STATEMENT OF

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UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

FOR A PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES RELATED TO SYNTHETIC DRUGS

PRESENTED

MARCH 14, 2018

Judge Pryor and members of the Sentencing Commission, thank you for the opportunity to present the Department of Justice's views on the Commission's proposed amendments to the U.S. Sentencing Guidelines related to synthetic drugs.[1] The Department appreciates the Commission's interest in this important topic.

I. Synthetic Cathinones

The Commission proposes adopting a class approach that would result in a single marijuana equivalency for all synthetic cathinones. The Department supports the class approach and believes it is superior to the process currently prescribed by Application Note 6 to §2D1.1. Unlike the Application Note 6 process, the class approach would conserve scarce judicial resources while promoting consistency and uniformity in sentencing.

As the Commission has heard from numerous witnesses earlier in the amendment cycle, the Application Note 6 process is cumbersome and inefficient. Application Note 6 provides that when a court encounters a drug not referenced in the Guidelines, the court should use the marijuana equivalency set forth for the most closely related controlled substance referenced in the guidelines. This requires multiple steps. First, the court must determine if the drug has a "chemical structure that is substantially similar to a controlled substance referenced" in

[1] U.S. SENTENCING COMM'N, FEDERAL REGISTER NOTICE OF PROPOSED 2018 AMENDMENTS, January 26, 2018, *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20180125_rf_proposed.pdf.

§2D1.1.[2] Second, the court must determine whether the drug has "a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar" to a controlled substance referenced in the §2D1.1.[3] Finally, the court must determine if "a lesser or greater quantity" of the drug is needed to "produce a substantially similar effect on the central nervous system as a controlled substance" referenced in §2D1.1.[4]

The Application Note 6 process, by necessity, usually involves a battle of the scientific experts.[5] And, that battle repeats itself in courtrooms across the country—if an unlisted drug is involved in cases prosecuted in the District of Hawaii, the District of New Jersey, and the Eastern District of Kentucky, each of those courts must independently wade through Application Note 6 to determine the marijuana equivalency. This can result in competing decisions where one district court holds that a substance should have a particular marijuana equivalency and another district court holds that the same substance should have a different marijuana equivalency.[6] It goes without saying that such inconsistency is

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[2] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Appl. Note 6 (2016)
[3] *Id.*
[4] *Id.*
[5] For an example of the issues involved in such expert testimony, *see* Document 53-1, U.S. v. Douglas Marshall et al., No. 1:14-CR-00232-TJM (N.D.N.Y. May 24, 2016).
[6] *See, e.g.*, United States v. Roche, No. 13-cr-20909 (F.L.S.D.) (applying a 1:250 equivalency); United States v. Arroyo, No. 2:14-cr-186 (N.J.D.) (1:500); United States v. Thammavongsa, (N.V.) No. 13-cr-255 (1:100); United States v. Chong, No. 13-cr-570 (N.Y.E.D.) (1:200); United States v. Lopez, No. 14-cr-5 (N.Y.E.D.) (1:200); United States v. McGuire et al., No. 13-cr-421 (F.L.M.D.) (1:200); United States v. Roche, No. 13-cr-20909 (F.L.S.D.) (1:250); United States v. Beurman et al. No. 13-mj-612 (N.Y.W.D.) (1:250); United States v. Letasi, No. 13-cr-635 (N.J.) (1:250); United States v. Manthei, No. 14-cr-5 (W.I.W.D.) (1:250); United States v. Bouchair, No. 12-cr-266 (V.A.E.D.) (1:250); United States v. Carillo, No. 13-cr-0779 (C.A.C.D.) (1:250); United States v. Farmer, No. 13-cr-20920 (M.I.E.D.) (1:250); United States v. Farrington, No. 13-cr-129 (M.E.) (1:250); United States v. Marte, No. 13-cr-20537 (F.L.S.D.) (1:250); United States v. McLaughlin, No. 13-cr-239 (N.Y.N.D.) (1:250); United States v. Merlin, No. 13-cr-96 (N.V.) (1:250); United States v. Murdough, No. 12-cr-163 (N.H.)

problematic and in tension with the Commission's goal of promoting uniformity in sentencing. Adopting a single marijuana equivalency for all synthetic cathinones would help ensure that similarly situated defendants receive similar sentencing ranges.

