

## AMENDMENTS TO THE SENTENCING GUIDELINES

Pursuant to section 994(p) of title 28, United States Code, the United States Sentencing Commission hereby submits to the Congress the following amendments to the Guidelines Manual and the reasons therefor. As authorized by such section, the Commission specifies an effective date of November 1, 2018, for these amendments.

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

1. Amendment: The Commentary to §1B1.1 captioned “Application Notes” is amended in Note 1 by redesignating paragraphs (D) through (L) as paragraphs (E) through (M), respectively; and by inserting the following new paragraph (D):

“(D) ‘Court protection order’ means ‘protection order’ as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).”.

The Commentary to §2B3.1 captioned “Application Notes” is amended in Note 2 by striking “Application Note 1(D)(ii) of §1B1.1” and inserting “Application Note 1(E)(ii) of §1B1.1”.

The Commentary to §2L1.1 captioned “Application Notes” is amended in Note 4 by striking “Application Note 1(L) of §1B1.1” and inserting “Application Note 1(M) of §1B1.1”.

Section 4A1.3(a)(2) is amended by striking “subsection (a)” and inserting “subsection (a)(1)”; and by striking “sentences for foreign and tribal offenses” and inserting “sentences for foreign and tribal convictions”.

The Commentary to §4A1.3 captioned “Application Notes” is amended—  
in Note 2 by inserting at the end the following new paragraph (C):

“(C) Upward Departures Based on Tribal Court Convictions.—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.
- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.
- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).”;

and in Note 3 by striking “A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(B)” and inserting “A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A)”.

Reason for Amendment: This two-part amendment addresses federal sentencing issues related to offenses committed in Indian country. The amendment responds to the findings and recommendations made by the Commission’s ad hoc Tribal Issues Advisory Group in its report to the Commission. See Report of the Tribal Issues Advisory Group (May 16, 2016), <http://www.ussc.gov/research/research-publications/report-tribal-issues-advisory-group>.

The amendment adds a definition of “court protection order” in the guidelines. This issue was initially raised by the Commission’s Victims Advisory Group and subsequently addressed in the Tribal Issues Advisory Group’s May 2016 report. The amendment amends §1B1.1 (Application Instructions) to add a definition of “court protection order” that incorporates by reference the statutory definition of a “protection order” as set forth in 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b). Under the Guidelines Manual, the violation of a court protection order is a specific offense characteristic in three Chapter Two offense guidelines. See USSG §§2A2.2 (Aggravated Assault), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2A6.2 (Stalking or Domestic Violence).

The amendment responds to concerns that the term “court protection order” has not been defined in the guidelines and should be clarified. Providing a clear definition of a “court protection order” in the Guidelines Manual will ensure that orders used for sentencing enhancements are the result of court proceedings assuring appropriate due process protections, that there is a consistent identification and treatment of such orders, and that

such orders issued by tribal courts receive treatment consistent with that of other issuing jurisdictions. The amendment also makes conforming technical changes to the Commentary of §§2B1.3 (Robbery) and 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).

The amendment addresses the treatment of tribal court convictions in Chapter Four (Criminal History and Criminal Livelihood) of the Guidelines Manual. Subsection (i) of §4A1.2 (Definitions and Instructions for Computing Criminal History) provides that sentences resulting from tribal court convictions are not counted in calculating a defendant's criminal history score but may be considered for an upward departure under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). Section 4A1.3 provides for an upward departure for prior sentences that are not used in computing the criminal history category, such as sentences for tribal convictions, where reliable information suggests that the defendant's criminal history category under-represents the seriousness of the defendant's prior record.

Tribal court convictions have been excluded from the criminal history score but have been a legitimate basis for upward departure since the original guidelines were promulgated in 1987. In recent years, some tribal courts have gained enhanced sentencing authority under the Tribal Law and Order Act of 2010, Pub. L. 111–211 (July 29, 2010), and expanded jurisdiction over non-Indian defendants in domestic abuse cases under the Violence Against Women Act Reauthorization Act of 2013, Pub. L. 113–4 (Mar. 7, 2013). Many tribal courts have also begun to increase due process protections and reliable record-keeping.

In recognition of these developments, the amendment provides additional guidance to courts on how to apply the departure provision at §4A1.3 in cases involving a defendant with a history of tribal convictions. Specifically, the amendment amends the Commentary to §4A1.3 at Application Note 2(c) to provide the following non-exhaustive list of six factors that courts may consider in deciding whether or to what extent an upward departure based on a tribal conviction may be appropriate:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.
- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

Because of the many cultural and historical differences among federally-recognized tribes, and especially among their tribal court systems, the Commission determined that — despite recent developments in Indian law to enlarge the scope of tribal court jurisdiction and the availability of due process in tribal court proceedings — a single approach to the consideration of tribal convictions would be difficult and could potentially lead to a disparate result among Indian defendants in federal courts. The amendment, therefore, reflects the Commission’s view that additional guidance about how to apply the departure provision at §4A1.3 in cases involving a defendant with a history of tribal convictions is appropriate, and that the non-exhaustive list of factors provides appropriate guidance and a more structured analytical framework under §4A1.3. The Commission intends, as informed by the Tribal Issues Advisory Group Report and public comment, that none of the factors should be determinative, but collectively the factors reflect important considerations to help courts balance the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences because of varying tribal court practices and circumstances, and the goal of accurately assessing a defendant’s criminal history.

The amendment also includes two technical changes to §4A1.3. First, the amendment amends §4A1.3(a)(2)(A) to change the phrase “sentences for foreign and tribal offenses” to “sentences for foreign and tribal convictions” to track the parallel language in §4A1.2(h) and (i). Second, the amendment makes a clerical change in Application Note 3 to correct an inaccurate reference to §4A1.3(b)(2)(B).

2. Amendment: Section 2B1.1(b) is amended by redesignating paragraphs (13) through (19) as paragraphs (14) through (20), respectively; and by inserting the following new paragraph (13):

“(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years’ imprisonment applies, increase by 4 levels. If the resulting offense level is less than 12, increase to level 12.”;

and in paragraph (17) (as so redesignated) by striking “subsections (b)(2) and (b)(16)(B)” and inserting “subsections (b)(2) and (b)(17)(B)”.

The Commentary to §2B1.1 captioned “Application Notes” is amended—

by redesignating Notes 11 through 20 as Notes 12 through 21, respectively; and by inserting the following new Note 11:

“11. Interaction of Subsection (b)(13) and §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(13) applies, do not apply §3B1.3.”;

in Note 12 (as so redesignated) by striking “(b)(14)” both places such term appears and inserting “(b)(15)”;

in Note 13 (as so redesignated) by striking “(b)(16)(A)” both places such term appears and inserting “(b)(17)(A)”;

in Note 14 (as so redesignated) by striking “(b)(16)(B)” and inserting “(b)(17)(B)”;

by striking “(b)(16)(B)(i)” and inserting “(b)(17)(B)(i)”;

and by striking “(b)(16)(B)(ii)” and inserting “(b)(17)(B)(ii)”;

in Note 15 (as so redesignated) by striking “(b)(18)” both places such term appears and inserting “(b)(19)”;

by striking “(b)(18)(A)(iii)” both places such term appears and inserting “(b)(19)(A)(iii)”;

and by striking “(b)(16)(B)” both places such term appears and inserting “(b)(17)(B)”;

in Note 16 (as so redesignated) by striking “(b)(19)” each place such term appears and inserting “(b)(20)”;

and in Note 21(B) (as so redesignated) by striking “(b)(18)(A)(iii)” and inserting “(b)(19)(A)(iii)”.

The Commentary to §2B1.1 captioned “Background” is amended by striking “(b)(13)” and inserting “(b)(14)”;

by striking “(b)(15)(B)” and inserting “(b)(16)(B)”;

by striking “(b)(16)(A)” and inserting “(b)(17)(A)”;

by striking “(b)(16)(B)(i)” and inserting “(b)(17)(B)(i)”;

by striking “Subsection (b)(17) implements the directive in section 209” and inserting “Subsection (b)(18) implements the directive in section 209”;

by striking “Subsection (b)(18) implements the directive in section 225(b)” and inserting “Subsection (b)(19) implements the directive in section 225(b)”;

and by striking “(b)(18)(B)” and inserting “(b)(19)(B)”.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. § 408 by inserting “, 2X1.1” at the end;

in the line referenced to 42 U.S.C. § 1011 by inserting “, 2X1.1” at the end;

and in the line referenced to 42 U.S.C. § 1383a(a) by inserting “, 2X1.1” at the end.

**Reason for Amendment:** This amendment responds to the Bipartisan Budget Act of 2015 (“the Act”), Pub. L. 114–74 (Nov. 2, 2015), which made numerous changes to the statutes governing Social Security fraud offenses at 42 U.S.C. §§ 408, 1011, and 1383a. The Act added new subsections criminalizing conspiracy to commit fraud for selected substantive offenses already proscribed in Title 42 and added an increased statutory penalty provision for certain persons who commit fraud offenses under the relevant Social Security programs.

