

**United States Sentencing Commission Public Meeting Minutes  
January 19, 2018**

Acting Chair William H. Pryor, Jr., called the meeting to order at 10:30 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- William H. Pryor, Jr., Acting Chair
- Rachel E. Barkow, Commissioner
- Charles R. Breyer, Commissioner
- Danny C. Reeves, Commissioner
- Zachary Bolitho, Commissioner Ex Officio

The following Commissioner was not present:

- J. Patricia Wilson Smoot, Commissioner Ex Officio

The following staff participated in the meeting:

- Kathleen Grilli, General Counsel

Acting Chair Pryor welcomed the public who were attending the Commission's meeting either in person or via the livestream broadcast on the Commission's website. He also expressed the commissioners' appreciation for the public's significant public interest in federal sentencing issues and the work of the Commission.

Acting Chair Pryor introduced the commissioners.

Commissioner Rachel Barkow is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law, and serves as the faculty director of the Center on the Administration of Criminal Law at the law school.

Judge Charles Breyer is a Senior District Judge for the Northern District of California and has served as a United States District Judge since 1998.

Judge Danny Reeves was appointed to the Commission this year. Judge Reeves is a District Court Judge for the Eastern District of Kentucky and has served in that position since 2001.

Zachary Bolitho is the ex officio Commissioner from the Department of Justice. Commissioner Bolitho serves as Deputy Chief of Staff and Associate Deputy Attorney General to the Deputy Attorney General of the United States.

Acting Chair Pryor called for a motion to adopt the August 17, 2017, public meeting minutes. Commissioner Breyer made a motion to adopt the minutes, with Commissioner Barkow

seconding. Hearing no discussion, the Acting Chair called for a vote, and the motion was adopted by voice vote.

Acting Chair Pryor provided an update on the Commission's recent work. He reported that last month the Commission published its fourth report in its continuing series on recidivism entitled The Effects of Aging on Recidivism Among Federal Offenders, which examines the impact of aging on federal offender recidivism, and once age is accounted for, the impact of other offense and offender characteristics. Last year the Commission also published eleven new reports on issues ranging from mandatory minimum penalties to an analysis of demographic differences in federal sentencing practices, and will issue additional publications regarding mandatory minimums, recidivism, and other sentencing issues in the coming weeks and months.

Acting Chair Pryor noted that in August the Commission voted to publish several holdover amendments from the previous amendment cycle. These proposals were not able to be fully considered previously because the Commission did not have a quorum for three critical months. He announced that in February the Commission planned to hold a public hearing on some of these proposed amendments, including those that would implement the Bipartisan Budget Act of 2015 and recommendations from the Commission's Tribal Issues Advisory Group regarding how tribal convictions are treated under Chapter Four of the guidelines.

Acting Chair Pryor further noted that in March, the Commission will hold a public hearing on another proposed amendment published in August, the proposed amendment regarding alternatives to incarceration and first offenders. The March hearing will also cover any amendments the Commission may vote to publish at today's meeting, in particular the proposed amendment on synthetic drugs. The proposed amendment on synthetic drugs reflects the information the Commission has learned from public comment and three public hearings it has held last year on synthetic cathinones, cannabinoids, fentanyl, and fentanyl analogues.

Acting Chair Pryor expressed the Commission's thanks to the numerous individuals and groups who submitted thoughtful comments and recommendations during its most recent public comment periods.

Acting Chair Pryor called on the General Counsel, Kathleen Grilli, to advise the Commission regarding a series of possible votes to publish in the Federal Register proposed amendments for the 2017-2018 amendment cycle.

Ms. Grilli stated that the first proposed amendment, attached hereto as Exhibit A, concerned synthetic drugs. The proposed three-part amendment was the result of the Commission's multiyear study of offenses involving synthetic cathinones, synthetic cannabinoids, THC, fentanyl, and fentanyl analogues. The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A of the proposed amendment would amend the Drug Equivalency Tables in §2D1.1 (Drug Trafficking) to adopt a class-based approach to account for synthetic cathinones and sets forth a single marijuana equivalency for the class, bracketing three possible equivalencies: 1 gram of

synthetic cathinone is = [200]/[380]/[500] grams of marihuana. Part A of the proposed amendment also brackets the possibility of making this class-based marihuana equivalency also applicable to methcathinone. Finally, Part A of the proposed amendment establishes a minimum base offense level of [12] for cases involving synthetic cathinones (except Schedule III, IV, and V substances).

Part B of the proposed amendment would amend the Drug Equivalency Tables in §2D1.1 to adopt a class-based approach to account for synthetic cannabinoids and sets forth a single marihuana equivalency for the class, bracketing three possible equivalencies: 1 gram of synthetic cannabinoid = [167]/[334]/[500] grams of marihuana. Part B includes a definition of the term “synthetic cannabinoid” and brackets for comment a provision establishing a minimum base offense level of [12] for cases involving synthetic cannabinoids (except Schedule III, IV, and V substances).

Part C of the proposed amendment would amend §2D1.1 in several ways to account for fentanyl and fentanyl analogues. First, it would provide penalties for offenses involving fentanyl equivalent to the higher penalties currently provided for offenses involving fentanyl analogues. Second, the proposed amendment would revise §2D1.1 by providing a definition of the term “fentanyl analogue,” setting forth a single marihuana equivalency applicable to all “fentanyl analogues” of 1 gram = 10 kilograms of marihuana, and specifying in the Drug Quantity Table that the penalties relating to “fentanyl” apply to those substances with a specific chemical name. Finally, Part C of the proposed amendment would amend §2D1.1 to provide an enhancement in cases in which fentanyl or a fentanyl analogue is misrepresented or marketed as another substance.

Each part also includes issues for comment.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on March 6, 2018, and a reply comment period closing on March 28, 2018, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Breyer made a motion to publish the proposed amendment, with Commissioner Reeves seconding. The Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit B, concerns illegal reentry. This proposed two-part amendment responds to issues that have arisen regarding application of the illegal reentry guideline at §2L1.2 (Unlawfully Reentering or Remaining in the United States). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

Part A would amend §2L1.2 by revising subsection (b)(2) so that its applicability turns on whether the defendant “engaged in criminal conduct” before he or she was first ordered deported

or ordered removed, rather than whether the defendant sustained the resulting conviction or convictions before that event. Part A would also make non-substantive, conforming changes to the language of subsection (b)(3).

Part B of the proposed amendment responds to an issue that has arisen in litigation concerning how §2L1.2's enhancements for prior convictions apply in the situation where a defendant's prior conviction included a term of probation, parole, or supervised release that was subsequently revoked and an additional term of imprisonment imposed. This part would revise the definition of "sentence imposed" in Application Note 2 of the Commentary to §2L1.2 to clarify that, consistent with the meaning of "sentence of imprisonment" under §4A1.2 (Definitions and Instructions for Computing Criminal History), the phrase "sentence imposed" in §2L1.2 includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

Each part also includes issues for comment.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on March 6, 2018, and a reply comment period closing on March 28, 2018, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Reeves made a motion to publish the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the final proposed amendment, attached hereto as Exhibit C, makes various technical changes to the Guidelines Manual.