As the DEA witnesses explained at the October 4, 2017 public hearing, the chemical structure and pharmacological effects of different synthetic cathinones are sufficiently similar to treat all synthetic cathinones as a class. All synthetic cathinones share a structural class that is well accepted in the scientific community.[7] Thus, the determination of whether a new substance falls within the synthetic cathinone class should be relatively easy and uncontroversial. The more difficult question for the Commission is what marijuana equivalency should be assigned to the synthetic cathinone class.

(1:250); United States v. Myers, No. 13-cr-117 (N.H.) (1:250); United States v. Orton, No. 12-cr-00117 (M.E.) (1:250); United States v. Safdari, No. 12-cr-249 (V.A.E.D.) (1:250); United States v. Sutton, No. 14-cr-51 (N.Y.N.D.) (1:250); United States v. Taylor, No. 13-cr-233 (P.A.W.D.) (1:250); United States v. Webster, No. 13-cr-44 (N.H.) (1:250); United States v. Konarski et al., No. 13-cr-71 (P.A.W.D.) (1:250); United States v. Borges et al., No. 13-cr-20239 (F.L.S.D.) (1:500); United States v. Falsey et al., No. 12-cr-29 (F.L.M.D.) (1:500); United States v. Guerrero, No. 12-cr-390 (N.J.) (1:500); United States v. Martinez, No. 13-cr-00316 (N.Y.E.D.) (1:500); United States v. Ordonez-Ramos et al., No. 12-cr-20815 (F.L.S.D.) (1:500); United States v. Singh, No. 13-cr-570 (N.Y.E.D.) (1:500); United States v. Poole, No. 13-cr-00066 (O.K.N.D.) (1:500, varied to 1:250).

[7] *Public Hearing on Synthetic Cathinones, Before U.S. SENTENCING COMM'N* (Oct. 4, 2017) (statement of Terrence Boos, Ph.D. and Cassandra Prioleau, Ph.D., Drug and Chemical Evaluation Section, Drug Enforcement Administration), 3-7, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171004/Boos-Prioleau.pdf ("Cathinones describe a structural class of substances that share pharmacological effects" …"[c]athinone is very similar in chemical structure to amphetamine (1-phenylpropan-2-amine)"… "[t]his structural class is well-established and accepted in the scientific literature"… "[t]he close structural similarity of the cathinones appearing in response to regulatory controls demonstrates the scientific and patent literature is being trolled for potent substances within a drug class."); *see generally* GLOBAL SMART PROGRAMME, UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE CHALLENGE OF NEW PSYCHOACTIVE SUBSTANCES (March 2013); *see also* J.P. Kelly, *Cathinone Derivatives: A Review of their Chemistry, Pharmacology, and Toxicology*, 3 DRUG TESTING AND ANALYSIS, 439-453 (2011); *see also* M. Capriola, *Synthetic Cathinones*, 5 CLINICAL PHARMACOLOGY: ADVANCES AND APPLICATIONS, 109-115 (2013)).

The Commission has proposed three options: 1:200, 1:380, and 1:500. In deciding which equivalency to adopt, it makes sense for the Commission to look closely at the equivalencies the courts have adopted in synthetic cathinone cases decided under Application Note 6. According to the Commission's data for fiscal year 2015, in such cases the mean equivalency was 1:364 and the median equivalency was 1:380.[8] Assigning an equivalency of 1:380 to the class of all currently unlisted synthetic cathinones would, therefore, accurately reflect the results the courts have reached using Application Note 6. And, it bears mentioning that an equivalency of 1:380 would mirror the equivalency proposed for synthetic cathinones in the bipartisan "Stop the Importation and Trafficking of Synthetic Analogues Act of 2017" (SITSA) that is pending before Congress.[9]

The Department would point out, however, that there is support in the record for adopting a ratio higher than 1:380. First, as the testimony during the October 4, 2017 hearing established, synthetic cathinones are incredibly dangerous and addictive substances. They can cause hyperthermia, fever, confusion, psychosis, paranoia, hallucinations, combativeness, agitation, tremors, seizures, and death.[10]

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[8] U.S. SENTENCING COMM'N, Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids, and Fentanyl and Fentanyl Analogues Amendments January, 2018, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf.

[9] https://www.congress.gov/bill/115th-congress/house-bill/2851/text (including a provision in Section 9 that would amend §2D1.1 to include a 1:380 equivalency for synthetic cathinones).

