

**UNITED STATES SENTENCING COMMISSION**

**Sentencing Guidelines for United States Courts**

**AGENCY:** United States Sentencing Commission

**ACTION:** Request for public comment.

**SUMMARY:** The United States Sentencing Commission intends to address certain issues relating to offenses involving fentanyl, fentanyl analogues, and other opioids. As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the Commission is publishing these issues for comment to inform the Commission's consideration of the issues related to this topic. The issues for comment are set forth in the Supplementary Information portion of this notice.

**DATES:** Public comment regarding the issues for comment set forth in this notice should be received by the Commission not later than **May 1, 2025**. Any public comment received after the close of the comment period may not be considered.

**ADDRESSES:** There are two methods for submitting public comment.

*Electronic Submission of Comments.* Comments may be submitted electronically via the Commission's Public Comment Submission Portal at <https://comment.ussc.gov>. Follow the online instructions for submitting comments.

*Submission of Comments by Mail.* Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Fentanyl and Other Opioids.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

**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).

## **REQUEST FOR COMMENT ON OFFENSES INVOLVING FENTANYL, FENTANYL ANALOGUES, AND OTHER OPIOIDS**

Fentanyl and fentanyl analogue cases have increased substantially over the last several years. Since fiscal year 2019, fentanyl cases have increased 244.7 percent, such that they comprised 16.3 percent of all federal drug trafficking cases in fiscal year 2023. Today, fentanyl represents the third most common drug type in federal drug trafficking cases. Fentanyl analogue cases have increased 113.5 percent since fiscal year 2019, but those cases occupy a much smaller portion of the federal drug trafficking case load (1.4%).

### *Previous Commission Action*

In response to rising numbers of fentanyl and fentanyl analogue cases, the Commission previously undertook a multi-year study of synthetic controlled substances. In 2018, following that study, the Commission amended §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit Those Offenses); Attempt or Conspiracy) to add an enhancement specific to fentanyl and fentanyl analogue cases. In particular, the Commission added a new specific offense characteristic at subsection (b)(13) providing a 4-level increase when the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. *See* USSG, App. C. amend. 807 (effective Nov. 1, 2018). In adding this new specific offense characteristic,

the Commission pointed to the harm attendant to cases where a user does not know the substance they are using contains fentanyl or fentanyl analogue. *Id.* As the Commission explained, “[b]ecause of fentanyl’s extreme potency, the risk of overdose death is great, particularly when the user is inexperienced or unaware of what substance he or she is using.” *Id.* Thus, the Commission concluded that “it is appropriate for traffickers who knowingly misrepresent fentanyl or a fentanyl analogue as another substance to receive additional punishment.” *Id.*

In 2023, the Commission amended §2D1.1(b)(13) based on the continued increase in fentanyl and fentanyl analogue distribution. *See* USSG, App. C. amend. 818 (effective Nov. 1, 2023). The amendment added a new subparagraph (B) with an alternative 2-level enhancement for offenses where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug. *Id.* As grounds for the amendment, the Commission cited data from the Drug Enforcement Agency (“DEA”) showing a substantial increase in the seizure of fake prescription pills. *Id.* The DEA reported seizing over 50.6 million fake pills in calendar year 2022, with 70 percent containing fentanyl. *Id.* Of those seized pills containing fentanyl, six out of ten contained a potentially lethal dose of the substance. *Id.* The Commission also pointed to the increase in drug overdose deaths—most of which involved synthetic opioids, primarily fentanyl. *Id.*

### *Feedback from Stakeholders*

Since 2023, the Commission has continued to receive public comment on whether the guidelines appropriately account for factors specific to offenses involving fentanyl, fentanyl analogues, and other opioids. For example, in a recent letter to the Commission, the Department of Justice stated that, “although the Commission added [a] new two-level enhancement [at §2D1.1(b)(13)(B)] to address the harm associated with imitation pills, the new two-level enhancement has proven not to be very useful.” Letter from Scott Meisler, *Ex-Officio* Member, U.S. Sent’g Comm’n, to Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (July 15, 2024) at 5, available at [https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029\\_public-comment\\_R.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf) [hereinafter “DOJ Letter”]. Commission data shows that, in fiscal year 2023, 2.1 percent of individuals sentenced for fentanyl trafficking and 1.5 percent sentenced for fentanyl analogue trafficking received the 4-level increase for knowingly misrepresenting or knowingly marketing a mixture or substance containing fentanyl or a fentanyl analogue as another substance. Because the enhancement at §2D1.1(b)(13)(B) became effective November 1, 2023, only preliminary 2024 data is available. Based on this preliminary data, 12 individuals sentenced for fentanyl trafficking and zero individuals sentenced for fentanyl analogue trafficking received the 2-level willful blindness enhancement.