First, the proposed amendment makes technical changes to provide updated references to certain sections in the United States Code that were restated in legislation, amending §2B1.5 (Cultural Heritage) and Appendix A (Statutory Index).

Second, the proposed amendment also makes technical changes to reflect the editorial reclassification of certain sections in the United States Code and makes changes to §2A3.5 (Failure to Register as a Sex Offender), §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)), §5B1.3 (Conditions of Probation), §5D1.3 (Conditions of Supervised Release), and Appendix A.

Finally, the proposed amendment revises subsection §8C2.1 (Applicability of Fine Guidelines) by deleting an outdated reference

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on March 6, 2018, and a reply comment period closing on March 28, 2018, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to publish the proposed amendment, with Commissioner Reeves seconding. The Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Acting Chair Pryor noted that the Commission was publishing a proposed amendment regarding synthetic drugs – which includes synthetic cathinones, otherwise known as “bath salts”, synthetic cannabinoids, including “K2” or “spice”, fentanyl, and fentanyl analogues. The Commission spent the previous six months publishing various issues for comment and conducting public hearings on this subject. It used the expertise gathered through this process to craft a proposal to appropriately respond to this urgent issue. The amendment proposes a class-based approach for synthetic cathinones and cannabinoids and increases penalties for offenses involving fentanyl equivalent to the higher penalties currently provided for offenses involving fentanyl analogues. The proposed amendment also provides an enhancement in cases where fentanyl or a fentanyl analogue is misrepresented or marketed as another substance.

Acting Chair Pryor announced that later in January the Commission will release a public data presentation which includes Commission data for the three categories of drugs that are the focus of the proposed synthetic drug amendment. Members of the public may find this information useful when preparing their public comment.

Acting Chair Pryor also noted that the Commission will publish a proposed amendment that addresses two miscellaneous application issues relating to immigration offenses and a proposed amendment that includes technical changes to the guidelines.

Acting Chair Pryor reminded the public that the Commission’s National Seminar on the Federal Sentencing Guidelines will be held in San Antonio, Texas, May 30 through June 1. The training seminar provides specialized instruction to probation officers, prosecutors, and defense attorneys on the guidelines. Registration for this event will open on January 22 on the Commission’s website. The Commission’s proposed amendments and issues for comment will also be on the Commission website soon.

Acting Chair Pryor stated that the Commission looked forward to working with all parties as it moved forward to another productive year and thanked the public for attending the Commission meeting.

Acting Chair Pryor asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Breyer made a motion to adjourn, with Commissioner Barkow seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 10:46 a.m.

# EXHIBIT-A

## PROPOSED AMENDMENT: SYNTHETIC DRUGS

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

**Part A** of the proposed amendment would amend the Drug Equivalency Tables in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to adopt a class-based approach to account for synthetic cathinones. It sets forth a single marihuana equivalency applicable to synthetic cathinones (except Schedule III, IV, and V substances) of 1 gram = [200]/[380]/[500] grams of marihuana. Part A of the proposed amendment also brackets the possibility of making this class-based marihuana equivalency also applicable to methcathinone, by deleting the specific reference to this controlled substance in the Drug Equivalency Tables. Finally, Part A of the proposed amendment establishes a minimum base offense level of [12] for cases involving synthetic cathinones (except Schedule III, IV, and V substances). Issues for comment are also provided.

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

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

## EXHIBIT-A

### (A) Synthetic Cathinones

**Synopsis of the Proposed Amendment:** Synthetic cathinones are human-made drugs chemically related to cathinone, a stimulant found in the khat plant. *See* National Institute on Drug Abuse, DrugFacts: Synthetic Cathinones (“Bath Salts”) (January 2016), available at <https://www.drugabuse.gov/publications/drugfacts/synthetic-cathinones-bath-salts>. According to the National Institute on Drug Abuse, synthetic variants of cathinone can be much stronger than the natural cathinone and, in some cases, very dangerous. *Id.* Abuse of synthetic cathinones, sometimes referred to as “bath salts,” has become more prevalent over the last decade.

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

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

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

Issues for comment are also provided.

# EXHIBIT-A

## Proposed Amendment:

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

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#### Commentary

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#### Application Notes:

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3. **Classification of Controlled Substances.**—Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13–15 is the appropriate classification.

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6. **Analogues and Controlled Substances Not Referenced in this Guideline.**—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. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline “*analogue*” has the meaning given the term “controlled substance analogue” in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marijuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

- (A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.
- (B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.
- (C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.



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7. **Multiple Transactions or Multiple Drug Types.**—Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.

8. **Use of Drug Equivalency Tables.**—

(A) **Controlled Substances Not Referenced in Drug Quantity Table.**—The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, *i.e.*, heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

- (i) Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.
- (ii) Find the equivalent quantity of marihuana in the Drug Quantity Table.
- (iii) Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.

(*See also* Application Note 6.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gram of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kilograms of marihuana. In a case involving 100 grams of oxymorphone, the equivalent quantity of marihuana would be 500 kilograms, which corresponds to a base offense level of 26 in the Drug Quantity Table.

(B) **Combining Differing Controlled Substances.**—The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.

For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are “capped” at specified amounts (*e.g.*, the combined equivalent weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of marihuana). Where there are controlled substances from more than one schedule (*e.g.*, a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

*Note:* Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

(C) **Examples for Combining Differing Controlled Substances.**—

- (i) The defendant is convicted of selling 70 grams of a substance containing PCP (Level 20) and 250 milligrams of a substance containing LSD (Level 16). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The

## EXHIBIT-A

total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 22.

- (ii) 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.
- (iii) The defendant is convicted of selling 80 grams of cocaine (Level 14) and 2 grams of cocaine base (Level 12). The cocaine is equivalent to 16 kilograms of marihuana, and the cocaine base is equivalent to 7.142 kilograms of marihuana. The total is therefore equivalent to 23.142 kilograms of marihuana, which has an offense level of 16 in the Drug Quantity Table.
- (iv) The defendant is convicted of selling 76,000 units of a Schedule III substance, 200,000 units of a Schedule IV substance, and 600,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 76 kilograms of marihuana (below the cap of 79.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 9.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 12.5 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 2.49 kilograms of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 3.75 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 79.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 88.48 (76 + 9.99 + 2.49) kilograms.