In response to these statutory changes, the amendment makes changes to both §2B1.1 (Theft, Property Destruction, and Fraud) and Appendix A (Statutory Index). The amendment to §2B1.1 addresses the increased penalty provisions of the Act by adding a new specific offense characteristic with a 4-level enhancement and a minimum offense level of 12 for those defendants subject to a 10-year statutory maximum, and adds commentary precluding the application of an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) when the new enhancement applies. The amendment to Appendix A references the new conspiracy subsections to the appropriate guidelines.

First, the amendment adds a specific offense characteristic to §2B1.1 in response to the enhanced penalty provisions of the Act. The new enhancement provides for a 4-level increase, as well as a minimum offense level of 12, for those defendants convicted under the relevant statutes and subject to the 10-year statutory maximum. The enhancement reflects both Congress's and the Commission's determination regarding the seriousness of these offenses, and further reflects the difficulty in calculating the true harm caused by such defendants, including the harm to the integrity and financial strength of the Social Security program and to legitimate Social Security program benefit recipients who face delays as a result of the review of claims submitted in these cases. The Commission was also persuaded in its determination by the significant administrative efforts and costs resulting from the regulatory requirement that the Social Security Administration review and redetermine the benefit eligibility for every benefit recipient associated with the defendant, whether part of the fraudulent conduct or not. The new enhancement reflects the increased harm caused by these types of cases compared to those types of fraud sentenced under §2B1.1 for which the loss table more appropriately reflects the severity of the offense.

Similar to other minimum offense levels in §2B1.1, the minimum offense level is intended to account for the difficulty in calculating the amount of loss, as well as the unique and non-monetary harms associated with offenses sentenced under the Act. As previously explained in similar contexts, “[t]he Commission frequently adopts a minimum offense level in circumstances in which, as in these cases, loss as calculated by the guidelines is difficult to compute or does not adequately account for the harm caused by the offense.” USSG, App. C, Amendment 719 (effective Nov. 1, 2008).

In establishing the 4-level increase, the Commission also added commentary precluding the application of an adjustment under §3B1.3 to those defendants who are subject to the Act's increased statutory maximum penalty. In the Act, Congress specifically defined positions of trust in the context of Social Security fraud by subjecting to the increased statutory maximum penalties those defendants who were:

a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this subchapter (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a

physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination . . . .

The Commission precluded application of §3B1.3 to these defendants because the new 4-level enhancement fully accounts for their special position. Addressing the abuse of special position in this manner will avoid uncertainty, prolonged sentencing hearings, and appeals regarding application of the abuse of trust adjustment to offenders subject to the increased statutory maximum penalties of the Act.

Second, the amendment amends Appendix A to reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)). The Commission determined that referencing these conspiracy provisions to §2X1.1, as well as the guideline referenced in the statutory index for the substantive offense, is consistent with the instructions at §1B1.2 (Applicable Guidelines).

3. Amendment: Section 2D1.1 is amended—

by redesignating subsections (b)(13) through (b)(17) as subsections (b)(14) through (b)(18), respectively; and by inserting the following new subsection (b)(13):

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

and in each of subsections (c)(1) through (c)(14) by striking “of Fentanyl” each place such term appears and inserting “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 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 includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance” and inserting “Except as otherwise provided, any reference to a particular controlled substance in these guidelines includes

all salts, isomers, all salts of isomers, and any analogue of that controlled substance”; 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”;

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 line:

“1 gm of a Fentanyl Analogue =	10 kg of marihuana”;
--------------------------------	----------------------

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

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

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

<u>“Synthetic Cathinones (except Schedule III, IV, and V Substances)*</u>
1 gm of a synthetic cathinone (except a Schedule III, IV, or V substance) = 380 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.”;

by inserting after the table under the heading “Schedule I Marihuana” the following new table:

<u>“Synthetic Cannabinoids (except Schedule III, IV, and V Substances)*</u>
1 gm of a synthetic cannabinoid (except a Schedule III, IV, or V substance) = 167 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 binds to and activates type 1 cannabinoid receptors (CB<sub>1</sub> receptors).’;

in Note 16 by striking “§2D1.1(b)(15)(D)” and inserting “§2D1.1(b)(16)(D)”;

in Note 18 by striking “(b)(13)” and inserting “(b)(14)”;

by striking “(b)(13)(A)” each place such term appears and inserting “(b)(14)(A)”;

by striking “(b)(13)(C)–(D)” and inserting “(b)(14)(C)–(D)”;

by striking “(b)(13)(C)(ii)” and inserting “(b)(14)(C)(ii)”;

and by striking “(b)(13)(D)” and inserting “(b)(14)(D)”.

in Note 19 by striking “(b)(14)” each place such term appears and inserting “(b)(15)”;

and by striking “(b)(13)(A)” and inserting “(b)(14)(A)”;

in Note 20 by striking “(b)(15)” and inserting “(b)(16)”;

by striking “(b)(15)(B)” both places such term appears and inserting “(b)(16)(B)”;

by striking “(b)(15)(C)” each place such term appears and inserting “(b)(16)(C)”;

and by striking “(b)(15)(E)” both places such term appears and inserting “(b)(16)(E)”;

in Note 21 by striking “(b)(17)” each place such term appears and inserting “(b)(18)”;

and in Note 27 by inserting at the end the following new paragraphs:

“(D) Departure Based on Potency of Synthetic Cathinones.—In addition to providing marijuana equivalencies for specific controlled substances and groups of substances, the Drug Equivalency Tables provide marijuana equivalencies for certain classes of controlled substances, such as synthetic cathinones. In the case of a synthetic cathinone that is not specifically referenced in this guideline, the marijuana equivalency for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class, such as methcathinone or alpha-PVP. In such a case, a departure may be warranted. For example, an upward departure may be warranted in cases involving MDPV, a substance of which a lesser quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone. In contrast, a downward departure may be warranted in cases involving methylone, a substance of which a greater quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

(E) Departures for Certain Cases involving Synthetic Cannabinoids.—

(i) Departure Based on Concentration of Synthetic Cannabinoids.—Synthetic cannabinoids are manufactured as powder or crystalline substances. The concentrated substance is then usually sprayed on or soaked into a plant or

other base material, and trafficked as part of a mixture. Nonetheless, there may be cases in which the substance involved in the offense is a synthetic cannabinoid not combined with any other substance. In such a case, an upward departure would be warranted.

There also may be cases in which the substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material. In such a case, a downward departure may be warranted.

- (ii) Downward Departure Based on Potency of Synthetic Cannabinoids.—In the case of a synthetic cannabinoid that is not specifically referenced in this guideline, the marijuana equivalency for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted.”.

The Commentary to §2D1.1 captioned “Background” is amended by striking “(b)(13)(A)” and inserting “(b)(14)(A)”; by striking “(b)(13)(C)(ii)” and inserting “(b)(14)(C)(ii)”; by striking “Subsection (b)(15) implements the directive to the Commission in section 6(3)” and inserting “Subsection (b)(16) implements the directive to the Commission in section 6(3)”; and by striking “Subsection (b)(16) implements the directive to the Commission in section 7(2)” and inserting “Subsection (b)(17) implements the directive to the Commission in section 7(2)”.

The Commentary to §2D1.6 captioned “Application Note” is amended in Note 1 by striking “, fentanyl” and inserting “, fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide)”.

Section 2D1.14(a)(1) is amended by striking “(b)(17)” and inserting “(b)(18)”.

The Commentary to §3B1.4 captioned “Application Notes” is amended in Note 2 by striking “§2D1.1(b)(15)(B)” and inserting “§2D1.1(b)(16)(B)”.

The Commentary to §3C1.1 captioned “Application Notes” is amended in Note 7 by striking “§2D1.1(b)(15)(D)” and inserting “§2D1.1(b)(16)(D)”.

Reason for Amendment: This amendment is a result of the Commission’s multi-year 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. The study included extensive data collection, review of scientific literature, multiple public comment periods, and four public hearings. The resulting amendment makes various changes to §2D1.1 pertaining to synthetic controlled substances.

The amendment first addresses fentanyl and fentanyl analogues. The Commission learned that while fentanyl has long been a drug of abuse, there are several indications that its abuse has become both more prevalent and more dangerous in recent years. For example, the Drug Enforcement Administration observed a dramatic increase in fentanyl reports between 2013 and 2015, and the Centers for Disease Control and Prevention reported that there were 9,580 deaths involving synthetic opioids (a category including fentanyl) in 2015, a 72.2 percent increase from 2014. The Commission received testimony and other information indicating that fentanyl and its analogues are often trafficked mixed with other controlled substances, including heroin and cocaine. In other instances, fentanyl is placed in pill or tablet form by drug traffickers. Although some purchasers of these substances may be aware that they contain fentanyl (or even seek them out for that reason), others may believe that they are purchasing heroin or pharmaceutically manufactured opioid pain relievers.

