



U.S. Department of Justice

Criminal Division

Office of Policy and Legislation

Washington, D.C. 20530

July 19, 2016

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Chief Judge Saris:

The Sentencing Reform Act of 1984 requires the Criminal Division to submit to the United States Sentencing Commission, at least annually, a report commenting on the operation of the sentencing guidelines, suggesting changes to the guidelines that appear to be warranted, and otherwise assessing the Commission's work.¹ We are pleased to submit this report pursuant to the Act. The report also responds to the Commission's request for public comment on its proposed priorities for the guideline amendment year ending May 1, 2017.²

Meaningful reform in criminal justice and sentencing remains a priority for this Administration. We aim to make the criminal justice system fairer, smarter, and more cost effective, while enhancing the ability of law enforcement to keep our communities safe. In 2015, we proposed working in partnership with you on necessary sentencing reform, and our partnership has been very productive, with the Department and the Commission working together to provide relevant data and testimony to Congress on a number of key sentencing and criminal justice reform bills. We are grateful to the Commission for the significant and important work you have done in this regard and look forward to continued collaboration with the Commission on this front. We also look forward to working with the Commission to simplify the guidelines to better reflect the current, post *Booker* legal framework, and to reduce needless litigation and circuit splits concerning overly precise and anachronistic guideline provisions.

We also thank you for providing us with data necessary to evaluate our Smart on Crime initiative, under which we amended our charging policies so that certain people who have committed low-level, nonviolent drug offenses, and who have no ties to large-scale organizations, gangs, or cartels, will no longer be charged with offenses imposing unnecessarily

¹ 28 U.S.C. § 994(o) (2006).

² *Notice of Proposed Priorities and Request for Public Comment*, 80 Fed. Reg. 26594 (June 25, 2015).

long mandatory minimum sentences.³ We are very happy to see that the measures adopted under Smart on Crime, in combination with other measures such as the Commission's actions to reduce drug penalties, are reaching their intended effect.⁴

We also want to bring to your attention that, although we were not in complete agreement with the Commission regarding your most recent revisions to the guidelines on Compassionate Release, we are building on what we have learned during last year's amendment cycle, and we are currently revising portions of the criteria for inmates seeking reduced sentences under the Bureau of Prisons Compassionate Release Program (also known as Reduction in Sentence, or RIS program).

The Commission has also expressed interest in the Department's Clemency Initiative, under which the Department makes recommendations to the President regarding commuted or reduced sentences for specific inmates. Under this Initiative, the Pardon Attorney and the Deputy Attorney General consider a variety of factors, including whether the inmate was low-level, nonviolent, not connected to a large-scale organization, gang, or cartel, has served at least 10 years in prison, would likely receive a shorter sentence today, and does not pose an ongoing risk to public safety. President Obama has thus far granted clemency to 348 inmates during his Administration, almost all pursuant to this initiative.⁵

With respect to the Commission's proposed priority to study approaches and encourage the use of alternatives to incarceration, we note that the Department is developing a federal community supervision demonstration project based on Hawaii's successful HOPE model. In Hawaii and several state and local jurisdictions nationwide, the HOPE model has dramatically driven down rates of probation revocations, violations of release conditions, drug use, reoffending, and the numbers of re-incarceration days for probationers.⁶ The program is based

³ The most recent data which you have provided to us for fiscal year 2015 shows that federal prosecutors have indeed charged fewer drug indictments carrying mandatory minimum sentences, and at the same time the cases we have charged are more serious cases.

⁴ The data show that federal prosecutors are charging mandatory minimums significantly less frequently, and being more selective in their drug prosecutions: even though drug cases are fewer in number, they are more focused on the most serious defendants. At the same time, the percentage of those drug defendants with a weapon rose, and the percentage of defendants with an aggravating role steadily increased as well. See DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, NEW SMART ON CRIME DATA REVEALS FEDERAL PROSECUTORS ARE FOCUSED ON MORE SIGNIFICANT DRUG CASES AND FEWER MANDATORY MINIMUMS FOR DRUG DEFENDANTS (March 21, 2016), <https://www.justice.gov/opa/pr/new-smart-crime-data-reveals-federal-prosecutors-are-focused-more-significant-drug-cases-and>.

⁵ October 1, 2015 through June 6, 2016. See CURRENT FISCAL YEAR CLEMENCY STATISTICS, <https://www.justice.gov/pardon/current-fiscal-year-clemency-statistics>.

