting the following:

“At least [10] G but less than [40] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(9) is amended by striking “At least 32 G but less than 40

G of Fentanyl;” and inserting the following:

“At least [8] G but less than [10] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(10) is amended by striking “At least 24 G but less than 32 G of Fentanyl;” and inserting the following:

“At least [6] G but less than [8] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(11) is amended by striking “At least 16 G but less than 24 G of Fentanyl;” and inserting the following:

“At least [4] G but less than [6] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(12) is amended by striking “At least 8 G but less than 16 G of Fentanyl;” and inserting the following:

“At least [2] G but less than [4] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(13) is amended by striking “At least 4 G but less than 8 G of Fentanyl;” and inserting the following:

“At least [1] G but less than [2] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

Section 2D1.1(c)(14) is amended by striking “Less than 4 G of Fentanyl;” and inserting the following:

“Less than [1] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);”.

The annotation to § 2D1.1(c) captioned “Notes to Drug Quantity Table” is amended by inserting at the end the following new Note (J):

“(J) Fentanyl analogue, for the purposes of this guideline, means any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is [substantially] similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended—in Note 6 by striking “Any reference to a particular controlled substance in these guidelines” and inserting “Except as otherwise provided, any reference to a particular controlled substance in these guidelines”, and by striking “For

purposes of this guideline ‘analogue’ has the meaning” and inserting “Unless otherwise specified, ‘analogue,’ for purposes of this guideline, has the meaning”;

and in note 8(D), in the table under the heading “Schedule I or II Opiates*”—[by striking the following two lines:

“1 gm of Alpha-Methylfentanyl = 10 kg of marihuana”

“1 gm of 3-Methylfentanyl = 10 kg of marihuana”

and] by inserting after the line referenced to Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) the following:

“1 gm of a Fentanyl Analogue = [10] kg of marihuana”.

Issues for Comment

1. Part C of the proposed amendment would amend the “Notes to Drug Quantity Table” in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to include a provision defining “fentanyl analogue” as “any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is [substantially] similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).” Is this definition appropriate? If not, what definition, if any, should the Commission provide? For example, should the Commission specify that to qualify as a “fentanyl analogue,” a substance, whether a controlled substance or not, must (A) have a chemical structure that is [substantially] similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) and (B) either (i) have an effect on the central nervous system that is substantially similar to [or greater than] fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide), or (ii) be represented or intended to have such an effect?

2. The proposed amendment would amend § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to adopt a class-based approach to account for all fentanyl analogues, whether they are controlled substances or not. Are fentanyl analogues sufficiently similar to one another in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms to support such class-based approach for sentencing purposes? If so,

are the penalties set forth in the Drug Quantity Table and the proposed 1:10,000 marihuana equivalency ratio appropriate for fentanyl analogues as a class? Should the Commission establish different penalties or a different equivalency applicable to such substances? If so, what penalties should the Commission provide and on what basis? Are there any fentanyl analogues that should not be included as part of a class-based approach and for which the Commission should provide penalties separate from other fentanyl analogues? If so, what penalties should the Commission provide for each such fentanyl analogue, and why? If the Commission were to provide a different approach to account for fentanyl analogues in the guidelines, what should that different approach be?

The proposed amendment brackets the possibility of making the marihuana equivalency applicable to all fentanyl analogues that are commonly regarded as analogues of “Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide” also applicable to alpha-methylfentanyl and 3-methylfentanyl by deleting the specific references to these controlled substances in the Drug Equivalency Tables. Are alpha-methylfentanyl and 3-methylfentanyl sufficiently similar to other fentanyl analogues in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms, to be included as part of a class-based approach for fentanyl analogues? Should the Commission instead continue to provide marihuana equivalencies for alpha-methylfentanyl and 3-methylfentanyl separate from other fentanyl analogues?

3. According to the Drug Enforcement Administration (DEA) and other sources, fentanyl and fentanyl analogues are typically manufactured in China and then shipped via freight forwarding companies or parcel post to the United States or to other places in the Western Hemisphere. Additionally, fentanyl and fentanyl analogues are available for purchase online through the “dark net” (commercial websites functioning as black markets) and regular websites, and commonly shipped into the United States. According to the DEA, the improper handling of fentanyl and fentanyl analogues presents grave danger to individuals who may inadvertently come into contact with such substances. Those at risk include law enforcement and emergency personnel who may unknowingly encounter these substances during arrests, searches, or emergency calls.

The Commission seeks comment on whether the guidelines provide appropriate penalties for cases in which fentanyl or a fentanyl analogue may create a substantial threat to the public health or safety (including the health or safety of law enforcement and emergency personnel). If not, how should the Commission revise the guidelines to provide appropriate penalties in such cases? Should the Commission provide new enhancements, adjustments, or departure provisions to account for such cases? If the Commission were to provide such a provision, what specific offense conduct, harm, or other factor should be the basis for applying the provision? What penalty increase should be provided?