[10] *See Synthetic Cathinones: Hearing Before U.S. SENTENCING COMM'N* (Oct. 4, 2017) (statement of Terrence Boos & Cassandra Prioleau), *available at* https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-october-4-2017; *see also Medical Toxicology: Hearing Before U.S. SENTENCING COMM'N* (Oct. 4, 2017) (statement by Christopher P. Holstege, MD, Department of Emergency Medicine and Pediatrics & Heather Borek, MD, Department of Emergency Medicine, University of Virginia School of Medicine), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171004/Borek-Holstege.pdf.

Second, witnesses at the October 4, 2017 hearing explained that the substances endanger first responders and medical personnel because users of synthetic cathinones can be combative and exhibit psychotic behavior.[11] Application Note 6 does not instruct courts to consider such facts when selecting a marijuana equivalency. As a result, relying exclusively on the equivalencies used by the courts in Application Note 6 cases may fail to fully account for the dangers presented by synthetic cathinones.

Third, synthetic cathinones have characteristics similar to amphetamine, methamphetamine, MDMA, and cocaine.[12] Of those four drugs, three have equivalencies in excess of 1:380—two have equivalencies of 1:2,000 (amphetamine and methamphetamine), one has an equivalency of 1:500 (MDMA), and one has an equivalency of 1:200 (cocaine). The Commission should be mindful of this information as it considers which equivalency to adopt for the class of synthetic cathinones. The Commission should also recognize that regardless of which of the three proposed equivalencies (1:200, 1:380, or 1:500) it adopts, the Commission will be selecting an equivalency that is considerably lower than methamphetamine (1:2,000)—a substance that has effects similar to those of synthetic cathinones.

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[11] *See Public Hearing on Synthetic Cathinones, Before U.S. SENTENCING COMM'N* (Oct. 4, 2017) (statement of Drs. Christopher Holstege & Heather Borek) at 1, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171004/Borek-Holstege.pdf

[12] *See Public Hearing on Synthetic Cathinones, Before U.S. SENTENCING COMM'N* (Oct. 4, 2017) (statement of Terrence Boos, Ph.D. and Cassandra Prioleau, Ph.D., Drug and Chemical Evaluation Section, Drug Enforcement Administration) at 9, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171004/Boos-Prioleau.pdf

II. Synthetic Cannabinoids

For largely the same reasons set forth above, the Department supports the Commission's proposal to create a single equivalency in the guidelines for the class of synthetic cannabinoids. The proposed amendment would address the ongoing problem of new synthetic cannabinoids being regularly introduced into the illicit drug market in a manner designed to circumvent the existing statutory and regulatory framework. As the Commission learned during the December 5, 2017 public hearing, drug trafficking organizations regularly tweak the structure of synthetic cannabinoids in an attempt to avoid the scheduling regime established by the Controlled Substances Act. Given the ever-evolving nature of synthetic cannabinoids, a class approach to synthetic cannabinoids is necessary and appropriate.

Synthetic cannabinoids are dangerous substances that are often marketed to users as a "legal high" or "legal marijuana." Although synthetic cannabinoids are designed to mimic the effects of THC—the primary psychoactive component in marijuana—synthetic cannabinoids are generally more powerful and toxic than THC. They are produced in clandestine laboratories with little to no quality control, and are then sold in gas stations, convenience stores, head shops, and on the streets with seemingly innocent names like "K2" and "spice." And, they are often marketed

to youth, those in drug rehab, the homeless, as well as persons attempting to evade drug testing.

Once again, the most difficult decision for the Commission will be what precise marijuana equivalency should be applied to the synthetic cannabinoid class. The Commission has provided three options: 1:167, 1:334, and 1:500. A review of the cases involving different synthetic cannabinoids demonstrates that many courts have arrived at an equivalency of 1:167 under the Application Note 6 process.[13] However, as noted above with respect to synthetic cathinones, Application Note 6 does not account for some of the most serious dangers associated with synthetic cannabinoids.