Because 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. To address this harm, the amendment adds a new specific offense characteristic at §2D1.1(b)(13) to provide for a 4-level increase whenever the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. The Commission determined that it is appropriate for traffickers who knowingly misrepresent fentanyl or a fentanyl analogue as another substance to receive additional punishment. If an offender does not know the substance contains fentanyl or a fentanyl analogue, the enhancement does not apply. The specific offense characteristic includes a mens rea requirement to ensure that only the most culpable offenders are subjected to these increased penalties.

The amendment also makes a definitional change in the Guidelines Manual. Title 21, United States Code, refers to fentanyl by reference to its chemical name (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) and sets mandatory minimum penalties for certain quantities of this substance and for analogues of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, although lesser quantities of the analogues are required to trigger the mandatory minimum penalties. See, e.g., 21 U.S.C. § 841(b)(1)(A)(vi). Consistent with its past practice concerning setting drug-trafficking penalties, the Commission relied upon the statutory framework in setting penalties for fentanyl and fentanyl analogues. Fentanyl has a marihuana equivalency of 1:2,500, while fentanyl analogues have a marihuana equivalency of 1:10,000. In the Guidelines Manual, however, the Commission did not use the chemical name for fentanyl reflected in Title 21. Instead, the Commission used the terms “fentanyl” and “fentanyl analogue” in the Drug Quantity Table.

Commission data suggests that offenses involving fentanyl analogues are increasing in the federal caseload. In studying these cases, the Commission has learned that the reference to “fentanyl analogue” in the Drug Quantity Table may interact in an unintended way with the definition of “analogue” provided by Application Note 6 and Section 802(32) of Title 21, United States Code. Because the guideline incorporates by reference the statutory definition of “controlled substance analogue,” and that definition specifically excludes already listed “controlled substances,” it appears that a scheduled fentanyl analogue cannot constitute a “controlled substance analogue,” and thus does not

constitute a fentanyl “analogue” for purposes of §2D1.1. This may have the result that, at sentencing, fentanyl analogues that have already been scheduled must go through the Application Note 6 process to determine the substance most closely related to them.

Additionally, based on implementation of Application Note 6, many courts have then sentenced such analogue cases at the lower fentanyl ratio rather than the higher ratio applicable to fentanyl analogues in the Drug Quantity Table. To address this problem, the amendment adopts a new definition of “fentanyl analogue” as “any substance (including any salt, isomer, or salt of isomer), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).” This portion of the amendment also amends the Drug Quantity Table to clarify that §2D1.1 uses the term “fentanyl” to refer to the chemical name identified by statute and deletes the current listings for alpha-methylfentanyl and 3-methylfentanyl from the Drug Equivalency Tables.

The Commission determined that adopting this definition of “fentanyl analogue” will create a class of fentanyl analogues identical to that already created by statute, clarify the legal confusion that has resulted from the current definition of “analogue” in §2D1.1, and reaffirm that fentanyl analogues are treated differently than fentanyl under the guidelines as well as the statute. Striking the separate references to alpha-methylfentanyl and 3-methylfentanyl will result in the treatment of these substances in common with all other fentanyl analogues. This change, in combination with the adoption of the definition of “fentanyl analogue” and addition of fentanyl analogue to the Drug Equivalency Tables, will limit the use of the listing for “fentanyl” to those cases involving the specific substance named in Title 21.

Next, the amendment addresses synthetic cathinones and synthetic cannabinoids. The Commission received comment from the Department of Justice and others expressing concern that the guidelines do not contain specific “marihuana equivalencies” for synthetic cathinones, such as methylone, mephedrone, and MDPV, or synthetic cannabinoids, such as JWH-018 and AM-2201. For substances that do not appear in either the Drug Quantity Table or the Drug Equivalency Table, Application Note 6 provides courts the process for calculating drug quantities. The note directs courts to identify the “most closely related controlled substance referenced in [§2D1.1]” and to then use that drug’s ratio to marihuana to calculate the quantity for purposes of determining the base offense level. Commenters advised that this process is a time-consuming, burdensome task that leads to sentencing disparities. Because Commission data indicated that the majority of cases relying on the Application Note 6 process involved synthetic cathinones and synthetic cannabinoids, the Commission concluded that this amendment will alleviate the burden associated with its application.

Synthetic cathinones, also known as “bath salts,” are human-made substances chemically related to cathinone, a stimulant found in the khat plant. Although the Commission’s study originally focused on specified cathinones, such as methylone, MDPV, and mephedrone, the Commission received comments indicating that new substances are regularly developed and trafficked and that it would not be feasible to establish a new ratio as each new substance enters the market. Given the large number of potential

substances, the Commission found it impracticable to add individual marijuana equivalencies for every synthetic cathinone. In contrast, the Commission determined a class-based approach for synthetic cathinones should capture both current and future synthetic cathinones.

The Commission has determined that synthetic cathinones constitute a well-defined class. Specifically, testimony and comment presented to the Commission consistently indicated that the whether a substance is a synthetic cathinone is not subject to debate. Likewise, comments and testimony made clear that synthetic cathinones share stimulant characteristics and hallucinogenic effects. The Commission determined that a precise definition is not necessary for such substances and that a class-based structure could be reasonably adopted. The Commission likewise determined that, because the class would encompass methcathinone, currently the lone specifically listed synthetic cathinone, the separate reference to methcathinone in the Drug Equivalency Table should be deleted. Given the Commission's priority to alleviate the burdens associated with the Application Note 6 process and the impracticality of adding many new marijuana equivalencies, the Commission concluded the class-based approach strikes a middle ground between precision and ease of guideline application.

The amendment creates an entry in the Drug Equivalency Tables for the class of synthetic cathinones, providing a marijuana equivalency of 1 gram of a synthetic cathinone (except a Schedule III, IV, or V substance) equals 380 grams of marijuana and applies a minimum base offense level of 12 to the class of synthetic cathinones. The Commission set a minimum base offense level of 12 for the class of synthetic cathinones to maintain consistency with the treatment of other controlled substances. With limited exceptions, all other Schedule I and II controlled substances are subject to the same minimum base offense level. The Commission was not presented with testimony or commentary that indicated a compelling basis to except synthetic cathinones from the minimum offense level.

The Commission adopted the 380-gram equivalency for three reasons. First, a review of the Commission's data indicated that the 380-gram equivalency was both the median and approximate mean ratio utilized by the courts when sentencing synthetic cathinone cases pursuant to Application Note 6. Thus, the Commission determined that the 380-gram equivalency best reflects the current sentencing practices for courts engaging in the Application Note 6 analysis.

Second, the Commission concluded that a ratio consistent with the existing methcathinone ratio was appropriate. The Commission set the methcathinone ratio based upon a scientific study that found that methcathinone was approximately 1.92 times more potent than amphetamine. At the time, amphetamine had a marijuana equivalency of 1:200, equivalent to the current marijuana equivalency of cocaine. The Commission's current study of cathinones did not uncover any new scientific evidence undermining its rationale for setting the methcathinone ratio.

Third, the Commission was presented with substantial information about synthetic cathinones' risks. Testimony before the Commission established that the effects and potencies of synthetic cathinones range from "at least as dangerous as cocaine" to methamphetamine-like. Medical experts discussed the substantial potential health impacts of cathinone use, while law enforcement witnesses offered reports of cathinone users' aggressive behavior posing threats to first responders. With cocaine at a 1:200 ratio and methamphetamine at a 1:2,000 ratio, the Commission concluded that the ratio of 1:380 minimized the risk of frequent over-punishment for substances in this class while providing penalty levels sufficient to account for the specific harms caused by distribution of these substances.

In adopting a class-based approach for both ease of application and because of the impracticability of listing every new substance in the class as it enters the market, the Commission recognizes, however, that some substances may be significantly more or less potent than the typical substances in the class that the ratio was intended to reflect. Therefore, the Commission added a departure provision to address those substances for which a greater or lesser quantity is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

To provide guidance to the court in determining whether to apply the departure, the departure provision identifies substances that the Commission found to be fair representatives of the synthetic cathinones that would fall within the spectrum of substances included in the class, as well as those that may warrant a departure. Specifically, the departure provision notes that: a typical cathinone has a potency comparable to methcathinone or alpha-PVP; methylone is an example of a lower potency substance; and MDPV is an example of a higher potency substance.