**(D) Drug Equivalency Tables.—**

SCHEDULE I OR II OPIATES*	
1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/ PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone (actual) =	6700 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg of marihuana

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*\*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

## COCAINE AND OTHER SCHEDULE I AND II STIMULANTS (AND THEIR IMMEDIATE PRECURSORS)\*

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm of marihuana
1 gm of Methylphenidate (Ritalin) =	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P <sub>2</sub> P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P <sub>2</sub> P (in any other case) =	75 gm of marihuana
1 gm Cocaine Base ("Crack") =	3,571 gm of marihuana
1 gm of Aminorex =	100 gm of marihuana
<del>1 gm of Methheathinone =</del>	<del>380 gm of marihuana]</del>
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana
1 gm of N-Benzylpiperazine =	100 gm of marihuana

*\*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

## SYNTHETIC CATHINONES (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)\*

1 gm of a synthetic cathinone (except a Schedule III, IV, or V substance) =	[200]/[380]/[500] gm of marihuana
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*\*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].*

## LSD, PCP, AND OTHER SCHEDULE I AND II HALLUCINOGENS (AND THEIR IMMEDIATE PRECURSORS)\*

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 gm of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DM =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-methamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA =	500 gm of marihuana
1 gm of Paramethoxymethamphetamine/PMA =	500 gm of marihuana

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1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC = 680 gm of marihuana  
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) = 1 kg of marihuana

*\*Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

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## SCHEDULE I MARIHUANA

1 gm of Marihuana/Cannabis, granulated, powdered, etc. = 1 gm of marihuana  
1 gm of Hashish Oil = 50 gm of marihuana  
1 gm of Cannabis Resin or Hashish = 5 gm of marihuana  
1 gm of Tetrahydrocannabinol, Organic = 167 gm of marihuana  
1 gm of Tetrahydrocannabinol, Synthetic = 167 gm of marihuana

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## FLUNITRAZEPAM \*\*

1 unit of Flunitrazepam = 16 gm of marihuana

*\*\*Provided*, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

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## SCHEDULE I OR II DEPRESSANTS (EXCEPT GAMMA-HYDROXYBUTYRIC ACID)

1 unit of a Schedule I or II Depressant  
(except gamma-hydroxybutyric acid) = 1 gm of marihuana

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## GAMMA-HYDROXYBUTYRIC ACID

1 ml of gamma-hydroxybutyric acid = 8.8 gm of marihuana

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## SCHEDULE III SUBSTANCES (EXCEPT KETAMINE)\*\*\*

1 unit of a Schedule III Substance = 1 gm of marihuana

*\*\*\*Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of marihuana.

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## KETAMINE

1 unit of ketamine = 1 gm of marihuana

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## SCHEDULE IV SUBSTANCES (EXCEPT FLUNITRAZEPAM)\*\*\*\*\*

1 unit of a Schedule IV Substance  
(except Flunitrazepam) = 0.0625 gm of marihuana

*\*\*\*\*\*Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of marihuana.

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## SCHEDULE V SUBSTANCES\*\*\*\*\*

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

*\*\*\*\*\*Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 2.49 kilograms of marihuana.

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# EXHIBIT-A

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LIST I CHEMICALS (RELATING TO THE MANUFACTURE OF AMPHETAMINE OR METHAMPHETAMINE)\*\*\*\*\*

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1 gm of Ephedrine =	10 kg of marihuana
1 gm of Phenylpropanolamine =	10 kg of marihuana
1 gm of Pseudoephedrine =	10 kg of marihuana

\*\*\*\*\**Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

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DATE RAPE DRUGS (EXCEPT FLUNITRAZEPAM, GHB, OR KETAMINE)

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1 ml of 1,4-butanediol =	8.8 gm marihuana
1 ml of gamma butyrolactone =	8.8 gm marihuana

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To facilitate conversions to drug equivalencies, the following table is provided:

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MEASUREMENT CONVERSION TABLE

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1 oz = 28.35 gm
1 lb = 453.6 gm
1 lb = 0.4536 kg
1 gal = 3.785 liters
1 qt = 0.946 liters
1 gm = 1 ml (liquid)
1 liter = 1,000 ml
1 kg = 1,000 gm
1 gm = 1,000 mg
1 grain = 64.8 mg.

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9. **Determining Quantity Based on Doses, Pills, or Capsules.**—If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (*e.g.*, 100 doses of Mescaline at 500 milligrams per dose = 50 grams of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

**TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE**

HALLUCINOGENS	
MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg

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	MARIHUANA	
1 marihuana cigarette		0.5 gm
	STIMULANTS	
Amphetamine*		10 mg
Methamphetamine*		5 mg
Phenmetrazine (Preludin)*		75 mg

\*For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

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\* \* \*

## Issues for Comment:

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

Should the Commission provide a class-based approach to account for synthetic cathinones? Are synthetic cathinones sufficiently similar to one another in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms, to support the adoption of a class-based approach for sentencing purposes? Are there any synthetic cathinones that should not be included as part of a class-based approach and for which the Commission should provide a marihuana equivalency separate from other synthetic cathinones? If so, what equivalency should the Commission provide for each such synthetic cathinone, and why? If the Commission were to provide a different approach to account for synthetic cathinones in the guidelines, what should that different approach be?

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

2. Part A of the proposed amendment brackets the possibility of making the marihuana equivalency applicable to synthetic cathinones also applicable to methcathinone by

## EXHIBIT-A

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

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

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### (B) Synthetic Cannabinoids

**Synopsis of the Proposed Amendment:** Synthetic cannabinoids are human-made, mind-altering chemicals developed to mimic the effects of tetrahydrocannabinol (THC), the main psychoactive chemical found in the marijuana plant. Like THC, synthetic cannabinoids act as an agonist at a specific part of the central nervous system known as the cannabinoid receptors, binding to and activating these receptors to produce psychoactive effects. However, the available scientific literature on this subject suggests that some synthetic cannabinoids bind more strongly to cell receptors affected by THC, and may produce stronger effects. See National Institute of Drug Abuse, DrugFacts: Synthetic Cannabinoids (Revised November 2015) available at <https://www.drugabuse.gov/publications/drugfacts/synthetic-cannabinoids>.

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

Currently, §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) specifically lists only one synthetic cannabinoid, synthetic THC. Synthetic THC has a marijuana equivalency of 1 gram = 167 grams of marijuana. Because other synthetic cannabinoids are not specifically listed in either the Drug Quantity Table or the Drug Equivalency Tables in §2D1.1, cases involving these substances require courts to use Application Note 6 of the Commentary to §2D1.1 to "determine the base offense level using the marijuana equivalency of the most closely related controlled substance referenced in [§2D1.1]." Although courts often rely on the synthetic THC equivalency in cases involving synthetic cannabinoids, the Commission has received comment suggesting that questions regarding "the most closely related controlled substance" arise frequently in such cases, and that the Application Note 6 process requires courts to hold extensive hearings to receive expert testimony on behalf of the government and the defendant.



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

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

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

Issues for comment are also provided.

## Proposed Amendment:

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

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\* \* \*

#### Commentary

\* \* \*

#### Application Notes:

\* \* \*

#### (D) Drug Equivalency Tables.—

\* \* \*

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#### SCHEDULE I MARIHUANA

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1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana

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1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm of marihuana

## SYNTHETIC CANNABINOIDS (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)[\*]

1 gm of a synthetic cannabinoid (except a Schedule III, IV, or V substance) =	[167]/[334]/[500] gm of marihuana
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[\**Provided*, that the minimum offense level from the Drug Quantity Table for any synthetic cannabinoid (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level [12].]

“*Synthetic cannabinoid*,” for purposes of this guideline, means any synthetic substance (other than synthetic tetrahydrocannabinol) that [acts as an agonist at][binds to and activates] type 1 cannabinoid receptors (CB<sub>1</sub> receptors).

## FLUNITRAZEPAM \*\*

1 unit of Flunitrazepam =	16 gm of marihuana
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\*\**Provided*, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

\* \* \*

## SCHEDULE III SUBSTANCES (EXCEPT KETAMINE)\*\*\*

1 unit of a Schedule III Substance =	1 gm of marihuana
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\*\*\**Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of marihuana.