As the Commission heard during the December 5, 2017 hearing, synthetic cannabinoids are more dangerous and toxic than THC and/or marijuana.[14] The

[13] United States v. Holder et al., No. 14-CR-244 (W.D. Okla.), United States v. Kyle Johnson, No. 14-cr-00260-R-1 (W.D. Okla.); United States v. Kattom et al., No. 13-cr-00197 (E.D. Ark.); United States v. Harris, No. 1:14-cr-190 (E.D. Cal.); United States v. Abdul, No. 8:14-cr-00012 (M.D. Fla.); United States v. Jin Liu, No. 3:14-cr-8(S1) and No. 3:14-cr-157 (M.D. Fla. Rule 20 case from C.D. Cal.); United States v. Uddin, No. 3:14-cr-23 (M.D. Fla.); United States v. Carlson, No. 12-cr-305 (D. Minn.); United States v. Alkadi, No. 14-cr-360 (D. Minn.) ; United States v. Hanson, No. 14-cr-355 (D. Minn.); United States v. E. Ramos, No. 14-cr-2014 (N.D. Iowa); United States v. M. Ramos, No. 13-cr-2034 (N.D. Iowa); United States v. McCauley, No. 14-cr-0094 (N.D. Iowa); United States v. Armstrong, No. 13-CR-253 (N.D.N.Y.); United States v. Mansour et al., No. 13-CR-429 (N.D.N.Y.); United States v. Schiffer, No. 13-CR-160 (N.D.N.Y.); United States v. Tebbetts, No. 12-cr-00567 (N.D.N.Y.); United States v. Makkar, No. 13-cr-205 (N.D. Okla.); United States v. Sweeney, No. 13-cr-446 (N.D. Tex.); United States v. Bays et al., No. 13-cr-357 (N.D. Tex.); United States v. Ways, No. 12-cr-391 (D. Neb.); United States v. Al-Washah, No. 14-cr-1762 (D.N.M.); United States v. Qualtieri, No. 12-cr-00136 (D. Nev.); United States v. Singh-Sidhu, No. 13-cr-32 (D. Nev.); United States v. Dimov et al., No. 3:13-cr-246 (D. Or.); United States v. Morrison, No. 12-cr-40114 (D.S.D.); United States v. Hayhurst, No. 12-cr-40138 (D.S.D.); United States v. Patel, No. 14-cr-0045 (S.D. Ala.); U.S. v. Al-Khafaji, No. 13-cr-895 (S.D.N.Y.); United States v. Libby, No. 13-cr-920 (S.D.N.Y.); United States v. Cochran, No. 13-cr-20216 (W.D. Tenn.); United States v. Johns, No. 2:14-cr-0001 (W.D. Va.); United States v. Samson, No. 12-cr-096 (W.D. Va.); United States v. Serdah, 12-cr-0097 (W.D. Va.); United States v. Coshow & Marg, No. 11-cr-00130 (W.D. Wis.); United States v. Patel, No. 14-CR-0045 (S.D. Ala); United States v. Kneeland, No. 3:16-cr-122-TMB (D. Alaska).

[14] *Fentanyl and Synthetic Cannabinoids: Hearing before U.S. SENTENCING COMM'N* (Dec. 5, 2017) (statement of Jordan Trecki, PhD), *available at*

synthetic cannabinoids encountered on the streets are generally more potent than THC, and those that happen to be less potent disappear from the illicit market quickly because they fail to provide users with the desired effects.[15] To illustrate the difference between marijuana, THC, and synthetic cannabinoids, Dr. Jordan Trecki provided the Commission with a helpful continuum[16]:

Additionally, findings reported in scientific journals concerning health risks of synthetic cannabinoids show that they are more dangerous than marijuana and THC. The Centers for Disease Control and Prevention reported on a multi-state outbreak of kidney injuries resulting from the use of the synthetic cannabinoid XLR-11.[17] The *Journal of Clinical Toxicology* reported an outbreak involving the synthetic cannabinoid AB-CHMINACA causing hospitalizations requiring ventilator support and ICU level care.[18] The journal *Forensic Science International* reported seizures due to the use of ABD-PINACA, at that time an unknown

https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Trecki.pdf.

[15] *Fentanyl and Synthetic Cannabinoids: Hearing before U.S. SENTENCING COMM'N* (Dec. 5, 2017) (statement of Jordan Trecki, PhD), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Trecki.pdf

[16] *Id.* at 6.

[17] *Acute Kidney Injury Associated with Synthetic Cannabinoid Use — Multiple States, 2012* 62 CENTERS FOR DISEASE CONTROL AND PREVENTION, Morbidity and Mortality Weekly Report (MMWR) 93-98 (Feb. 15, 2013).