Synthetic cannabinoids mimic the effects of tetrahydrocannabinol ("THC"), the main psychoactive chemical in marijuana. Unlike THC, however, most synthetic cannabinoids are "full agonists." That is, they activate the body's type 1 cannabinoid receptors (CB<sub>1</sub>) to a greater degree (*i.e.*, at 100%) than THC, which activates the CB<sub>1</sub> receptors only at 30 to 50 percent. Additionally, unlike THC, synthetic cannabinoids do not contain the additional substances that moderate their adverse effects. To the contrary, they may contain additional substances that augment their hallucinogenic effects. Further, some forms of packaged mixtures (*e.g.*, "K2", "Spice") may contain preservatives, additives, and other chemicals such as benzodiazepines that may compound the adverse effects caused by the cannabinoids. Also unlike THC, synthetic cannabinoids have been associated with physical harms such as organ failure and death.

Through the Commission's multi-year synthetic drug study, the Commission learned that hundreds of synthetic cannabinoids exist. When first marketed, synthetic cannabinoids generally have not yet been scheduled as controlled substances. Often, once a synthetic cannabinoid is scheduled, a new one is created to replace it. Given the large number of potential substances, the Commission found it impracticable to add individual marijuana equivalencies for every synthetic cannabinoid. In contrast, the Commission determined

that a class-based approach for synthetic cannabinoids would be a better means to capture both current and future synthetic cannabinoids.

Based on hearing testimony, the scientific literature, and public comment, the Commission determined that all synthetic cannabinoids can be covered by a single class because these substances share a similar pharmacological effect: all synthetic cannabinoids bind to and activate the CB<sub>1</sub> receptor. Given the Commission's priority to alleviate the burdens associated with the Application Note 6 process and the impracticality of adding many new marijuana equivalencies, the Commission concluded the class-based approach strikes a middle ground between precision and ease of guideline application.

The amendment defines the term "synthetic cannabinoid" as "any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB<sub>1</sub> receptors)." The amendment establishes a marijuana equivalency for the class of synthetic cannabinoids of 1 gram of a synthetic cannabinoid (except a Schedule III, IV, or V substance) equals 167 grams of marijuana and applies a minimum base offense level of 12 to the class.

The marijuana equivalency selected for the class is identical to the existing marijuana equivalencies for both organic and synthetic tetrahydrocannabinol (THC). The Commission originally derived the organic and synthetic THC equivalencies from a comparison of standard dosage units of THC (3 mg) and marijuana (500 mg) and the relationship between the two, rather than the actual amount of THC commonly found in a dose of marijuana. During its current study, the Commission considered whether to incorporate THC (synthetic) into the new synthetic cannabinoid class. As noted, the new synthetic cannabinoid class will be subject to the minimum base offense level of 12 applicable to most Schedule I and II controlled substances. The Commission set a minimum base offense level of 12 to the class for consistency with other Schedule I and II controlled substances. THC (synthetic) is not currently subject to the same minimum offense level. Thus, incorporating THC (synthetic) into the synthetic cannabinoid class would effectively change penalties for certain THC (synthetic) offenses, an outcome contrary to the Commission's intent. Consequently, THC (synthetic) is exempted from the class, its separate marijuana equivalency is retained, and that equivalency is applicable only in cases involving THC (synthetic).

Nevertheless, the Commission used the same marijuana equivalency for the class of synthetic cannabinoids. Commission data for cases involving synthetic cannabinoids indicates that the courts almost uniformly apply the marijuana equivalency for THC to such cases. Hence, the 1:167 ratio for the synthetic cannabinoid class reflects the courts' current sentencing practices. Although synthetic cannabinoids activate the CB<sub>1</sub> receptor to a greater degree than THC, the evidence also established that synthetic cannabinoids exhibit a range of potencies. Those most frequently encountered in the Commission's data exhibited potencies ranging from one to six times that of THC. Adoption of the existing THC marijuana equivalency minimizes the risk of frequent over-punishment for

substances in this class while providing penalty levels that are sufficient to account for the specific harms caused by distribution of these substances.

Finally, the amendment provides two departure provisions addressing synthetic cannabinoids. First, the amendment provides for a departure based on the concentration of a synthetic cannabinoid. The Commission learned that synthetic cannabinoids are manufactured as a powder or crystalline substance and are typically sprayed on or mixed with inert material (such as plant matter) before retail sale. As a result, a synthetic cannabinoid seized after it has been prepared for retail sale will typically weigh significantly more than the undiluted form of the same controlled substance.

Given the central role of drug quantity in setting the base offense level, an individual convicted of an offense involving a synthetic cannabinoid mixture would likely be subject to a guideline penalty range significantly higher than another individual convicted of an offense involving an undiluted synthetic cannabinoid (but who could nevertheless produce an equivalent amount of consumable product). In a case involving undiluted synthetic cannabinoid, an upward departure may be appropriate for that reason. By contrast, in a case where the mixture containing synthetic cannabinoids contained a high quantity of inert material, a downward departure may be warranted.

The second departure provision provides that a downward departure may be appropriate where a substantially greater quantity of the synthetic cannabinoid involved in the offense is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class. The two synthetic cannabinoids specifically cited in the Commission’s priority, JWH-018 and AM-2201, are three and a half times and five times more potent, respectively, than THC. If an offense involves a substantially less potent synthetic cannabinoid than JWH-018 or AM-2201, the court may wish to consider whether a downward departure is appropriate.

4. Amendment: The Commentary to §1B1.10 captioned “Application Notes” is amended in Note 5 by striking “Drug Equivalency Tables” and inserting “Drug Equivalency Tables (currently called Drug Conversion Tables)”.

Section 2D1.1(c)(1), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● 90,000 KG or more of Converted Drug Weight.”

Section 2D1.1(c)(2), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 30,000 KG but less than 90,000 KG of Converted Drug Weight.”



Section 2D1.1(c)(3), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 10,000 KG but less than 30,000 KG of Converted Drug Weight.”.

Section 2D1.1(c)(4), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 3,000 KG but less than 10,000 KG of Converted Drug Weight.”.

Section 2D1.1(c)(5), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 1,000 KG but less than 3,000 KG of Converted Drug Weight.”.

Section 2D1.1(c)(6), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 700 KG but less than 1,000 KG of Converted Drug Weight.”.

Section 2D1.1(c)(7), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 400 KG but less than 700 KG of Converted Drug Weight.”.

Section 2D1.1(c)(8), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 100 KG but less than 400 KG of Converted Drug Weight.”.

Section 2D1.1(c)(9), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 80 KG but less than 100 KG of Converted Drug Weight.”.

Section 2D1.1(c)(10), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 60 KG but less than 80 KG of Converted Drug Weight.”

Section 2D1.1(c)(11), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 40 KG but less than 60 KG of Converted Drug Weight.”

Section 2D1.1(c)(12), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 20 KG but less than 40 KG of Converted Drug Weight.”

Section 2D1.1(c)(13), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● At least 10 KG but less than 20 KG of Converted Drug Weight.”

Section 2D1.1(c)(14), as amended by Amendment 3 of this document, is further amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon; and by adding at the end the following:

“ ● At least 5 KG but less than 10 KG of Converted Drug Weight.”

Section 2D1.1(c)(15) is amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon, and by adding at the end the following:

“ ● At least 2.5 KG but less than 5 KG of Converted Drug Weight.”

Section 2D1.1(c)(16) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon; and by adding at the end the following:

“ ● At least 1 KG but less than 2.5 KG of Converted Drug Weight.”

Section 2D1.1(c)(17) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon; and by adding at the end the following:

“ ● Less than 1 KG of Converted Drug Weight.”

The annotation to §2D1.1(c) captioned “Notes to Drug Quantity Table”, as amended by Amendment 3 of this document, is further amended by inserting at the end the following

new Note (K):

“(K) The term ‘Converted Drug Weight,’ for purposes of this guideline, refers to a nominal reference designation that is used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.”.