To address the harm in cases involving fentanyl, fentanyl analogues, and other opioids, the Department of Justice proposed several amendments to §2D1.1 to enhance

sentences when certain circumstances are present. *See* DOJ Letter at 6–8. First, the Department of Justice proposed creating an enhancement under §2D1.1 for distribution of fentanyl, fentanyl analogues, and other opioids to individuals under the age of 21. *Id.* at 6. According to the Department of Justice, “[m]embers of that age group have increasingly become victims of drug overdoses.” *Id.* Commission data reveals 37 cases in fiscal year 2023 in which the offense involved distribution of fentanyl or a fentanyl analogue to a person under 21 years old.

Second, the Department of Justice proposed creating an enhancement under §2D1.1 for drug-trafficking offenses using “the dark web or other anonymizing technologies to avoid detection.” DOJ Letter at 6. The Department of Justice explains that individuals “are increasingly relying on anonymizing technologies to further their illicit activity, posting advertisements for fentanyl pills on dark web marketplaces where the seller is unknown to the buyer, the transaction involves an exchange of cryptocurrency, and the product is shipped with misleading tracking information.” *Id.* Commission data reveals 60 cases in fiscal year 2023 in which the offense involved the use of the dark web or cryptocurrency to traffic fentanyl or a fentanyl analogue. Of these 60 cases, 39 cases involved the use of both the dark web and cryptocurrency, 17 cases involved only the use of the dark web, and four cases involved only the use of cryptocurrency.

Third, the Department of Justice asked the Commission to consider an enhancement for drug trafficking offenses involving fentanyl or another synthetic opioid

adulterated with xylazine or medetomidine. DOJ Letter at 6–7. According to the Department of Justice, individuals engaged in drug trafficking “are increasingly adulterating fentanyl with these alpha-2-adrenergic agonists, which can extend a user’s high and also serve as a filler and binding agent.” *Id.* The Department of Justice notes that the effects of these substances “have not yet been fully studied” but states that they “are profoundly dangerous because their effects cannot be reversed by life-saving medicines like naloxone (Narcan).” *Id.* at 7. Commission data reveals 94 cases in fiscal year 2023 in which the offense involved mixing fentanyl or a fentanyl analogue with xylazine or medetomidine. Of these 94 cases, 90 cases used xylazine as the mixing agent, and four cases used medetomidine as the mixing agent.

**Issues for Comment:**

1. The Commission seeks comment on whether it should consider revising §2D1.1 to add an enhancement for distribution of fentanyl, fentanyl analogues, and other opioids to individuals under the age of 21. If so, should the enhancement be defendant-based or offense-based? By how many levels should the enhancement increase base offense levels, and what is the basis for such increase? Should the Commission consider any other changes to §2D1.1 to address the harm in these cases?
2. The Commission seeks comment on whether it should consider revising §2D1.1 to add an enhancement for fentanyl, fentanyl analogue, and opioid offenses

involving the use of the dark web or other anonymizing technologies. If so, how should the Commission define or describe what technologies qualify for the enhancement? Should the enhancement be defendant-based or offense-based? By how many levels should the enhancement increase base offense levels, and what is the basis for such increase? Should the Commission consider any other changes to §2D1.1 to address the harm in these cases?

3. The Commission seeks comment on whether it should consider revising §2D1.1 to add an enhancement for drug trafficking offenses involving fentanyl, a fentanyl analogue, or another synthetic opioid adulterated with xylazine or medetomidine. The Commission invites comment on xylazine and medetomidine, particularly their pharmacological effects, potential for addiction and abuse, the patterns of abuse and harms associated with their abuse, and the patterns of trafficking and harms associated with their trafficking. The Commission also invites comment on whether there are other adulterants to fentanyl, fentanyl analogues, and other synthetic opioids for which an enhancement should apply. If the Commission were to add an enhancement to §2D1.1 for drug trafficking offenses involving fentanyl, a fentanyl analogue, or another synthetic opioid adulterated with xylazine, medetomidine, or another adulterant should the enhancement be defendant-based or offense-based? By how many levels should the enhancement increase base offense levels, and what is the basis for such increase? Should the Commission consider any other changes to §2D1.1 to address the harm in these cases?



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

**Carlton W. Reeves,**

*Chair.*