⁶ See ANGELA HAWKEN, PH.D. AND MARK KLEIMAN, PH.D., NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE 17-26 (Dec. 2, 2009) (HOPE program), <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>; ANGELA HAWKEN, PH.D., ET AL., NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, HOPE II: A FOLLOW-UP EVALUATION OF HAWAII'S HOPE PROBATION 22-28 (May 17, 2016) (surveying success of HOPE model in other jurisdictions throughout country), <https://www.ncjrs.gov/pdffiles1/nij/grants/249912.pdf>; NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, "Swift and Certain" Sanctions in Probation Are Highly Effective: Evaluation of the HOPE Program, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, <http://www.nij.gov/topics/corrections/community/drug-offenders/pages/hawaii->

on the principles of behavior modification, and a significant feature of the HOPE model is to swiftly punish *all* offenders who violate their conditions of supervision, but do so with the use of multiple, micro-sanctions: incarceration measured by days, weekends or weeks, rather than the months or years recommended under the current guidelines. The Department currently makes technical support available to states implementing such programs, under the rubric of Swift Certain Fair (SCF).⁷ Although recent research indicates that defendants on probation and supervised release in the federal system have lower recidivism than their counterparts in the state system,⁸ there is much room for growth in this space. We look forward to discussing with the Commission the results of this and possibly other pilot programs, with an eye on things that we can do to improve the federal system generally.

We also bring to your attention a number of deficiencies in the current guidelines which currently need to be addressed, even as we work together on longer term projects. These deficiencies concern serious issues, and failing to resolve them now will leave loopholes, encourage law breakers, and erode confidence in the guidelines. Specifically:

- We ask the Commission to update the guidelines treatment of illegal synthetic drugs, a serious public health problem involving overdoses and deaths, for which our current regulatory and statutory framework has evolved, but for which the guidelines have not, creating a problem for law enforcement.
- We ask the Commission to make amendments for certain environmental offenses under three of our Nation's pollution statutes – the Clean Water Act, the Resource Conservation and Recovery Act, and the Clean Air Act: specifically, offenses where defendants knowingly endanger the public. Under the current guidelines, such offenders are generally facing a third of the sentence that Congress intended.
- We ask the Commission to address the guidelines concerning tax offenses involving hidden offshore accounts so that defendants who willfully conceal the existence of offshore bank accounts in order to avoid paying taxes do not escape punishment. We also ask the Commission to amend the guideline for tax evasion to make clear that loss includes penalties and interest. And we also ask the Commission to amend the sophisticated means enhancement in two tax guidelines to conform to the 2015 amendment narrowing this enhancement as applied to the fraud guideline.

[hope.aspx](#) (last modified Feb. 3, 2012); *Why Swift Certain & Fair?*, SWEET CERTAIN & FAIR, <http://www.swiftcertainfair.com/why-swift-certain-and-fair/>; ZACHARY HAMILTON, PH.D., ET AL., WASHINGTON STATE UNIVERSITY, EVALUATION OF WASHINGTON STATE DEPARTMENT OF CORRECTIONS (WADOC) SWIFT AND CERTAIN (SAC) POLICY, PROCESS, OUTCOME AND COST-BENEFIT EVALUATION 35-48 (Aug. 31, 2015), https://wsicj.wsu.edu/wp-content/uploads/sites/436/2015/11/SAC-Final-Report_2015-08-31.pdf.

⁷ See Swift, Certain, and Fair Sanctions Program (SCF): Replicating the Concepts Behind Project HOPE FY 2016 Competitive Grant Announcement, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, <https://www.bja.gov/funding/swiftandcertain.pdf>.

⁸ JOSHUA A. MARKMAN, BJS STATISTICIAN, ET. AL. BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, RECIDIVISM OF OFFENDERS PLACED ON FEDERAL COMMUNITY SUPERVISION IN 2005, PATTERNS FROM 2005 TO 2010 (2016), <http://www.bjs.gov/content/pub/pdf/ropfcs05p0510.pdf>.

- We ask that the Commission address the issue of how to calculate loss when offenders fraudulently obtain government contracts under the Small Business Administration by falsely certifying that their firm is minority-owned. Some courts apply credits against loss and determine that there has been no loss, at odds with provisions of the Small Business Jobs Act of 2010.

- Finally, we ask that the Commission add to its many valuable research products two studies which would be of great value to the Department, namely re-sentencings following *United States v. Johnson* and new jurisprudence regarding the definition of a crime of violence; and how suspended sentences for prior convictions for sexual abuse of a minor, sexual assault, and assault are being used in practice in sentencing illegal reentry offenses.

Please see below for a discussion of each these. Thank you in advance for considering our proposals.