2. Illegal Reentry Guideline Enhancements

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of miscellaneous guidelines application issues. See U.S. Sentencing Comm'n, "Notice of Final Priorities," 82 FR 39949 (Aug. 22, 2017). It responds to issues that have arisen regarding application of the illegal reentry guideline at § 2L1.2 (Unlawfully Entering or Remaining in the United States). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

Part A of the proposed amendment responds to an issue brought to the Commission's attention by the Department of Justice. See Annual Letter from the Department of Justice to the Commission (July 31, 2017), available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/DOJ.pdf>. In its annual letter to the Commission, the Department suggested that the illegal reentry guideline's enhancements for prior convictions (other than convictions for illegal reentry) contain a gap in coverage. Subsection (b)(2) of the guideline provides for an increase in the defendant's offense level if, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant "sustained . . . a conviction" for a felony offense (other than an illegal reentry offense) or "three or more convictions" for certain misdemeanor offenses. Subsection (b)(3) of the guideline provides for an increase in the defendant's offense level, if after the defendant was ordered deported or ordered removed from the United States

for the first time, the defendant "engaged in criminal conduct resulting in" such a felony conviction or three or more such misdemeanor convictions. Neither subsection (b)(2) nor subsection (b)(3), however, provides for an increase in the defendant's offense level in the situation where a defendant engaged in criminal conduct before being ordered deported or ordered removed from the United States for the first time but did not sustain a conviction or convictions for that criminal conduct until after he or she was first ordered deported or ordered removed.

Part A of the proposed amendment would amend § 2L1.2 to cover this situation by revising subsection (b)(2) so that its applicability turns on whether the defendant "engaged in criminal conduct" before he or she was first ordered deported or order removed, rather than whether the defendant sustained the resulting conviction or convictions before that event. Part A would also make non-substantive, conforming changes to the language of subsection (b)(3).

An issue for comment is also provided.

Part B of the proposed amendment responds to an issue that has arisen in litigation concerning how § 2L1.2's enhancements for prior convictions apply in the situation where a defendant's prior conviction included a term of probation, parole, or supervised release that was subsequently revoked and an additional term of imprisonment imposed.

As described above, subsections (b)(2) and (b)(3) of § 2L1.2 provide for increases in a defendant's offense level for prior convictions (other than convictions for illegal reentry). The magnitude of the offense level increase that the subsections provide for a prior felony conviction varies depending on the length of the "sentence imposed." Application Note 2 of the Commentary to § 2L1.2 states that "[s]entence imposed" has the meaning given the term 'sentence of imprisonment' in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History)." Under § 4A1.2, the "sentence of imprisonment" includes not only the original term of imprisonment imposed but also any term of imprisonment imposed upon revocation of probation, parole, or supervised release. See USSG § 4A1.2, comment. (n.11). Consistent with that approach, Application Note 2 of the Commentary to § 2L1.2 states that, under § 2L1.2, "[t]he length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervisory

release." Two courts of appeals have held, however, that, under § 2L1.2(b)(2), the "sentence imposed" does not include a period of imprisonment imposed upon revocation of probation, parole, or supervisory release if that revocation occurred after the defendant was ordered deported or ordered removed from the United States for the first time. See *United States v. Martinez*, 870 F.3d 1163 (9th Cir. 2017); *United States v. Franco-Galvan*, 846 F.3d 338 (5th Cir. 2017).

Part B of the proposed amendment would revise the definition of "sentence imposed" in Application Note 2 of the Commentary to § 2L1.2 to clarify that, consistent with the meaning of "sentence of imprisonment" under § 4A1.2, the phrase "sentence imposed" in § 2L1.2 includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

Proposed Amendment

(A) Closing the Coverage Gap

Section 2L1.2(b)(2) is amended by striking "the defendant sustained" and inserting "the defendant engaged in criminal conduct that, at any time, resulted in".

Section 2L1.2(b)(3) is amended by striking "If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in" and inserting "If, after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in".

Issue for Comment

1. The Commission has received comments indicating that the enhancements for prior convictions (other than convictions for illegal reentry) in § 2L1.2 (Unlawfully Entering or Remaining in the United States) currently do not apply in the situation where a defendant engaged in criminal conduct before being ordered deported or ordered removed from the United States for the first time but did not sustain a conviction or convictions for that criminal conduct until after he or she was first ordered deported or ordered removed. Part A of the proposed amendment would address this situation by revising the language of § 2L1.2(b)(2) so that its applicability would turn on when the defendant "engaged in criminal conduct resulting in" one or more of the covered convictions, rather than when the

defendant “sustained” that “conviction” or “convictions.”

Should the Commission amend § 2L1.2 to cover the situation where a defendant engages in criminal conduct before a first order of removal or deportation but does not sustain a conviction or convictions for the criminal conduct until after that order? How frequently does this situation occur? Does Part A of the proposed amendment appropriately address this situation? Should the Commission address the situation differently? If so, how?