The Commentary to §2D1.1 captioned “Application Notes”, as amended by Amendment 3 of this document, is further amended—

in Note 6 by striking “marihuana equivalency” and inserting “converted drug weight”; and by inserting after “the most closely related controlled substance referenced in this guideline.” the following: “See Application Note 8.”;

in the heading of Note 8 by striking “Drug Equivalency Tables” and inserting “Drug Conversion Tables”;

in Note 8(A) by striking “Drug Equivalency Tables” both places such term appears and inserting “Drug Conversion Tables”; by striking “to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana” and inserting “to find the converted drug weight of the controlled substance involved in the offense”; by striking “Find the equivalent quantity of marihuana” and inserting “Find the corresponding converted drug weight”; by striking “Use the offense level that corresponds to the equivalent quantity of marihuana” and inserting “Use the offense level that corresponds to the converted drug weight determined above”; by striking “an equivalent quantity of 5 kilograms of marihuana” and inserting “5 kilograms of converted drug weight”; and by striking “the equivalent quantity of marihuana would be 500 kilograms” and inserting “the converted drug weight would be 500 kilograms”;

in Note 8(B) by striking “Drug Equivalency Tables” each place such term appears and inserting “Drug Conversion Tables”; by striking “convert each of the drugs to its marihuana equivalent” and inserting “convert each of the drugs to its converted drug weight”; by striking “For certain types of controlled substances, the marihuana equivalencies” and inserting “For certain types of controlled substances, the converted drug weights assigned”; by striking “e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of marihuana” and inserting “e.g., the combined converted weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of converted drug weight”; by striking “determine the marihuana equivalency for each schedule separately” and inserting “determine the converted drug weight for each schedule separately”; and by striking “Then add the marihuana equivalencies to determine the combined marihuana equivalency” and inserting “Then add the converted drug weights to determine the combined converted drug weight”;

in Note 8(C)(i) by striking “of marihuana” each place such term appears and inserting “of

converted drug weight”; and by striking “The total is therefore equivalent to 95 kilograms” and inserting “The total therefore converts to 95 kilograms”;

in Note 8(C)(ii) by striking the following:

“The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 8 in the Drug Quantity Table.”,

and inserting the following:

“The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The marihuana converts to 500 grams of converted drug weight. The diazepam, a Schedule IV drug, converts to 625 grams of converted drug weight. The total, 1.125 kilograms of converted drug weight, has an offense level of 8 in the Drug Quantity Table.”;

in Note 8(C)(iii) by striking “is equivalent” both places such term appears and inserting “converts”; by striking “of marihuana” each place such term appears and inserting “of converted drug weight”; and by striking “The total is therefore equivalent” and inserting “The total therefore converts”;

in Note 8(C)(iv) by striking “marihuana equivalency” each place such term appears and inserting “converted drug weight”; by striking “76 kilograms of marihuana” and inserting “76 kilograms”; by striking “79.99 kilograms of marihuana” both places such term appears and inserting “79.99 kilograms of converted drug weight”; by striking “equivalent weight” each place such term appears and inserting “converted weight”; by striking “9.99 kilograms of marihuana” and inserting “9.99 kilograms”; and by striking “2.49 kilograms of marihuana” and inserting “2.49 kilograms”;

in Note 8(D)—

in the heading, by striking “Drug Equivalency Tables” and inserting “Drug Conversion Tables”;

under the heading relating to Schedule I or II Opiates, by striking the heading as follows:

“Schedule I or II Opiates\*”,

and inserting the following new heading:

“Schedule I or II Opiates\* Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating Cocaine and Other Schedule I and II Stimulants (and their immediate precursors), by striking the heading as follows:

“Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)\*”,

and inserting the following new heading:

“Cocaine and Other Schedule I and II Stimulants  
(and their immediate precursors)\*” Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating to Synthetic Cathinones (except Schedule III, IV, and V Substances), by striking the heading as follows:

“Synthetic Cathinones (except Schedule III, IV, and V Substances)\*”,

and inserting the following new heading:

“Synthetic Cathinones  
(except Schedule III, IV, and V Substances)\*” Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the heading as follows:

“LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)\*”,

and inserting the following new heading:

“LSD, PCP, and Other Schedule I and II Hallucinogens  
(and their immediate precursors)\*” Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating to Schedule I Marihuana, by striking the heading as follows:

“Schedule I Marihuana”,

and inserting the following new heading:

“Schedule I Marihuana” Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating to Synthetic Cannabinoids (except Schedule III, IV, and V Substances), by striking the heading as follows:

“Synthetic Cannabinoids (except Schedule III, IV, and V Substances)\*”,

and inserting the following new heading:

“Synthetic Cannabinoids  
(except Schedule III, IV, and V Substances)\*                    Converted Drug Weight”;

and by striking “of marijuana”;

under the heading relating to Flunitrazepam, by striking the heading as follows:

“Flunitrazepam\*\*”,

and inserting the following new heading:

“Flunitrazepam\*\*                                                                 Converted Drug Weight”;

and by striking “of marijuana”;

under the heading relating to Schedule I or II Depressants (except gamma-hydroxybutyric acid), by striking the heading as follows:

“Schedule I or II Depressants (except gamma-hydroxybutyric acid)”,

and inserting the following new heading:

“Schedule I or II Depressants  
(except gamma-hydroxybutyric acid)                                                                 Converted Drug Weight”;

and by striking “of marijuana”;

under the heading relating to Gamma-hydroxybutyric Acid, by striking the heading as follows:

“Gamma-hydroxybutyric Acid”,

and inserting the following new heading:

“Gamma-hydroxybutyric Acid                                                                 Converted Drug Weight”;

and by striking “of marijuana”;

under the heading relating to Schedule III Substances (except ketamine), by striking the heading as follows:

“Schedule III Substances (except ketamine)\*\*\*”,

and inserting the following new heading:

“Schedule III Substances (except ketamine)\*\*\*                      Converted Drug Weight”;

by striking “1 gm of marihuana” and inserting “1 gm”; by striking “equivalent weight” and inserting “converted weight”; and by striking “79.99 kilograms of marihuana” and inserting “79.99 kilograms of converted drug weight”;

under the heading relating to Ketamine, by striking the heading as follows:

“Ketamine”,

and inserting the following new heading:

“Ketamine                                                                                              Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Schedule IV Substances (except flunitrazepam), by striking the heading as follows:

“Schedule IV Substances (except flunitrazepam)\*\*\*\*\*”,

and inserting the following new heading:

“Schedule IV Substances (except flunitrazepam)\*\*\*                      Converted Drug Weight”;

by striking “0.0625 gm of marihuana” and inserting “0.0625 gm”; and by striking “\*\*\*\*\*Provided, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of marihuana.” and inserting “\*\*\*\*\*Provided, that the combined converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of converted drug weight.”;

under the heading relating to Schedule V Substances, by striking the heading as follows:

“Schedule V Substances\*\*\*\*\*”,

and inserting the following new heading:

“Schedule V Substances\*\*\*\*\*                                                                                              Converted Drug Weight”;

by striking “0.00625 gm of marihuana” and inserting “0.00625 gm”; and by striking “\*\*\*\*\*Provided, that the combined equivalent weight of Schedule V substances shall not exceed 2.49 kilograms of marihuana.” and inserting “\*\*\*\*\*Provided, that the combined converted weight of Schedule V substances shall not exceed 2.49 kilograms of converted drug weight.”;

under the heading relating to List I Chemicals (relating to the manufacture of amphetamine or methamphetamine), by striking the heading as follows:

“List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)\*\*\*\*\*”,

and inserting the following new heading:

“List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)\*\*\*\*\*                      Converted Drug Weight”;

by striking “of marihuana” each place such term appears; and by striking “\*\*\*\*\*Provided, that in a case involving” and inserting “\*\*\*\*\*Provided, that in a case involving”;

under the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or ketamine), by striking the heading as follows:

“Date Rape Drugs (except flunitrazepam, GHB, or ketamine)”,

and inserting the following new heading:

“Date Rape Drugs (except flunitrazepam, GHB, or ketamine)                      Converted Drug Weight”;

and by striking “marihuana” both places such term appears;

and in the text before the heading relating to Measurement Conversion Table, by striking “To facilitate conversions to drug equivalencies” and inserting “To facilitate conversions to converted drug weight”;

in Note 27(D) by striking “marihuana equivalencies” both place such term appears and inserting “converted drug weights”; by striking “Drug Equivalency Tables” and inserting “Drug Conversion Tables”; and by striking “marihuana equivalency” and inserting “converted drug weight”;

and in Note 27(E)(ii) by striking “marihuana equivalency” and inserting “converted drug weight”.



The Commentary to §2D1.1 captioned “Background”, as amended by Amendment 3 of this document, is further amended by adding at the end the following new paragraph:

“The Drug Conversion Tables set forth in Application Note 8 were previously called the Drug Equivalency Tables. In the original 1987 Guidelines Manual, the Drug Equivalency Tables provided four conversion factors (or ‘equivalents’) for determining the base offense level in cases involving either a controlled substance not referenced in the Drug Quantity Table or multiple controlled substances: heroin, cocaine, PCP, and marihuana. In 1991, the Commission amended the Drug Equivalency Tables to provide for one substance, marihuana, as the single conversion factor in §2D1.1. See USSG App. C, Amendment 396 (effective November 1, 1991). In 2018, the Commission amended §2D1.1 to replace marihuana as the conversion factor with the new term ‘converted drug weight’ and to change the title of the Drug Equivalency Tables to the ‘Drug Conversion Tables.’”.

The Commentary to §2D1.11 captioned “Application Notes” is amended in Note 9 by striking “Drug Equivalency Table” and inserting “Drug Conversion Table”.

The Concluding Commentary to Part D of Chapter Three is amended in Example 2 by striking “marihuana equivalents” and inserting “converted drug weight”; by striking “Drug Equivalency Tables” and inserting “Drug Conversion Tables”; and by striking “of marihuana” each place such term appears and inserting “of converted drug weight”.