## KETAMINE

1 unit of ketamine =	1 gm of marihuana
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## SCHEDULE IV SUBSTANCES (EXCEPT FLUNITRAZEPAM)\*\*\*\*

1 unit of a Schedule IV Substance (except Flunitrazepam) =	0.0625 gm of marihuana
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\*\*\*\**Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of marihuana.

## SCHEDULE V SUBSTANCES\*\*\*\*\*

1 unit of a Schedule V Substance =	0.00625 gm of marihuana
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\*\*\*\*\**Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 2.49 kilograms of marihuana.

\* \* \*

## EXHIBIT-A

### Issues for Comment:

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

Should the Commission provide a class-based approach to account for synthetic cannabinoids? Are synthetic cannabinoids sufficiently similar to one another in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms to support the adoption of a class-based approach for sentencing purposes? Are there any synthetic cannabinoids that should not be included as part of a class-based approach and for which the Commission should provide a marihuana equivalency separate from other synthetic cannabinoids? If so, what equivalency should the Commission provide for each such synthetic cannabinoid, and why? If the Commission were to provide a different approach to account for synthetic cannabinoids in the guidelines, what should that different approach be?

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

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

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3. Part B of the proposed amendment would include in the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) a provision defining the term “synthetic cannabinoid” as “any synthetic substance (other than synthetic tetrahydrocannabinol) that [acts as an agonist at][binds to and activates] type 1 cannabinoid receptors (CB<sub>1</sub> receptors).” Is this definition appropriate? If not, what definition, if any, should the Commission provide? Are there any synthetic cannabinoids that would not be included under this definition but should be? Are there any substances that would be included in this definition but should not be? What factors should the Commission take into account in defining “synthetic cannabinoid”? What additional guidance, if any, should the Commission provide on how to apply the proposed class-based marijuana equivalency for synthetic cannabinoids?
4. Part B of the proposed amendment brackets the possibility of establishing a minimum base offense level of [12] for cases involving synthetic cannabinoids (except Schedule III, IV, and V substances) individually, or in combination with another substance. Should the Commission provide a minimum base offense level for such cases? What minimum base offense level, if any, should the Commission provide for cases involving synthetic cannabinoids, and under what circumstances should it apply?
5. The Commission seeks comment on whether, if the Commission were to adopt a 1:167 equivalency ratio for synthetic cannabinoids, this class-based marijuana equivalency should also be applicable to synthetic tetrahydrocannabinol (THC). If so, should the Commission delete the specific reference to this controlled substance in the Drug Equivalency Tables and expand the proposed definition of “synthetic cannabinoid” to include “any synthetic substance that [acts as an agonist at][binds to and activates] type 1 cannabinoid receptors (CB<sub>1</sub> receptors)”? Is synthetic THC covered by this definition of “synthetic cannabinoid”? Is synthetic THC sufficiently similar to other synthetic cannabinoids in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms, to be included as part of a class-based approach for synthetic cannabinoids? Should the Commission instead continue to provide a marijuana equivalency for synthetic THC separate from other synthetic cannabinoids?

## EXHIBIT-A

### (C) Fentanyl and Fentanyl Analogues

**Synopsis of Proposed Amendment:** Fentanyl is a powerful synthetic opioid analgesic that is similar to morphine but 50 to 100 times more potent. See National Institute on Drug Abuse, DrugFacts: Fentanyl (June 2016), available at <https://www.drugabuse.gov/publications/drugfacts/fentanyl>. Fentanyl is a prescription drug that can be diverted for illicit use. Fentanyl and analogues of fentanyl are also produced in clandestine laboratories for illicit use. See, e.g., U.N. Office on Drugs & Crime, *Fentanyl and Its Analogues – 50 Years On*, GLOBAL SMART UPDATE 17 (March 2017), available at [https://www.unodc.org/documents/scientific/Global\\_SMART\\_Update\\_17\\_web.pdf](https://www.unodc.org/documents/scientific/Global_SMART_Update_17_web.pdf). These substances are sold on the illicit drug market as powder, pills, absorbed on blotter paper, mixed with or substituted for heroin, or as tablets that may mimic the appearance of prescription opioids. While most fentanyl analogues are typically about as potent as fentanyl itself, some analogues, such as sufentanil and carfentanil, are reported to be many times more potent than fentanyl.

#### *The Statutory and Guidelines Framework*

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

The Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) contains entries for both “fentanyl” and “fentanyl analogue,” at severity levels that reflect the mandatory minimum penalty structure. The Drug Equivalency Tables in the Commentary to §2D1.1 clearly identify fentanyl with the specific substance associated with the statutory minimum penalty by providing a marijuana equivalency for 1 gm of “Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)” equal to 2.5 kg of marijuana (*i.e.*, a 1:2,500 ratio). The Drug Equivalency Tables also set forth the marijuana equivalencies for two other substances, alpha-methylfentanyl and 3-methylfentanyl. Both substances have the same marijuana equivalency ratio, 1:10,000, which corresponds with the penalties for fentanyl analogues. Alpha-methylfentanyl and 3-methylfentanyl are pharmaceutical analogues of fentanyl that were developed in the 1960s or 1970s. See, e.g., T.J. Gillespie, *et al.*, *Identification and Quantification of Alpha-Methylfentanyl in Post Mortem Specimens*, 6(3) J. OF ANALYTICAL TOXICOLOGY 139 (May-June 1982).

#### *Higher Penalties for Offenses Involving Fentanyl*

First, Part C of the proposed amendment would revise §2D1.1 to increase penalties for offenses involving fentanyl. The Commission has received comment indicating that the

## EXHIBIT-A

proliferation and ease of availability of multiple varieties of fentanyl and fentanyl analogues has resulted in an increased number of deaths from overdoses. Commenters have argued that §2D1.1 does not adequately reflect the serious dangers posed by fentanyl and its analogues, including their high potential for abuse and addiction. Public health data shows that the harms associated with abuse of fentanyl and fentanyl analogues far exceed those associated with other opioid analgesics.

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

### *Issues Relating to “Fentanyl Analogues”*

Second, Part C of the proposed amendment would revise §2D1.1 to address several issues relating to offenses involving fentanyl analogues. The Commission has received comment that the penalty for “fentanyl analogue” set forth in the guidelines interacts in a potentially confusing way with the guideline definition of the term “analogue.” Although the term “fentanyl analogue” is not defined by the guidelines, Application Note 6 states that, for purposes of §2D1.1, “analogue” has the meaning given the term “controlled substance analogue” in 21 U.S.C. § 802(32). Section 802(32) defines “controlled substance analogue” to exclude “a controlled substance” – that is, a substance that has been scheduled. Thus, once the Drug Enforcement Administration (or Congress) schedules a substance that is a “fentanyl analogue” in the scientific sense, that substance may not qualify as a “fentanyl analogue” for purposes of the Drug Quantity Table. Hence, in cases involving a scheduled “fentanyl analogue” other than the two fentanyl analogues listed by name in the Drug Equivalency Tables, courts would be required by Application Note 6 of the Commentary to §2D1.1 to “determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in [§2D1.1].”

