



**ISSUE FOR COMMENT: OFFENSES INVOLVING FENTANYL, FENTANYL
ANALOGUES, AND OTHER OPIOIDS**

This document sets forth the unofficial text of an issue for comment promulgated by the Commission and is provided only for the convenience of the user in the preparation of public comment. As with all proposed amendments on which a vote to publish for comment has been made but not yet officially submitted to the Federal Register for formal publication, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once submitted to the Federal Register, official text of the issue for comment will be posted on the Commission’s website at www.ussc.gov and will be available in a forthcoming edition of the Federal Register

Written public comment should be received by the Commission not later than **May 1, 2025**. Public comment received after the close of the comment period may not be considered. All written comment should be sent to the Commission via any of the following two methods: (1) comments may be submitted electronically via the Commission’s Public Comment Submission Portal at <https://comment.ussc.gov>; or (2) comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Issue for Comment on Fentanyl and Other Opioids. For further information, see the full contents of the official notice when it is published in the Federal Register (available at www.ussc.gov).

The issue for comment is as follows:

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

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

Previous Commission Action

In response to rising numbers of fentanyl and fentanyl analogue cases, the Commission previously undertook a multi-year study of synthetic controlled substances. In 2018, following that study, the Commission amended §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit Those Offenses); Attempt or Conspiracy) to add an enhancement specific to fentanyl and fentanyl analogue cases. In particular, the Commission added a new specific offense characteristic at subsection (b)(13) providing a 4-level increase when the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. *See* USSG, App. C. amend. 807 (effective Nov. 1, 2018). In adding this new specific offense characteristic, the Commission pointed to the harm attendant to cases where a user does not know the substance they are using contains fentanyl or fentanyl analogue. *Id.* As the Commission explained, “[b]ecause of fentanyl’s extreme potency, the risk of overdose death is great, particularly when the user is inexperienced or unaware of what substance he or she is using.” *Id.* Thus, the Commission concluded that “it is appropriate for traffickers who knowingly misrepresent fentanyl or a fentanyl analogue as another substance to receive additional punishment.” *Id.*

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

Feedback from Stakeholders

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

substance. Because the enhancement at §2D1.1(b)(13)(B) became effective November 1, 2023, only preliminary 2024 data is available. Based on this preliminary data, 12 individuals sentenced for fentanyl trafficking and zero individuals sentenced for fentanyl analogue trafficking received the 2-level willful blindness enhancement.

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

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

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

Issues for Comment:

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

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

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