Reason for Amendment: This amendment makes technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). It replaces the term “marihuana equivalency,” which is used in the Drug Equivalency Tables for determining penalties for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances, with the term “converted drug weight.”

The Commission received comment expressing concern that the term “marihuana equivalency” is misleading and results in confusion for individuals not fully versed in the guidelines. Some commenters suggested that the Commission should replace “marihuana equivalency” with another term.

Specifically, the amendment adds the new term “converted drug weight” to all provisions of the Drug Quantity Table at §2D1.1(c) and changes the title of the “Drug Equivalency Tables” to “Drug Conversion Tables.” In addition, the amendment makes technical changes throughout the Guidelines Manual to account for the new term.

This amendment is not intended as a substantive change in policy for §2D1.1.

5. Amendment: Section 2L1.2(b)(2) is amended by striking “If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained—” and inserting “If, before 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—”.

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—”.

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 “includes any term of imprisonment given upon revocation of probation, parole, or supervised release” and inserting “includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred”;

in Note 4 by striking “subsection (b)(3),” and inserting “subsection (b)(2) or (b)(3), as appropriate,”;

and by redesignating Notes 5 through 7 as Notes 6 through 8, respectively; and by inserting the following new Note 5:

“5. Cases in Which the Criminal Conduct Underlying a Prior Conviction Occurred Both Before and After the Defendant Was First Ordered Deported or Ordered Removed.—There may be cases in which the criminal conduct underlying a prior conviction occurred both before and after the defendant was ordered deported or ordered removed from the United States for the first time. For purposes of subsections (b)(2) and (b)(3), count such a conviction only under subsection (b)(2).”

Reason for Amendment: This amendment responds to two application issues that arose after §2L1.2 (Unlawfully Entering or Remaining in the United States) was extensively amended in 2016. See USSG, App. C, Amendment 802 (effective Nov. 1, 2016).

The specific offense characteristic at §2L1.2(b)(2) applies a sliding scale of enhancements, based on sentence length, if the “defendant sustained” a “conviction” before being ordered removed for the first time. Correspondingly, §2L1.2(b)(3) applies a parallel scale of enhancements if the defendant “engaged in criminal conduct resulting in” a conviction “at any time after” the first order of removal. In most situations, any prior felony conviction that received criminal history points will qualify under either subsection (b)(2) or (b)(3), with the extent of the increase depending on the length of the sentence imposed. In some scenarios, a felony will not qualify for an upward adjustment under either subsection (b)(2) or (b)(3) even though it received criminal history points. Those scenarios occur when a defendant committed a crime before being ordered

removed for the first time but was not convicted (or sentenced) for that crime until after that first order of removal.

The amendment addresses this issue by establishing that the application of the §2L1.2(b)(2) enhancement depends on the timing of the underlying “criminal conduct,” and not on the timing of the resulting conviction. It does so by amending the first paragraph of subsection (b)(2) to state that the enhancement applies if pre-first removal conduct resulted in a conviction “at any time,” and makes a conforming change to the first paragraph of subsection (b)(3). In order to address how to treat an offense involving conduct that occurred both before and after a defendant’s first order of removal, the amendment adds a new Application Note 5 explaining that an offense involving such conduct should be counted only under subsection (b)(2). The Commission determined that a defendant with a prior non-illegal reentry felony conviction that received criminal history points should receive an enhancement for that conviction under either subsection (b)(2) or (b)(3). A defendant should not avoid an enhancement for an otherwise qualifying conviction because the conviction occurred after a defendant’s first order of removal or deportation but was premised on conduct that occurred before that order. Because a conviction could be premised on conduct that occurred both before and after the first order of removal or deportation, the Commission adopted Application Note 5 to explain that such convictions are only counted once, under subsection (b)(2).

The specific offense characteristics at §2L1.2(b)(2) and (b)(3) increase a defendant’s offense level based on the length of the “sentence imposed” for a prior felony conviction. An application note defines “sentence imposed” to mean “sentence of imprisonment” as that term is used in the criminal history guideline, §4A1.2. See USSG §2L1.2, comment. (n.2.). Consistent with that definition, the application note also directs that “[t]he length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.” Id.

Another part of the commentary to §2L1.2 directs that only convictions receiving criminal history points under “§4A1.1(a), (b), or (c)” (which assign points based on the length of the prior sentence imposed) are to be counted under §2L1.2(b). See USSG §2L1.2, comment. (n.3). In determining the length of a sentence for purposes of Chapter Four (and thus the number of criminal history points to be applied), the length of any term imposed on revocation of probation, parole, supervised release, or other similar status is added to the original term of imprisonment and the total term is used to calculate criminal history points under §4A1.1(a), (b), or (c). See USSG §4A1.2(k)(1).

A Fifth Circuit opinion interpreted §2L1.2(b)(2) to bar consideration of a revocation that did not occur until *after* a defendant’s first order of removal, even if the defendant was convicted prior to the first order of the removal. See *United States v. Franco-Galvan*, 864 F.3d 338 (5th Cir. 2017). The court found that Application Note 2, despite its instruction that “the length of the sentence imposed includes any term of imprisonment

given upon revocation of probation, parole, or supervised release,” was insufficiently clear to resolve the “temporal” question of when a revocation must occur, given that the Commission had resolved a prior circuit conflict in 2012 by directing that revoked time should not be counted in the situation. See USSC, App. C, Amendment 764 (effective Nov. 1, 2012). A subsequent decision of the Ninth Circuit reached the same result. See United States v. Martinez, 870 F.3d 1163 (9th Cir. 2017). Although both cases involved an enhancement under subsection (b)(2), the same logic would seem to apply to enhancements under subsection (b)(3) when the conviction and revocation were separated by an intervening order of removal or deportation.

The amendment resolves this issue by adding the clarifying phrase “regardless of when the revocation occurred” to the definition of “sentence imposed” in Application Note 2. The Commission determined that, consistent with the purposes of the 2016 amendment to §2L1.2, the data underlying it, and the statement in Application Note 2, the length of a sentence imposed for purposes of §2L1.2(b)(2) and (b)(3) should include any additional term of imprisonment imposed upon revocation of probation, suspended sentence, or supervised release, regardless of whether the revocation occurred before or after the defendant’s first (or any subsequent) order of removal. As the reason for amendment for Amendment 802 explained, “[t]he Commission determined that a sentence-imposed approach is consistent with the Chapter Four criminal history rules, easily applied, and appropriately calibrated to account for the seriousness of prior offenses.” USSC, App. C, Amendment 802 (effective Nov. 1, 2016). Excluding sentence length added by post-removal revocations would be inconsistent with the purpose of Amendment 802 and its underlying data analysis. Id.

6. Amendment: The Commentary to §3E1.1 captioned “Application Notes” is amended in Note 1(A) by striking “However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility” and inserting “A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant’s challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous”.

Reason for Amendment: This amendment responds to concerns that some courts have interpreted the commentary to §3E1.1 (Acceptance of Responsibility) to automatically preclude application of the 2-level reduction for acceptance of responsibility when the defendant makes an unsuccessful good faith, non-frivolous challenge to relevant conduct. Application Note 1 provides a non-exhaustive list of appropriate considerations in determining whether a defendant has clearly demonstrated acceptance of responsibility. Among those considerations is whether the defendant truthfully admitted the conduct comprising the offense(s) of conviction and truthfully admitted or did not falsely deny any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). See USSG §3E1.1, comment. (n.1(A)). The application note further

provides that “a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.” The amendment clarifies that an unsuccessful challenge to relevant conduct does not necessarily establish that the challenge was either a false denial or frivolous. Specifically, the amendment adds “but the fact that a defendant’s challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous” to the end of Application Note 1(A).

7. Amendment: The Commentary to §5C1.1 captioned “Application Notes” is amended by redesignating Notes 4 through 9 as Notes 5 through 10, respectively; and by inserting the following new Note 4:

“4. If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). See 28 U.S.C. § 994(j). For purposes of this application note, a ‘nonviolent first offender’ is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase ‘comparable judicial dispositions of any kind’ includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of nolo contendere and juvenile adjudications.”.

The Commentary to §5F1.2 captioned “Application Notes” is amended in Note 1 by striking “Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention” and inserting “Electronic monitoring is an appropriate means of surveillance for home detention”; and by striking “alternative means of surveillance may be used so long as they are as effective as electronic monitoring” and inserting “alternative means of surveillance may be used if appropriate”.

The Commentary to §5F1.2 captioned “Background” is amended by striking “The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring” and inserting “The Commission has concluded that electronic monitoring is an appropriate means of surveillance for home detention”; and by striking “the court should be confident that an alternative form of surveillance will be equally effective” and inserting “the court should be confident that an alternative form of surveillance is appropriate considering the facts and circumstances of the defendant’s case”.