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

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

## EXHIBIT-A

references to these controlled substances in the Drug Equivalency Tables. In addition, the proposed amendment would amend the Drug Quantity Table to specify that the penalties relating to “fentanyl” apply to the substance identified in the statute as “N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide.”

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

Finally, Part C of the proposed amendment would amend §2D1.1 to address cases involving fentanyl and fentanyl analogues misrepresented as another substance. The Commission has received comment that fentanyl and fentanyl analogues are being mixed with, and in some instances substituted for, other drugs, such as heroin and cocaine. According to commenters, fentanyl and fentanyl analogues are also being pressed into pills that resemble prescription opioids, such as oxycodone and hydrocodone. Commenters have also suggested that the harms associated with the use of fentanyl and fentanyl analogues are heightened by the fact that users may unknowingly consume fentanyl or fentanyl analogues in products misrepresented or sold as other substances, such as heroin or counterfeit prescription pills. Because such users may be unaware that what they believe to be a certain substance, such as heroin, is either fentanyl or has been laced with fentanyl, they may not mitigate against the added risks of use, including overdose.

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

Issues for comment are also provided.

### **Proposed Amendment:**

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

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(a) Base Offense Level (Apply the greatest):

- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant

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committed the offense after one or more prior convictions for a similar offense; or

- (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the **4**-level (“minimal participant”) reduction in §3B1.2(a), decrease to level **32**.

### (b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
- (2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by **2** levels.
- (3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.



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- (4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
- (6) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
- (7) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.
- (9) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.
- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.

**[Insert the following as (13) and renumber other provisions accordingly:]**

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

- (13) (Apply the greatest):

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- (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
- (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (C) If—
  - (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
  - (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.
- (D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.
- (14) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels.
- (15) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:
  - (A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

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- (B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;
- (C) the defendant was directly involved in the importation of a controlled substance;
- (D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;
- (E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by **2** levels.

- (16) If the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a) and the offense involved all of the following factors:

- (A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;
- (B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and
- (C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by **2** levels.

- (17) If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within

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the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

- (2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

- (1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

### (c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL
(1) ● 90 KG or more of Heroin; ● 450 KG or more of Cocaine; ● 25.2 KG or more of Cocaine Base; ● 90 KG or more of PCP, or 9 KG or more of PCP (actual); ● 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of "Ice"; ● 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); ● 900 G or more of LSD; ● <del>36 KG</del> [9] KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● 9 KG or more of a Fentanyl Analogue; ● 90,000 KG or more of Marihuana; ● 18,000 KG or more of Hashish; ● 1,800 KG or more of Hashish Oil; ● 90,000,000 units or more of Ketamine; ● 90,000,000 units or more of Schedule I or II Depressants; ● 5,625,000 units or more of Flunitrazepam.	<b>Level 38</b>
(2) ● At least 30 KG but less than 90 KG of Heroin; ● At least 150 KG but less than 450 KG of Cocaine; ● At least 8.4 KG but less than 25.2 KG of Cocaine Base; ● At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual);	<b>Level 36</b>

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- At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of “Ice”;
- At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);
- At least 300 G but less than 900 G of LSD;
- At least ~~12 KG~~ [3] KG but less than ~~36 KG~~ [9] KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 3 KG but less than 9 KG of a Fentanyl Analogue;
- At least 30,000 KG but less than 90,000 KG of Marihuana;
- At least 6,000 KG but less than 18,000 KG of Hashish;
- At least 600 KG but less than 1,800 KG of Hashish Oil;
- At least 30,000,000 units but less than 90,000,000 units of Ketamine;
- At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;
- At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam.

- (3) **Level 34**
- At least 10 KG but less than 30 KG of Heroin;
  - At least 50 KG but less than 150 KG of Cocaine;
  - At least 2.8 KG but less than 8.4 KG of Cocaine Base;
  - At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
  - At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of “Ice”;
  - At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);
  - At least 100 G but less than 300 G of LSD;
  - At least ~~4 KG~~ [1] KG but less than ~~12 KG~~ [3] KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
  - At least 1 KG but less than 3 KG of a Fentanyl Analogue;
  - At least 10,000 KG but less than 30,000 KG of Marihuana;
  - At least 2,000 KG but less than 6,000 KG of Hashish;
  - At least 200 KG but less than 600 KG of Hashish Oil;
  - At least 10,000,000 but less than 30,000,000 units of Ketamine;
  - At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
  - At least 625,000 but less than 1,875,000 units of Flunitrazepam.

- (4) **Level 32**
- At least 3 KG but less than 10 KG of Heroin;
  - At least 15 KG but less than 50 KG of Cocaine;
  - At least 840 G but less than 2.8 KG of Cocaine Base;
  - At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
  - At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of “Ice”;
  - At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
  - At least 30 G but less than 100 G of LSD;
  - At least ~~1.2 KG~~ [300] G but less than ~~4 KG~~ [1] KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
  - At least 300 G but less than 1 KG of a Fentanyl Analogue;
  - At least 3,000 KG but less than 10,000 KG of Marihuana;

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- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

- (5) **Level 30**
- At least 1 KG but less than 3 KG of Heroin;
  - At least 5 KG but less than 15 KG of Cocaine;
  - At least 280 G but less than 840 G of Cocaine Base;
  - At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
  - At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of “Ice”;
  - At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
  - At least 10 G but less than 30 G of LSD;
  - At least ~~400 G~~ [100] G but less than ~~1.2 KG~~ [300] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
  - At least 100 G but less than 300 G of a Fentanyl Analogue;
  - At least 1,000 KG but less than 3,000 KG of Marihuana;
  - At least 200 KG but less than 600 KG of Hashish;
  - At least 20 KG but less than 60 KG of Hashish Oil;
  - At least 1,000,000 but less than 3,000,000 units of Ketamine;
  - At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
  - At least 62,500 but less than 187,500 units of Flunitrazepam.

- (6) **Level 28**
- At least 700 G but less than 1 KG of Heroin;
  - At least 3.5 KG but less than 5 KG of Cocaine;
  - At least 196 G but less than 280 G of Cocaine Base;
  - At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
  - At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of “Ice”;
  - At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
  - At least 7 G but less than 10 G of LSD;
  - At least ~~280 G~~ [70] G but less than ~~400 G~~ [100] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
  - At least 70 G but less than 100 G of a Fentanyl Analogue;
  - At least 700 KG but less than 1,000 KG of Marihuana;
  - At least 140 KG but less than 200 KG of Hashish;
  - At least 14 KG but less than 20 KG of Hashish Oil;
  - At least 700,000 but less than 1,000,000 units of Ketamine;
  - At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
  - At least 43,750 but less than 62,500 units of Flunitrazepam.

