

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

(B) Title References to § 4A1.3

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

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

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

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

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

(C) Clerical Changes

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

Section 2D1.11 is amended in subsection (d)(6) by striking “Pseudoephedrine” and inserting “Pseudoephedrine”;

and in subsection (e)(2), under the heading relating to List I Chemicals, by striking the period at the end and inserting a semicolon.

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

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

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

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

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

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 371 by rearranging the guidelines to place them in proper order, and in the line referencing 18 U.S.C. 1591 by rearranging the guidelines to place them in proper order.

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## UNITED STATES SENTENCING COMMISSION

### Sentencing Guidelines for United States Courts

**AGENCY:** United States Sentencing Commission.

**ACTION:** Request for public comment.

**SUMMARY:** In August 2016, the Commission indicated that one of its priorities would be the “[s]tudy of offenses involving MDMA/Ecstasy, synthetic cannabinoids (such as JWH–018 and AM–2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone), and consideration of any amendments to the *Guidelines Manual* that may be appropriate in light of the information obtained from such study.” See 81 FR 58004 (Aug. 24, 2016). As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the United States Sentencing Commission is publishing this issue for comment to inform the Commission’s consideration of the issues related to this policy priority. The issue for comment is set forth in the Supplementary Information portion of this notice.

**DATES:** Public comment regarding the issue for comment set forth in this notice should be received by the Commission not later than March 10, 2017.

**ADDRESSES:** All written comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is *Public Comment@ussc.gov*. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle NE., Suite 2–500, Washington, DC 20002–8002, Attention: Public Affairs.

**FOR FURTHER INFORMATION CONTACT:** Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502–4500, *pubaffairs@ussc.gov*.

**SUPPLEMENTARY INFORMATION:** The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

In August 2016, the Commission indicated that one of its priorities would be the “[s]tudy of offenses involving MDMA/Ecstasy, synthetic cannabinoids (such as JWH–018 and AM–2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone), and consideration of any amendments to the *Guidelines Manual* that may be appropriate in light of the information obtained from such study.” See 81 FR 58004 (Aug. 24, 2016). The Commission intends that this study will be conducted over a two-year period and will solicit input, several times during this period, from experts and other members of the public. The Commission further intends that in the amendment cycle ending May 1, 2018, it may, if appropriate, publish a proposed amendment as a result of the study.

*MDMA, Synthetic Cathinones, and Synthetic Cannabinoids.*—As part of the study related to this policy priority, the Commission intends to examine offenses involving the following controlled substances:

- *Synthetic Cathinones*
- MDPV (Methylenedioxypropylvalerone)
- Methylone (3,4-Methylenedioxy-N-Methylcathinone)
- Mephedrone (4-Methylmethcathinone (4–MMC))
- *Synthetic Cannabinoids*
- JWH-018 (1-Pentyl-1-3-1-(1-Naphthoyl)Indole)
- AM-2201 (1-(5-Fluoropentyl)-3-(1-Naphthoyl)Indole)
- *MDMA/Ecstasy (3,4-Methylenedioxy-Methamphetamine)*

The synthetic cathinones and synthetic cannabinoids listed above are Schedule I controlled substances that are not currently referenced at § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

MDPV, methylone, and mephedrone, are synthetic cathinones. According to the National Institute on Drug Abuse, synthetic cathinones, also known as “bath salts,” are man-made substances related to cathinone, a stimulant found in the khat plant. See National Institute on Drug Abuse, DrugFacts: Synthetic Cathinones (“Bath Salts”) (Revised January 2016) available at <https://www.drugabuse.gov/publications/drugfacts/synthetic-cathinones-bath-salts>.

JWH-018 and AM-2201 are synthetic cannabinoids, sometimes referred to as “Spice” or “K2.” These substances are also man-made and, in liquid form, can be sprayed on shredded plant material so they can be smoked. See National Institute of Drug Abuse, DrugFacts: Synthetic Cannabinoids (Revised November 2015) available at <https://www.drugabuse.gov/publications/drugfacts/synthetic-cannabinoids>.