[18] Joseph A. Tyndall et al., *An Outbreak of Acute Delirium from Exposure to the Synthetic Cannabinoid AB-CHMINACA*, 53 CLINICAL TOXICOLOGY, 1-7 (Nov. 10, 2015).

synthetic cannabinoid belonging to the FUBINACA family of substances.[19] The *Journal of Clinical Toxicology* reported convulsions associated with MDMB-CHMICA.[20] The *New England Journal of Medicine* reported over 20 deaths resulting from the use of AM2201, JWH-018, JWH-122, UR-144, XLR11, 5F-PB-22, AB-CHMINACA, ABD-FUBINACA, AB-PINACA, THJ-2201, and MAB-CHMINACA, among others.[21]

In sum, there is ample evidence to show that synthetic cannabinoids are more toxic and dangerous than THC and marijuana. Moreover, the trafficking patterns and manner in which the drugs are designed to avoid detection and evade the requirements of U.S. law differentiate synthetic cannabinoids from THC and marijuana. Accordingly, the Department believes the equivalency for synthetic cannabinoids should be higher than the 1:167 equivalency currently provided for THC.

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[19] Michael D. Schwartz et al., *A Common Source Outbreak of Severe Delirium Associated with Exposure to the Novel Synthetic Cannabinoid ADB-PINACA*, 48 JOURNAL OF EMERGENCY MEDICINE, 573-580 (2015) (also reporting seizures as a common negative health effects resulting from exposure to synthetic cannabinoids; *see also* Kevin G. Shanks, David Winston, John Heidingsfelder & George Behonick, *Case Reports of Synthetic Cannabinoid XLR-11 Associated Fatalities*, 252 FORENSIC SCIENCE INTERNATIONAL, e1-e4 (2015)).

[20] Simon L. Hill et al., *Clinical Toxicity Following Analytically Confirmed Use of the Synthetic Cannabinoid Receptor Agonist MDMB-CHMICA. A Report from the Identification of Novel PsychoActive Substances (IONA) Study*, 54 CLINICAL TOXICOLOGY (June 2, 2016) (in addition to convulsions, also reporting reduced levels of consciousness following the poisoning).

[21] Jordan Trecki, Roy R. Gerona & Michael D. Schwartz, *Synthetic Cannabinoid-Related Illnesses and Deaths*, 373 THE NEW ENGLAND JOURNAL OF MEDICINE, 103-107 (July 9, 2015) (the first author on this article is a DEA employee who appeared before the Commission as a witness during a December 5 2017 hearing).

III. Fentanyl and Fentanyl Analogues

a. Proposed Change to Offense Levels for Fentanyl

It would be difficult to overstate the impact of the opioid crisis that is currently gripping our nation. The Eastern District of Kentucky where I serve as the United States Attorney has been one of the hardest hit by the crisis. On a daily basis, I see the death and destruction caused by fentanyl and fentanyl analogues. We have prosecuted numerous "death-resulting" cases, many involving fentanyl and fentanyl analogues, and there are more in the pipeline. The lethality of fentanyl and fentanyl analogues is virtually unmatched. But, that unmatched lethality is not currently reflected in the guidelines, which punish fentanyl and fentanyl analogue dealers lighter than those who sell less lethal drugs.

Although opioid tolerance may develop in users, as little as two milligrams is a lethal dosage in most people.[22] The lethal dose of fentanyl analogues like carfentantil is even lower. In contrast, the average lethal dose for heroin is approximately 200 milligrams.[23] Yet, the lowest quantity threshold for fentanyl in the drug quantity table at §2D1.1 is currently 4 grams. Thus, a defendant trafficking in up to 4 grams of fentanyl receives a base offense level of 12—or 10 after the common 2-level adjustment for acceptance of responsibility. For a

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[22] DRUG ENFORCEMENT ADMINISTRATION, FENTANYL FAQ'S, last visited Feb. 18, 2018, https://www.dea.gov/druginfo/fentanyl-faq.shtml; EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, FENTANYL DRUG PROFILE, PHARMACOLOGY, last visited Jan. 28, 2018, http://www.emcdda.europa.eu/publications/drug-profiles/fentanyl; *see also* Ellenhorn, M.J. & D.G. Barceloux, *Medical Toxicology - Diagnosis and Treatment of Human Poisoning,* New York, NY:. ELSEVIER SCIENCE PUBLISHING CO. INC., 745 (1988) (.25 milligrams, reported in micrograms).