- (7) **Level 26**
- At least 400 G but less than 700 G of Heroin;
  - At least 2 KG but less than 3.5 KG of Cocaine;
  - At least 112 G but less than 196 G of Cocaine Base;
  - At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);

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- At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of “Ice”;
  - At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
  - At least 4 G but less than 7 G of LSD;
  - At least ~~160 G~~[40] G but less than ~~280 G~~[70] G of Fentanyl ((N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
  - At least 40 G but less than 70 G of a Fentanyl Analogue;
  - At least 400 KG but less than 700 KG of Marihuana;
  - At least 80 KG but less than 140 KG of Hashish;
  - At least 8 KG but less than 14 KG of Hashish Oil;
  - At least 400,000 but less than 700,000 units of Ketamine;
  - At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
  - At least 25,000 but less than 43,750 units of Flunitrazepam.
- (8) **Level 24**
- At least 100 G but less than 400 G of Heroin;
  - At least 500 G but less than 2 KG of Cocaine;
  - At least 28 G but less than 112 G of Cocaine Base;
  - At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
  - At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of “Ice”;
  - At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
  - At least 1 G but less than 4 G of LSD;
  - At least ~~40 G~~[10] G but less than ~~160 G~~[40] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
  - At least 10 G but less than 40 G of a Fentanyl Analogue;
  - At least 100 KG but less than 400 KG of Marihuana;
  - At least 20 KG but less than 80 KG of Hashish;
  - At least 2 KG but less than 8 KG of Hashish Oil;
  - At least 100,000 but less than 400,000 units of Ketamine;
  - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
  - At least 6,250 but less than 25,000 units of Flunitrazepam.
- (9) **Level 22**
- At least 80 G but less than 100 G of Heroin;
  - At least 400 G but less than 500 G of Cocaine;
  - At least 22.4 G but less than 28 G of Cocaine Base;
  - At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
  - At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of “Ice”;
  - At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
  - At least 800 MG but less than 1 G of LSD;
  - At least ~~32 G~~[8] G but less than ~~40 G~~[10] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
  - At least 8 G but less than 10 G of a Fentanyl Analogue;
  - At least 80 KG but less than 100 KG of Marihuana;
  - At least 16 KG but less than 20 KG of Hashish;

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- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 6,250 units of Flunitrazepam.

- (10) ● At least 60 G but less than 80 G of Heroin; **Level 20**
- At least 300 G but less than 400 G of Cocaine;
  - At least 16.8 G but less than 22.4 G of Cocaine Base;
  - At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
  - At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of “Ice”;
  - At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
  - At least 600 MG but less than 800 MG of LSD;
  - At least ~~24 G~~[6] G but less than ~~32 G~~[8] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
  - At least 6 G but less than 8 G of a Fentanyl Analogue;
  - At least 60 KG but less than 80 KG of Marihuana;
  - At least 12 KG but less than 16 KG of Hashish;
  - At least 1.2 KG but less than 1.6 KG of Hashish Oil;
  - At least 60,000 but less than 80,000 units of Ketamine;
  - At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
  - 60,000 units or more of Schedule III substances (except Ketamine);
  - At least 3,750 but less than 5,000 units of Flunitrazepam.

- (11) ● At least 40 G but less than 60 G of Heroin; **Level 18**
- At least 200 G but less than 300 G of Cocaine;
  - At least 11.2 G but less than 16.8 G of Cocaine Base;
  - At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
  - At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of “Ice”;
  - At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
  - At least 400 MG but less than 600 MG of LSD;
  - At least ~~16 G~~[4] G but less than ~~24 G~~[6] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
  - At least 4 G but less than 6 G of a Fentanyl Analogue;
  - At least 40 KG but less than 60 KG of Marihuana;
  - At least 8 KG but less than 12 KG of Hashish;
  - At least 800 G but less than 1.2 KG of Hashish Oil;
  - At least 40,000 but less than 60,000 units of Ketamine;
  - At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
  - At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine);
  - At least 2,500 but less than 3,750 units of Flunitrazepam.

- (12) ● At least 20 G but less than 40 G of Heroin; **Level 16**
- At least 100 G but less than 200 G of Cocaine;
  - At least 5.6 G but less than 11.2 G of Cocaine Base;



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- At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of “Ice”;
- At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD;
- At least ~~8 G~~[2] G but less than ~~16 G~~[4] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam.

- (13) ● At least 10 G but less than 20 G of Heroin; **Level 14**
- At least 50 G but less than 100 G of Cocaine;
  - At least 2.8 G but less than 5.6 G of Cocaine Base;
  - At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
  - At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of “Ice”;
  - At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
  - At least 100 MG but less than 200 MG of LSD;
  - At least ~~4 G~~[1] G but less than ~~8 G~~[2] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
  - At least 1 G but less than 2 G of a Fentanyl Analogue;
  - At least 10 KG but less than 20 KG of Marihuana;
  - At least 2 KG but less than 5 KG of Hashish;
  - At least 200 G but less than 500 G of Hashish Oil;
  - At least 10,000 but less than 20,000 units of Ketamine;
  - At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
  - At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine);
  - At least 625 but less than 1,250 units of Flunitrazepam.

- (14) ● Less than 10 G of Heroin; **Level 12**
- Less than 50 G of Cocaine;
  - Less than 2.8 G of Cocaine Base;
  - Less than 10 G of PCP, or less than 1 G of PCP (actual);
  - Less than 5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of “Ice”;
  - Less than 5 G of Amphetamine, or less than 500 MG of Amphetamine (actual);

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- Less than 100 MG of LSD;
  - Less than 4 G [1] G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidiny] Propanamide);
  - Less than 1 G of a Fentanyl Analogue;
  - At least 5 KG but less than 10 KG of Marihuana;
  - At least 1 KG but less than 2 KG of Hashish;
  - At least 100 G but less than 200 G of Hashish Oil;
  - At least 5,000 but less than 10,000 units of Ketamine;
  - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
  - At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
  - At least 312 but less than 625 units of Flunitrazepam;
  - 80,000 units or more of Schedule IV substances (except Flunitrazepam).
- (15) ● At least 2.5 KG but less than 5 KG of Marihuana; **Level 10**
- At least 500 G but less than 1 KG of Hashish;
  - At least 50 G but less than 100 G of Hashish Oil;
  - At least 2,500 but less than 5,000 units of Ketamine;
  - At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
  - At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine);
  - At least 156 but less than 312 units of Flunitrazepam;
  - At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam).
- (16) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 8**
- At least 200 G but less than 500 G of Hashish;
  - At least 20 G but less than 50 G of Hashish Oil;
  - At least 1,000 but less than 2,500 units of Ketamine;
  - At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
  - At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine);
  - Less than 156 units of Flunitrazepam;
  - At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam);
  - 160,000 units or more of Schedule V substances.
- (17) ● Less than 1 KG of Marihuana; **Level 6**
- Less than 200 G of Hashish;
  - Less than 20 G of Hashish Oil;
  - Less than 1,000 units of Ketamine;
  - Less than 1,000 units of Schedule I or II Depressants;
  - Less than 1,000 units of Schedule III substances (except Ketamine);
  - Less than 16,000 units of Schedule IV substances (except Flunitrazepam);
  - Less than 160,000 units of Schedule V substances.
-

## EXHIBIT-A

### \*Notes to Drug Quantity Table:

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.
- (B) The terms “**PCP (actual)**”, “**Amphetamine (actual)**”, and “**Methamphetamine (actual)**” refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The terms “**Hydrocodone (actual)**” and “**Oxycodone (actual)**” refer to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

- (C) “**Ice**,” for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) “**Cocaine base**,” for the purposes of this guideline, means “crack.” “**Crack**” is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marijuana plants, treat each plant, regardless of sex, as equivalent to 100 grams of marijuana. *Provided*, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one “**unit**” means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one “**unit**” means 0.5 milliliters. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 milligrams of an anabolic steroid is one “unit”.
- (G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 milligrams of LSD for the purposes of the Drug Quantity Table.