MDMA is a synthetic drug that alters the user’s mood and perception of surrounding objects and conditions. MDMA, also known as “ecstasy” or “molly,” is both a stimulant and hallucinogen, and is typically taken in tablet or capsule form. See National Institute of Drug Abuse, DrugFacts: MDMA (Ecstasy/Molly) (Revised October 2016) available at <https://www.drugabuse.gov/publications/drugfacts/mdma-ecstasy-molly>.

**Guidelines Penalty Structure.**—When a drug trafficking offense involves a controlled substance not specifically referenced in the guidelines, the Commentary to § 2D1.1 instructs the court to “determine the base offense level using the marijuana equivalency of the most closely related controlled substance referenced in [§ 2D1.1].” See USSG § 2D1.1, comment. (n.6). The guidelines establish a three-step process for making this determination. See USSG § 2D1.1, comment. (n.6, 8).

First, courts must determine the most closely related controlled substance by considering the following factors to the extent practicable:

(A) Whether the controlled substance not referenced in § 2D1.1 has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.

(B) Whether the controlled substance not referenced in § 2D1.1 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 § 2D1.1 is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

Once the most closely related controlled substance is determined, the next step is to refer to the marijuana equivalency from the Drug Equivalency Tables at Application Note 8(D) for the most closely related controlled substance to convert the quantity of controlled substance in the offense into its equivalent quantity of marijuana. The final step is to find the equivalent quantity of marijuana in the Drug Quantity Table at § 2D1.1(c) and use the corresponding offense level as the base offense level of the controlled substance involved in the offense.

For example, in cases involving methylone, Commission data indicates that in fiscal year 2015, the courts always identified MDMA as its most closely related controlled substance. The marijuana equivalency of MDMA is 1 gm MDMA = 500 gm marijuana. Pursuant to the Drug Equivalency Tables, when sentencing methylone offenders, this is the equivalency to be used. Thus, if an offender is accountable for 50 grams of methylone, the base offense level at § 2D1.1 would be determined by multiplying the 50 grams by 500 grams of marijuana. The resulting equivalency of 25,000 grams of marijuana provides for a base offense level 16.

In recent years, the Commission has received comment from the public suggesting that questions regarding “the most closely related controlled substance” require courts to hold extensive hearings. In addition, the Commission has heard that courts have identified different controlled substances as the “most closely related controlled substance” to the synthetic cathinones and synthetic cannabinoids included in the Commission’s study and, in some cases, adjusted the marijuana equivalency to account for perceived differences between the “most closely related controlled substance” and the controlled substance involved in the offense. Both outcomes may result in sentencing disparities among similarly situated defendants. To possibly alleviate these issues, one possible outcome of the Commission’s study may be to establish marijuana

equivalencies for each of the synthetic cathinones (MDPV, methylone, and mephedrone) and synthetic cannabinoids (JWH-018 and AM-2201). The Commission decided to include MDMA in its study because courts have identified MDMA as the most closely related controlled substance referenced in § 2D1.1 to methylone.

**Issue for Comment.**—In determining the marijuana equivalencies for specific controlled substances, the Commission has considered, among other things, the chemical structure, the pharmacological effects, the legislative and scheduling history, potential for addiction and abuse, the pattern of abuse and harms associated with abuse, and the patterns of trafficking and harms associated with trafficking.

The Commission invites general comment on any or all of these factors as they relate to the Commission’s study of synthetic cathinones (MDPV, methylone, and mephedrone) and synthetic cannabinoids (JWH-018 and AM-2201).

The Commission further seeks broad comment on offenses involving synthetic cathinones (MDPV, methylone, and mephedrone) and synthetic cannabinoids (JWH-018 and AM-2201), and the offenders involved in such offenses. What is the conduct involved in such offenses and the nature and seriousness of the harms posed by such offenses? How these offenses and offenders compare with other drug offenses and drug offenders? How are these substances manufactured, distributed, possessed, and used? What are the characteristics of the offenders involved in these various activities? What harms are posed by these activities?

Which of the controlled substances currently referenced in § 2D1.1 should be identified as the “most closely related controlled substance” to any of the synthetic cathinones and synthetic cannabinoids included in the Commission’s study? To what extent does the synthetic cathinone or synthetic cannabinoid differ from its “most closely related controlled substance”?

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

**Patti B. Saris,**

*Chair.*

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