(B) Treatment of Revocations of Probation, Parole, or Supervised Release

The Commentary to § 2L1.2 captioned “Application Notes” is amended in Note 2 in the paragraph that begins “‘Sentence imposed’ has the meaning” by striking “term of imprisonment given upon revocation of probation, parole, or supervised release” and inserting “term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred”.

3. Technical Amendment

Synopsis of the Proposed Amendment: This proposed amendment makes various technical changes to the *Guidelines Manual*.

First, the proposed amendment makes technical changes to provide updated references to certain sections in the United States Code that were restated in legislation. As part of an Act to codify existing law relating to the National Park System, Congress repealed numerous sections in Title 16 of the United States Code, and restated them in Title 18 and a newly enacted Title 54. *See* Public Law 113–287 (Dec. 19, 2014). The proposed amendment amends the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources) to correct outdated references to certain sections in Title 16 that were restated, with minor revisions, when Congress enacted

Title 54. It also deletes from the Commentary to § 2B1.5 the provision relating to the definition of “historic resource,” as that term was omitted from Title 54. In addition, the proposed amendment makes a technical change to Appendix A (Statutory Index), to correct an outdated reference to 16 U.S.C. 413 by replacing it with the appropriate reference to 18 U.S.C. 1865(c).

Second, the proposed amendment also makes technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective September 1, 2017, the Office of Law Revision Counsel transferred certain provisions bearing on crime control and law enforcement, previously scattered throughout various parts of the United States Code, to a new Title 34. To reflect the new section numbers of the reclassified provisions, Part B of the proposed amendment makes changes to—

- (1) The Commentary to § 2A3.5 (Failure to Register as a Sex Offender);
 - (2) the Commentary to § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline));
 - (3) subsection (a)(10) of § 5B1.3 (Conditions of Probation);
 - (4) subsection (a)(8) of § 5D1.3 (Conditions of Supervised Release); and
 - (5) Appendix A (Statutory Index), by updating references to certain sections in Title 42 to reflect their reclassified section numbers in the new Title 34.
- Finally, the proposed amendment revises subsection (a) of § 8C2.1 (Applicability of Fine Guidelines) by deleting an outdated reference to § 2C1.6, which was deleted by consolidation with § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) effective November 1, 2004.

Proposed Amendment

The Commentary to § 2A3.5 captioned “Application Notes” is amended in Note 1—

in the paragraph that begins “‘Sex offense’ has the meaning” by striking “42 U.S.C. 16911(5)” and inserting “34 U.S.C. 20911(5)”;

and in the paragraph that begins “‘Tier I offender’, ‘Tier II offender’, and ‘Tier

III offender’ have the meaning” by striking “42 U.S.C. 16911” and inserting “34 U.S.C. 20911”.

The Commentary to § 2B1.5 captioned “Application Notes” is amended—

in Note 1(A) by striking clause (ii) and redesignating clauses (iii) through (vii) as clauses (ii) through (vi), respectively;

in Note 1(A)(i) by striking “16 U.S.C. 470w(5)” and inserting “54 U.S.C. 300308”;

in Note 3(C) by striking “16 U.S.C. 470a(a)(1)(B)” and inserting “54 U.S.C. 302102”;

in Note 3(E) by striking “the Antiquities Act of 1906 (16 U.S.C. 431)” and inserting “54 U.S.C. 320301”;

and in Note 3(F) by striking “16 U.S.C. 1c(a)” and inserting “54 U.S.C. 100501”.

The Commentary to § 2X5.2 captioned “Statutory Provisions” is amended by striking “42 U.S.C. 14133” and inserting “34 U.S.C. 12593”.

Section 5B1.3(a)(10) is amended by striking “42 U.S.C. 14135a” and inserting “34 U.S.C. 40702”.

Section 5D1.3(a)(8) is amended by striking “42 U.S.C. 14135a” and inserting “34 U.S.C. 40702”.

Section 8C2.1(a) is amended by striking “§§ 2C1.1, 2C1.2, 2C1.6;” and inserting “§§ 2C1.1, 2C1.2;”.

Appendix A (Statutory Index) is amended—

by striking the line referenced to 16 U.S.C. 413;

by inserting after the line referenced to 18 U.S.C. 1864 the following:

“18 U.S.C. 1865(c) 2B1.1”;

by inserting after the line referenced to 33 U.S.C. 3851 the following:

“34 U.S.C. 10251 2B1.1

34 U.S.C. 10271 2B1.1

34 U.S.C. 12593 2X5.2

34 U.S.C. 20962 2H3.1

34 U.S.C. 20984 2H3.1”;

and by striking the lines referenced to 42 U.S.C. 3791, 42 U.S.C. 3795, 42 U.S.C. 14133, 42 U.S.C. 16962, and 42 U.S.C. 16984.

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