# EXHIBIT-A

- (H) **Hashish**, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabinal, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) **Hashish oil**, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabinal, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.
- (J) **Fentanyl analogue**, for the purposes of this guideline, means any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is [substantially] similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).

\* \* \*

## Commentary

\* \* \*

### Application Notes:

\* \* \*

- 6. **Analogues and Controlled Substances Not Referenced in this Guideline.**—Any Except as otherwise provided, 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. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. ~~For purposes of this guideline~~ Unless otherwise specified, “**analogue**,” for purposes of this guideline, has the meaning given the term “controlled substance analogue” in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marijuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

- (A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.
- (B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.

# EXHIBIT-A

- (C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

\* \* \*

8. **Use of Drug Equivalency Tables.—**

\* \* \*

(D) **Drug Equivalency Tables.—**

SCHEDULE I OR II OPIATES*	
1 gm of Heroin =	1 kg of marihuana
<del>1 gm of Alpha-Methylfentanyl =</del>	<del>10 kg of marihuana]</del>
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
<del>1 gm of 3-Methylfentanyl =</del>	<del>10 kg of marihuana]</del>
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg [10] kg of marihuana
1 gm of a Fentanyl Analogue =	[10] kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone (actual) =	6700 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg of marihuana

\*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

\* \* \*

**Issues for Comment:**

1. Part C of the proposed amendment would amend the “Notes to Drug Quantity Table” in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to include a provision defining “fentanyl analogue” as “any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is [substantially] similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).” Is this definition appropriate? If not, what definition, if any, should the Commission provide? For example, should the

## EXHIBIT-A

Commission specify that to qualify as a “fentanyl analogue,” a substance, whether a controlled substance or not, must (A) have a chemical structure that is [substantially] similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) and (B) either (i) have an effect on the central nervous system that is substantially similar to [or greater than] fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide), or (ii) be represented or intended to have such an effect?

2. The proposed amendment would amend §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to adopt a class-based approach to account for all “fentanyl analogues,” whether they are controlled substances or not. Are fentanyl analogues sufficiently similar to one another in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms to support such class-based approach for sentencing purposes? If so, are the penalties set forth in the Drug Quantity Table and the proposed 1:10,000 marijuana equivalency ratio appropriate for fentanyl analogues as a class? Should the Commission establish different penalties or a different equivalency applicable to such substances? If so, what penalties should the Commission provide and on what basis? Are there any fentanyl analogues that should not be included as part of a class-based approach and for which the Commission should provide penalties separate from other fentanyl analogues? If so, what penalties should the Commission provide for each such fentanyl analogue, and why? If the Commission were to provide a different approach to account for fentanyl analogues in the guidelines, what should that different approach be?

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

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

## EXHIBIT-A

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

## EXHIBIT-B

### PROPOSED AMENDMENT:

### ILLEGAL REENTRY GUIDELINE ENHANCEMENTS

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

**Part A** of the proposed amendment responds to an issue brought to the Commission's attention by the Department of Justice. *See* Annual Letter from the Department of Justice to the Commission (July 31, 2017), at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/DOJ.pdf>. In its annual letter to the Commission, the Department suggested that the illegal reentry guideline's enhancements for prior convictions (other than convictions for illegal reentry) contain a gap in coverage. Subsection (b)(2) of the guideline provides for an increase in the defendant's offense level if, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant "sustained . . . a conviction" for a felony offense (other than an illegal reentry offense) or "three or more convictions" for certain misdemeanor offenses. Subsection (b)(3) of the guideline provides for an increase in the defendant's offense level, if after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant "engaged in criminal conduct resulting in" such a felony conviction or three or more such misdemeanor convictions. Neither subsection (b)(2) nor subsection (b)(3), however, provides for an increase in the defendant's offense level in the situation where a defendant engaged in criminal conduct before being ordered deported or ordered removed from the United States for the first time but did not sustain a conviction or convictions for that criminal conduct until after he or she was first ordered deported or ordered removed.

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

An issue for comment is also provided.

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

As described above, subsections (b)(2) and (b)(3) of §2L1.2 provide for increases in a defendant's offense level for prior convictions (other than convictions for illegal reentry). The magnitude of the offense level increase that the subsections provide for a prior felony conviction varies depending on the length of the "sentence imposed." Application Note 2 of the Commentary to §2L1.2 states that "'[s]entence imposed' has the meaning given the term 'sentence of imprisonment' in Application Note 2 and subsection (b) of §4A1.2 (Definitions



## EXHIBIT-B

and Instructions for Computing Criminal History).” Under §4A1.2, the “sentence of imprisonment” includes not only the original term of imprisonment imposed but also any term of imprisonment imposed upon revocation of probation, parole, or supervised release. *See* USSG §4A1.2, comment. (n.11). Consistent with that approach, Application Note 2 of the Commentary to §2L1.2 states that, under §2L1.2, “[t]he length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervisory release.” Two courts of appeals have held, however, that, under §2L1.2(b)(2), the “sentence imposed” does not include a period of imprisonment imposed upon revocation of probation, parole, or supervisory release if that revocation occurred after the defendant was ordered deported or ordered removed from the United States for the first time. *See United States v. Martinez*, 870 F.3d 1163 (9th Cir. 2017); *United States v. Franco-Galvan*, 846 F.3d 338 (5th Cir. 2017).

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

### Proposed Amendment:

#### (A) Closing the Coverage Gap

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#### §2L1.2. Unlawfully Entering or Remaining in the United States

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- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) (Apply the Greater) If the defendant committed the instant offense after sustaining—
    - (A) a conviction for a felony that is an illegal reentry offense, increase by **4** levels; or
    - (B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by **2** levels.
  - (2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant ~~sustained~~ engaged in criminal conduct that, at any time, ~~resulted in~~—

## EXHIBIT-B

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by **10** levels;
  - (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by **8** levels;
  - (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;
  - (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or
  - (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.
- (3) (Apply the Greatest) 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 **that, at any time, resultingresulted** in—
- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by **10** levels;
  - (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by **8** levels;
  - (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;
  - (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or
  - (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.

\* \* \*

### Issue for Comment:

1. The Commission has received comments indicating that the enhancements for prior convictions (other than convictions for illegal reentry) in §2L1.2 (Unlawfully Entering

## EXHIBIT-B

or Remaining in the United States) currently do not apply in the situation where a defendant engaged in criminal conduct before being ordered deported or ordered removed from the United States for the first time but did not sustain a conviction or convictions for that criminal conduct until after he or she was first ordered deported or ordered removed. Part A of the proposed amendment would address this situation by revising the language of §2L1.2(b)(2) so that its applicability would turn on when the defendant “engaged in criminal conduct resulting in” one or more of the covered convictions, rather than when the defendant “sustained” that “conviction” or “convictions.”