Section 5H1.3 is amended by striking “See §5C1.1, Application Note 6” and inserting “See §5C1.1, Application Note 7”.

Section 5H1.4 is amended by striking “See §5C1.1, Application Note 6” and inserting “See §5C1.1, Application Note 7”.

Reason for Amendment: The amendment adds a new application note to the Commentary at §5C1.1 (Imposition of a Term of Imprisonment), which states that if a defendant is a “nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.” This new application note is consistent with the statutory language in 28 U.S.C. § 994(j) regarding the “general appropriateness of imposing a sentence other than imprisonment” for “a first offender who has not been convicted of a crime of violence or an otherwise serious offense” and cites the statutory provision in support. It also is consistent with a recent Commission recidivism study, which demonstrated that offenders with zero criminal history points have a lower recidivism rate than offenders with one criminal history point, and that offenders with zero criminal history points and no prior contact with the criminal justice system have an even lower recidivism rate. See Tracey Kyckelhahn & Trishia Cooper, U.S. Sentencing Comm’n, The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders at 6–9 (2017).

Where permitted by statute, the Guidelines Manual provides for non-incarceration sentences for offenders in Zones A and B of the Sentencing Table. Zone A (in which all sentencing ranges are zero to six months regardless of criminal history category) permits the full spectrum of sentencing options: (1) a fine only; (2) a term of probation only; (3) probation with conditions of confinement (home detention, community confinement, or intermittent confinement); (4) a “split sentence” (a term of imprisonment followed by a term of supervised release with condition of confinement that substitutes for a portion of the guideline term); or (5) a term of imprisonment only. Zone B (which includes sentencing ranges that have a low-end of one month and a high-end of 15 months, and vary by criminal history category) also authorizes non-prison sentences. However, Zone B sentencing options are more restrictive, authorizing (1) probation with conditions of confinement; (2) a “split sentence”; or (3) a term of imprisonment only. Consistent with the statutory mandate in section 994(j), the application note is intended to serve as a reminder to courts to consider imposing non-incarceration sentences for a defined class of “nonviolent first offenders” whose applicable guideline ranges are in Zones A or B of the Sentencing Table.

For purposes of the new application note, the amendment defines a “nonviolent first offender” as a defendant who (1) has no prior convictions or other comparable judicial dispositions of any kind; and (2) did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense. It explains that “comparable judicial dispositions of any kind” includes “diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of nolo contendere and juvenile adjudications.”

The amendment adopts language from the statutory and guidelines “safety-valve” provisions to exclude offenders who “use[d] violence or credible threats of violence or possess[ed] a firearm or other dangerous weapon in connection with the offense.” See 18 U.S.C § 3553(f)(2); USSG §5C1.2(a)(2). This real-offense definition of “violent” offense avoids the complicated application of the “categorical approach” to determine

whether an offense qualifies as “violent.” See United States v. Starks, 861 F.3d 306, 324 (1st Cir. 2017) (describing the “immensely complicated analysis required by the categorical approach”); see also USSG §5C1.2, comment. (n.3) (noting that the determination of whether “the offense” was violent or involved a firearm requires a court to consider not only the offense of conviction but also “all relevant conduct”). It also ensures that only nonviolent offenders are covered by the new application note.

The amendment also deletes language from the commentary to §5F1.2 (Home Detention) that generally encouraged courts to use electronic monitoring (also called location monitoring) when home detention is made a condition of supervision, and instead instructs that electronic monitoring or any alternative means of surveillance may each be used, as “appropriate.” The goal of this change is to increase the use of probation with home detention as an alternative to incarceration. The Commission received testimony indicating that location monitoring is resource-intensive and otherwise demanding on probation officers. Additionally, it heard testimony that imposing location monitoring by default is inconsistent with the evidence-based “risk-needs-responsivity” (RNR) model of supervision and may be counterproductive for certain lower-risk offenders. For many low-risk offenders, less intensive surveillance methods (e.g., telephonic contact, video conference, unannounced home visits by probation officers) are sufficient to enforce home detention. The revised language would allow probation officers and courts to exercise discretion to use surveillance methods that they deem appropriate in light of evidence-based practices.

8. Amendment: The Commentary to §2A3.5 captioned “Statutory Provision” is amended by striking “§ 2250(a)” and inserting “§ 2250(a), (b)”.

The Commentary to §2A3.5 captioned “Application Notes” is amended by redesignating Note 2 as Note 3; and by inserting the following new Note 2:

“2. Application of Subsection (b)(1).—For purposes of subsection (b)(1), a defendant shall be deemed to be in a ‘failure to register status’ during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).”.

Section 2A3.6(a) is amended by striking “§ 2250(c)” and inserting “§ 2250(d)”.

The Commentary to §2A3.6 captioned “Statutory Provisions” is amended by striking “2250(c)” and inserting “2250(d)”.

The Commentary to §2A3.6 captioned “Application Notes” is amended—

in Note 1 by striking “Section 2250(c)” and inserting “Section 2250(d)”; and by inserting after “18 U.S.C. § 2250(a)” the following: “or (b)”;

in Note 3 by striking “§ 2250(c)” and inserting “§ 2250(d)”;

and in Note 4 by striking “§ 2250(c)” and inserting “§ 2250(d)”.

Section 2B5.3(b)(5) is amended by striking “counterfeit drug” and inserting “drug that uses a counterfeit mark on or in connection with the drug”.

The Commentary to §2B5.3 captioned “Application Notes” is amended in Note 1 by striking the third undesignated paragraph as follows:

“‘Counterfeit drug’ has the meaning given that term in 18 U.S.C. § 2320(f)(6).”;

and by inserting after the paragraph that begins “‘Counterfeit military good or service’ has the meaning” the following new paragraph:

“‘Drug’ and ‘counterfeit mark’ have the meaning given those terms in 18 U.S.C. § 2320(f).”.

The Commentary to §2G1.3 captioned “Application Notes” is amended in Note 4 by striking “(b)(3)” each place such term appears and inserting “(b)(3)(A)”.

Section 5D1.3(a)(6)(A) is amended by striking “18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664” and inserting “18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution”.

Appendix A (Statutory Index) is amended—

in the line referenced to 15 U.S.C. § 2615 by striking “§ 2615” and inserting “§ 2615(b)(1)”;

by inserting before the line referenced to 15 U.S.C. § 6821 the following new line reference:

“15 U.S.C. § 2615(b)(2)                      2Q1.1”;

in the line referenced to 18 U.S.C. § 2250(a) by striking “§ 2250(a)” and inserting “§ 2250(a), (b)”;

and in the line referenced to 18 U.S.C. § 2250(c) by striking “§ 2250(c)” and inserting “§ 2250(d)”.

**Reason for Amendment:** This multi-part amendment responds to recently enacted legislation and miscellaneous guideline application issues.

First, the amendment responds to section 6 of the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. 114–119 (Feb. 8, 2016), which added a new registration requirement for certain sex offenders required to register under the Sex Offender Registration and Notification Act (SORNA) at 34 U.S.C. § 20914. SORNA requires sex



offenders to register in the sex offender registry, and keep their registration current, by providing certain identifying information including names, addresses, and Social Security Numbers. The new requirement at 34 U.S.C. § 20914(7) directs sex offenders to provide information relating to intended travel outside the United States, including any anticipated dates and places of departure, arrival or return, air carrier and flight numbers, and destination country. The Act also established a new offense at 18 U.S.C. § 2250(b). For those required to register under SORNA, knowingly failing to provide this travel-related information and engaging or attempting to engage in the intended travel outside of the United States, carries a statutory maximum of 10 years of imprisonment. Section 2250 offenses are referenced in Appendix A (Statutory Index) to §2A3.5 (Failure to Register as a Sex Offender). The amendment amends Appendix A so the new offense at 18 U.S.C. § 2250(b) is referenced to §2A3.5. The amendment also adds a new Application Note 2 to the Commentary to §2A3.5 providing that for purposes of §2A3.5(b)(1), a defendant shall be considered in a “failure to register status” during the time the defendant engaged in conduct described in either section 2250(a) (failing to register or update registration) or section 2250(b) (failing to provide required travel-related information). This application note reflects the Commission’s determination that failing to provide information about intended foreign travel meets the definition of failing to update registration information in the sex offender registry. In addition, the amendment makes clerical changes to §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to reflect the adoption of section 2250(b) and the associated redesignation of section 2250(c) as section 2250(d).