[23] EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, HEROIN DRUG PROFILE, PHARMACOLOGY, last visited Jan. 28, 2018, http://www.emcdda.europa.eu/publications/drug-profiles/heroin.

defendant who pleads guilty and falls within Criminal History Category I, a base offense level of 10 yields a Zone B guidelines range of 6-12 months.[24] Thus, a defendant who sells enough fentanyl to kill almost 2,000 people is eligible for probation. That must be changed. It makes little sense that heroin—a similar but less lethal opioid—is punished more severely than fentanyl and fentanyl analogues.

As the Commission is aware, the Department asked the Commission to increase the penalties for fentanyl and fentanyl analogues by adjusting the thresholds so that the base offense levels in the drug quantity table would more accurately reflect the dangerousness of fentanyl and fentanyl analogues. The Commission's proposed amendment takes a slightly different approach by changing the base offense levels for fentanyl to parallel those established for fentanyl analogues. Although the Department would like to have seen the Commission propose an amendment increasing the penalties for both fentanyl and fentanyl analogues, the Department supports the proposed amendment because it will ultimately result in increased penalties for those who traffic in fentanyl.

For example, a defendant who sells 2.5 grams of fentanyl today would receive (before an acceptance of responsibility adjustment) a base offense level of 12 and a guidelines range of 10-16 months. Under the proposed amendment, that same defendant would receive a base offense level of 16 and a guidelines range of 21-27

[24] The guidelines provide that if the applicable guideline range is in Zone C, the minimum term may be satisfied by a sentence of imprisonment, ***or***, "a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least ***one-half*** of the minimum term is satisfied by imprisonment." (Emphasis added.) U.S.S.G. § 5 C1.1(d)(2).

months. This is a step in the right direction, and the Department urges the Commission to adopt the proposed amendment.

b. Proposed Definitional Change

The Commission has also proposed a new guideline definition for fentanyl analogue. Under the proposed amendment, the term "fentanyl analogue" would be defined 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)." This definition would resolve a current ambiguity in the guidelines and stave off potentially time-consuming litigation. Accordingly, the Department has no objection to the proposed amendment.

c. Enhancement for Offenses Involving Fentanyl and Fentanyl Analogues Misrepresented as Another Substance

According to testimony presented earlier in the amendment cycle, drug traffickers are now mixing fentanyl and fentanyl analogues with other drugs. And, drug traffickers are now using commercially available pill presses to produce pills that contain fentanyl and fentanyl analogues but appear to be less lethal prescription drugs like oxycodone and hydrocodone. Both of these practices are incredibly dangerous and are directly related to the increase in overdose deaths. As a medical examiner in Ohio explained after 19 people died from using what they

believed was cocaine, "[i]f someone is using cocaine, they might not be expecting it to be mixed with fentanyl. . . .It's very dangerous."[25]

The Commission has responded to this problem by proposing an enhancement (2 or 4 levels) that would apply in cases where fentanyl and fentanyl analogues are misrepresented as another substance. The proposed amendment has two alternatives—one requiring that the government prove that the defendant "knowingly misrepresented or knowingly marketed" fentanyl or a fentanyl analogue as another substance and another that does not require the government to prove that the defendant acted "knowingly."

Of the options, the Department favors adding the 4-level enhancement without the "knowingly" requirement. Although all fentanyl and fentanyl analogue dealers deserve stiff punishment, those who lace less lethal drugs with fentanyl and fentanyl analogues pose an increased risk to public safety and should receive additional punishment. The idea that such an amendment will be unfair to unwitting drug traffickers formulates the issue backwards. Drug traffickers are already creating great risk by trafficking in fentanyl. Overdoses and deaths are occurring all around them, and this widespread phenomenon is what brings us all here today. The law is well settled that to convict a defendant of drug trafficking, the government needs to prove that the defendant knowingly sold a controlled substance—it need not prove that the defendant knew that it was a particular

[25] Cocaine Laced with Heroin, Fentanyl Linked to String of Northeast Ohio Overdose Deaths, Feb 10, 2017, Cleveland.com, http://www.cleveland.com/metro/index.ssf/2017/02/cocaine_mixed_with_heroin_fent.html.

controlled substance.[26] The Commission should not depart from that well settled principle here.

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Thank you for the opportunity to share the Department's views on these important issues. I look forward to answering your questions.

[26] *See, e.g.*, *United States v. McKenzie*, 686 F. App'x 77, 79 (2d Cir. 2017) (stating that under "long-established law . . . it is enough for a defendant to know that he was dealing in a controlled substance even if he did not know the specific identity of that substance").