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

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

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#### §2L1.2. Unlawfully Entering or Remaining in the United States

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\* \* \*

#### Commentary

\* \* \*

#### Application Notes:

\* \* \*

2. **Definitions.**—For purposes of this guideline:

\* \* \*

“*Sentence imposed*” has the meaning given the term “sentence of imprisonment” in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History). The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

\* \* \*

## EXHIBIT-C

### PROPOSED AMENDMENT: TECHNICAL

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

First, the proposed amendment makes technical changes to provide updated references to certain sections in the United States Code that were restated in legislation. As part of an Act to codify existing law relating to the National Park System, Congress repealed numerous sections in Title 16 of the United States Code, and restated them in Title 18 and a newly enacted Title 54. *See* Pub. L. 113–287 (Dec. 19, 2014). The proposed amendment amends the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources) to correct outdated references to certain sections in Title 16 that were restated, with minor revisions, when Congress enacted Title 54. It also deletes from the Commentary to §2B1.5 the provision relating to the definition of “historic resource,” as that term was omitted from Title 54. In addition, the proposed amendment makes a technical change to Appendix A (Statutory Index), to correct an outdated reference to 16 U.S.C. § 413 by replacing it with the appropriate reference to 18 U.S.C. § 1865(c).

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

- (1) the Commentary to §2A3.5 (Failure to Register as a Sex Offender);
- (2) the Commentary to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline));
- (3) subsection (a)(10) of §5B1.3 (Conditions of Probation);
- (4) subsection (a)(8) of §5D1.3 (Conditions of Supervised Release); and
- (5) Appendix A (Statutory Index), by updating references to certain sections in Title 42 to reflect their reclassified section numbers in the new Title 34.

Finally, the proposed amendment revises subsection (a) of §8C2.1 (Applicability of Fine Guidelines) by deleting an outdated reference to §2C1.6, which was deleted by consolidation with §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) effective November 1, 2004.

# EXHIBIT-C

## Proposed Amendment:

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### §2A3.5. Failure to Register as a Sex Offender

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\* \* \*

#### Commentary

\* \* \*

“*Sex offense*” has the meaning given that term in ~~42 U.S.C. § 16911(5)~~ 34 U.S.C. § 20911(5).

“*Tier I offender*”, “*Tier II offender*”, and “*Tier III offender*” have the meaning given the terms “tier I sex offender”, “tier II sex offender”, and “tier III sex offender”, respectively, in ~~42 U.S.C. § 16911~~ 34 U.S.C. § 20911.

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### §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

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\* \* \*

#### Commentary

\* \* \*

#### Application Notes:

1. **Definitions.**—For purposes of this guideline:

(A) “*Cultural heritage resource*” means any of the following:

- (i) A historic property, as defined in ~~16 U.S.C. § 470w(5)~~ 54 U.S.C. § 300308 (*see also* section 16(l) of 36 C.F.R. pt. 800).
- ~~(ii) A historic resource, as defined in 16 U.S.C. § 470w(5).~~
- ~~(iii)~~ (i) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (*see also* section 3(a) of 43 C.F.R. pt. 7; 36 C.F.R. pt. 296; 32 C.F.R. pt. 229; 18 C.F.R. pt. 1312).
- ~~(iv)~~ (ii) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3) (*see also* 43 C.F.R. § 10.2(d)).

# EXHIBIT-C

- (v) A commemorative work. “*Commemorative work*” (I) has the meaning given that term in 40 U.S.C. § 8902(a)(1); and (II) includes any national monument or national memorial.
- (vi) An object of cultural heritage, as defined in 18 U.S.C. § 668(a)(2).
- (vii) Designated ethnological material, as described in 19 U.S.C. §§ 2601(2)(ii), 2601(7), and 2604.

\* \* \*

### 3. Enhancement in Subsection (b)(2).—For purposes of subsection (b)(2):

\* \* \*

- (C) “*National Historic Landmark*” means a property designated as such pursuant to ~~16 U.S.C. § 470a(a)(1)(B)~~ 54 U.S.C. § 302102.
- (D) “*National marine sanctuary*” means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.
- (E) “*National monument or national memorial*” means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (~~16 U.S.C. § 431~~) 54 U.S.C. § 320301.
- (F) “*National park system*” has the meaning given that term in ~~16 U.S.C. § 1e(a)~~ 54 U.S.C. § 100501.

\* \* \*

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## §2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

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\* \* \*

### Commentary

**Statutory Provisions:** 18 U.S.C. §§ 1365(f), 1801; ~~42 U.S.C. § 14133~~ 34 U.S.C. § 12593; 49 U.S.C. § 31310.

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## §5B1.3. Conditions of Probation

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### (a) MANDATORY CONDITIONS

\* \* \*

- (10) The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if

## EXHIBIT-C

the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (~~42 U.S.C. § 14135a~~ 34 U.S.C. § 40702).

\* \* \*

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### §5D1.3. Conditions of Supervised Release

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(a) MANDATORY CONDITIONS

\* \* \*

- (8) The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (~~42 U.S.C. § 14135a~~ 34 U.S.C. § 40702).

\* \* \*

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### §8C2.1. Applicability of Fine Guidelines

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The provisions of §§8C2.2 through 8C2.9 apply to each count for which the applicable guideline offense level is determined under:

- (a) §§2B1.1, 2B1.4, 2B2.3, 2B4.1, 2B5.3, 2B6.1;  
§§2C1.1, 2C1.2, ~~2C1.6~~;  
§§2D1.7, 2D3.1, 2D3.2;  
§§2E3.1, 2E4.1, 2E5.1, 2E5.3;  
§2G3.1;  
§§2K1.1, 2K2.1;  
§2L1.1;  
§2N3.1;  
§2R1.1;  
§§2S1.1, 2S1.3;  
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T1.9, 2T2.1, 2T2.2, 2T3.1; or

# EXHIBIT-C

- (b) §§2E1.1, 2X1.1, 2X2.1, 2X3.1, 2X4.1, with respect to cases in which the offense level for the underlying offense is determined under one of the guideline sections listed in subsection (a) above.

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## APPENDIX A

## STATUTORY INDEX

\* \* \*

16 U.S.C. § 146                      2B1.1, 2B2.3

~~16 U.S.C. § 413~~                      ~~2B1.1~~

16 U.S.C. § 470aaa-5              2B1.1, 2B1.5

\* \* \*

18 U.S.C. § 1864                      2Q1.6

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

18 U.S.C. § 1901                      2C1.3

\* \* \*

33 U.S.C. § 3851                      2Q1.2

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

38 U.S.C. § 787                        2B1.1

\* \* \*

42 U.S.C. § 3631                      2H1.1

~~42 U.S.C. § 3791~~                      ~~2B1.1~~

42 U.S.C. § 3792                      2B1.1



## EXHIBIT-C

~~42 U.S.C. § 3795~~ ————— ~~2B1.1~~

42 U.S.C. § 5157(a)                    2B1.1

\* \* \*

42 U.S.C. § 9603(d)                    2Q1.2

~~42 U.S.C. §14133~~ ————— ~~2X5.2~~

42 U.S.C. § 14905                    2B1.1

~~42 U.S.C. § 16962~~ ————— ~~2H3.1~~

~~42 U.S.C. § 16984~~ ————— ~~2H3.1~~

43 U.S.C. § 1350                    2Q1.2

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