Second, the amendment responds to section 3 of the Transnational Drug Trafficking Act of 2016, Pub. L. 114–154 (May 16, 2016), which made changes relating to the trafficking of counterfeit drugs by amending the language in the penalty provision at 18 U.S.C. § 2320. The Act amended section 2320(b)(3) to replace the term “counterfeit drug” with the phrase “a drug that uses a counterfeit mark on or in connection with the drug.” The Act also revised section 2320(f) to define the term “drug” by reference to the term as defined in the Federal Food, Drug, and Cosmetic Act found at 21 U.S.C. § 321. Section 2320 offenses are referenced in Appendix A (Statutory Index) to §2B5.3 (Criminal Infringement of Copyright or Trademark). The amendment replaces the term “counterfeit drug” at §2B5.3(b)(5) with the new phrase in the revised section 2320(b)(3), to remain consistent with the language of the statute. Similarly, the amendment amends the commentary to §2B5.3 to remove a definition for the obsolete term “counterfeit drug” and replace it with definitions of the terms “drug” and “counterfeit mark” as found in the revised statute.

Third, the amendment responds to section 12 of the Frank R. Lautenberg Chemical Safety for the 21st Century Act of 2016, Pub. L. 114–182 (June 22, 2016), which amended section 16 of the Toxic Substances Control Act (15 U.S.C. § 2615) by adding a new provision at section 2615(b)(2). The new provision prohibits any person from knowingly and willfully violating specific provisions of the Toxic Substances Control Act, knowing at the time of the violation that the violation puts a person in imminent danger of death or bodily injury, with a maximum penalty of 15 years of imprisonment. The Toxic Substances Control Act is referenced in Appendix A (Statutory Index) to

§2Q1.2 (Mishandling of Hazardous or Toxic Substances of Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). The amendment continues to reference the preexisting offense, now codified at section 2615(b)(1), to §2Q1.2, but references the new offense, codified at section 2615(b)(2), to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants). The Commission determined §2Q1.1 is the most analogous guideline because it covers similar “knowing endangerment” provisions and has a similar mens rea element found in similar statutes referenced in Appendix A to §2Q1.1.

Fourth, the amendment responds to section 2 of the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016), which amended 18 U.S.C. § 3583(d) (relating to conditions of supervised release) to require a court, when imposing a sentence of supervised release, to include as a condition that the defendant make restitution in accordance with sections 3663 and 3663A of Title 18 of the United States Code, or any other statute authorizing a sentence of restitution. The amendment amends subsection (a)(6)(A) of §5D1.3 (Conditions of Supervised Release) to include a mandatory condition of supervised release in conformance with the new statutory requirement. The amendment also parallels the Judicial Conference of the United States’ recent revision of the Judgment in a Criminal Case form to include a new mandatory condition of supervised release.

Fifth, the amendment clarifies an application issue that has arisen with respect to §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), which applies to several offenses involving the transportation of a minor for illegal sexual activity. A two-level enhancement at §2G1.3(b)(3) applies if the offense involved the use of a computer to either (A) persuade, entice or coerce a minor, or to facilitate the travel of a minor, to engage in prohibited sexual conduct, or (B) to entice, offer, or solicit a person to engage in prohibited sexual conduct with a minor. While Application Note 4 sets forth guidance on this enhancement, it fails to distinguish between the two prongs of subsection (b)(3). As a result, an application issue has arisen regarding whether the note prohibits application of the enhancement where a computer was used to solicit a third party to engage in prohibited sexual conduct with a minor, as set out in subsection (b)(3)(B). Courts have concluded that the application note is inconsistent with the language of §2G1.3(b)(3), and that application of the enhancement for the use of a computer in third party solicitation cases is proper. See e.g., United States v. Cramer, 777 F.3d 597, 606 (2d Cir. 2015); United States v. McMillian, 777 F.3d 444, 449–50 (7th Cir. 2015); United States v. Hill, 782 F.3d 842, 846 (11th Cir. 2015); United States v. Pringler, 765 F.3d 455 (5th Cir. 2014). The amendment is intended to clarify the Commission’s original intent that Application Note 4 apply only to subsection (b)(3)(A).

9. Amendment: Chapter One, Part A is amended—

in Subpart 1(4)(b) (Departures) by inserting an asterisk after “§5K2.19 (Post-Sentencing Rehabilitative Efforts)”; and by inserting after the first paragraph the following note:

“\*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (See USSG App. C, amendment 768.)”;

and in the note at the end of Subpart 1(4)(d) (Probation and Split Sentences) by striking “Supplement to Appendix C” and inserting “USSG App. C”.

The Commentary to §1B1.13 captioned “Application Notes” is amended in Note 4 by striking “factors set forth 18 U.S.C. § 3553(a)” and inserting “factors set forth in 18 U.S.C. § 3553(a)”.

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 §2B1.1 captioned “Application Notes” is amended in Note 2(A)(i) by striking “as determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction” and inserting the following: “specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of §1B1.2 (Applicable Guidelines)”.

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”.

Section 2D1.11 is amended in subsection (d)(6) by striking “Pseudoephedrine” and inserting “Pseudoephedrine”; and in subsection (e)(2), under the heading relating to List I Chemicals, by striking the period at the end and inserting a semicolon.

The Commentary to §2M2.1 captioned “Statutory Provisions” is amended by striking “§ 2153” and inserting “§§ 2153”; and by inserting at the end the following: “For additional statutory provision(s), see Appendix A (Statutory Index).”.

The Commentary to §2Q1.1 captioned “Statutory Provisions” is amended by striking “42 U.S.C. § 6928(e)” and inserting “42 U.S.C. §§ 6928(e), 7413(c)(5)”; and by inserting at the end the following: “For additional statutory provision(s), see Appendix A (Statutory Index).”.

The Commentary to §2Q1.2 captioned “Statutory Provisions” is amended by striking “7413” and inserting “7413(c)(1)–(4)”.

The Commentary to §2Q1.3 captioned “Statutory Provisions” is amended by striking “7413” and inserting “7413(c)(1)–(4)”.

The Commentary to §2Q1.3 captioned “Application Notes” is amended in Note 8 by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to §2R1.1 captioned “Application Notes” is amended in Note 7 by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

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 4A1.2 is amended in subsections (h), (i), and (j) by striking “Adequacy of Criminal History Category” each place such term appears and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to §4A1.2 captioned “Application Notes” is amended in Notes 6 and 8 by striking “Adequacy of Criminal History Category” both places such term appears and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to §4B1.4 captioned “Background” is amended by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

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

Section 5D1.3 is amended in subsection (a)(4) by striking “release on probation” and inserting “release on supervised release”; and in subsection (a)(8) 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;

in the line referenced to 18 U.S.C. § 371 by rearranging the guidelines to place them in proper numerical order;

in the line referenced to 18 U.S.C. § 1591 by rearranging the guidelines to place them in proper numerical order;

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

“18 U.S.C. § 1865(c)            2B1.1”;

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

“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.

Reason for Amendment: This amendment makes various technical changes to the Guidelines Manual.

First, the amendment sets forth clarifying changes to two guidelines. The amendment amends Chapter One, Part A, Subpart 1(4)(b) (Departures) to provide an explanatory note addressing the fact that §5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. The amendment also makes minor clarifying changes to Application Note 2(A) to §2B1.1 (Theft, Property Destruction, and Fraud), to make clear that, for purposes of subsection (a)(1)(A), an offense is “referenced to this guideline” if §2B1.1 is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction.

Second, the 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 Pub. L. 113–287 (Dec. 19, 2014). The 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 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).

Third, the amendment makes additional 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, the amendment makes changes to: the Commentary to §2A3.5 (Failure to Register as a Sex Offender); the Commentary to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)); subsection (a)(10) of §5B1.3 (Conditions of Probation); subsection (a)(8) of §5D1.3 (Conditions of Supervised Release); and Appendix A (Statutory Index).

Fourth, the amendment makes clerical changes in §§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Finally, the amendment also makes clerical changes to—

- the Commentary to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)), by inserting a missing word in Application Note 4;
- subsection (d)(6) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), by correcting a typographical error in the line referencing Pseudoephedrine;
- subsection (e)(2) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), by correcting a punctuation mark under the heading relating to List I Chemicals;
- the Commentary to §2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) captioned “Statutory Provisions,” by adding a missing section symbol and a reference to Appendix A (Statutory Index);

- the Commentary to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) captioned “Statutory Provisions,” by adding a missing reference to 42 U.S.C. § 7413(c)(5) and a reference to Appendix A (Statutory Index);
- the Commentary to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) captioned “Statutory Provisions,” by adding a specific reference to 42 U.S.C. § 7413(c)(1)–(4);
- the Commentary to §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) captioned “Statutory Provisions,” by adding a specific reference to 42 U.S.C. § 7413(c)(1)–(4);
- subsection (a)(4) to §5D1.3. (Conditions of Supervised Release), by changing an inaccurate reference to “probation” to “supervised release”;
- 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; and
- the lines referencing “18 U.S.C. § 371” and “18 U.S.C. § 1591” in Appendix A (Statutory Index), by rearranging the order of certain Chapter Two guidelines references to place them in proper numerical order.