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I. Jointly Propose to Congress Legislation to Enact Simplified Guideline System to Address Growing Unevenness in Sentencing Outcomes for Similar Offense Conduct

As we suggested in our letter to you in July of 2015, we believe that a new, simpler guideline system would better guide judicial decision-making, given the current legal framework, and also reduce needless litigation and unwarranted disparities in federal sentencing.⁹ In its report on the impact of *Booker v. United States*,¹⁰ the Commission recognized the disconnect between the legal structure left in the wake of the Supreme Court's new Sixth Amendment jurisprudence and the structure of the federal sentencing guidelines, which was crafted in a different legal context and based on different legal assumptions. As the Commission is already well enough aware, federal courts currently sentence in varying ways, with fundamental policy disagreements, leading to dramatically different sentencing results between judges in the same district, between districts, and between circuits. We brought this problem to your attention to this last year, and referenced Table 26 of the Commission's 2013 annual sourcebook.¹¹ Sadly, the same conclusion can be drawn from this year's figures from Table 26 in the 2014 Sourcebook.¹² It is hard to imagine that Table 26 from the 2015 and 2016 sourcebooks will be any different.

II. Equivalencies for Two Synthetic Cannabinoids, as well as for Methylone, Mephedrone, and MDVP

The Commission has proposed as a priority for this year to study offenses involving Methylone (3,4-Methylenedioxy-N-methylcathinone) and to consider any amendments to the guidelines that may be appropriate. We support this proposal, but we ask that the Commission also address four other substances. Two – JWH-018 and AM-2201 – are synthetic cannabinoids, producing effects intended to be similar to tetrahydrocannabinol (THC), primary psychoactive constituent of marijuana. The two others – MDPV and Mephedrone – are synthetic cathinones, intended to produce effects similar to methamphetamine, amphetamine, cocaine, cathinone, methcathinone and MDMA.

These substances were all charged and prosecuted as analogues until they were recently regulated and placed in Schedule I. The process involved was resource intensive and time

⁹ JONATHAN WRUBLEWSKI, DIRECTOR, OFFICE OF POLICY AND LEGISLATION, CRIMINAL DIVISION, DEP'T OF JUSTICE, ANNUAL LETTER TO PATTI B. SARIS, CHAIR, U.S. SENTENCING COMM'N, 8, (2014) (on file with Dep't of Justice at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/DOJ.pdf>).

¹⁰ U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf.

¹¹ See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 26 (2013), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table26.pdf>.

¹² See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 26 (2014), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table26.pdf>.

consuming, requiring the promulgation of three new regulations,¹³ and the enactment of new legislation.¹⁴ However, without specific “marijuana equivalencies” in the guidelines, in each case, courts must determine anew the degree to which the synthetic substance meets the factors identified in Application Note 6 of §2D1.1. In applying these factors, courts must consult and interpret empirical evidence and scientific research, a burdensome task that leads to discrepancy, as courts reach different results.

Furthermore, the amount of work involved signals to all parties that cases involving these synthetics will be more difficult than cases involving the illegal substances they are intended to mimic. The system in effect incentivizes the illegal synthetic drug trade, even as synthetic substances disproportionately result in emergency hospital room visits, injuries, and deaths. In sum, manufacturers and dealers of illegal synthetic drugs took advantage of the American legal and regulatory system by introducing synthetic versions of illegal drugs. Drug traffickers have flooded our country with dangerous synthetic drugs at a pace that has challenged our capacity to legislate and regulate. They now take advantage of our legal system again and place a heavy burden on the Government by disputing factors going into the guideline calculation required for sentencing.

As you know, last year the Department asked the Commission to create equivalencies in the guidelines for all five of these substances.¹⁵ Together these five substances continue to present a serious challenge to law enforcement, and a serious threat to public health. In contrast to the Commission’s most recent action for offenses involving hydrocodone, the five synthetic substances in question here have no lawful use, and Commission action in this matter will not have to consider the medical use of the drug.

In setting equivalencies, the Commission should review the scientific research on these five synthetic substances, and apply the three factors of §2D1.1 discussed above. But the Commission should not stop there: the Commission should also consider that these two synthetic cannabinoids are intended as alternatives to other controlled substances, and have been manufactured and distributed with the most sophisticated means to defeat our legal and

¹³See, e.g., Placement of Methylone into Schedule I, 78 Fed. Reg. 21818 (Apr. 12, 2013); Temporary Placement of Three Synthetic Cathinones into Schedule I, 76 Fed. Reg. 65371 (Oct. 21, 2011); Temporary Placement of Five Synthetic Cannabinoids into Schedule I, 76 Fed. Reg. 11075 (Mar. 1, 2011).

¹⁴Food and Drug Safety and Innovation Act of 2012, Pub. L. No. 112-144, § 1152). The synthetic cannabinoid AM-2201 was first scheduled by Congress in 2012. See Synthetic Drug Control Act, H.R. 1254, 112th Cong. § 2 (2011). For illustration of the effects of these substances, see the following studies related to AM-2201 published in the last few years: David McQuade et. al., *First European Case of Convulsions Related to Analytically Confirmed Use of the Synthetic Cannabinoid Receptor Agonist AM-2201*, 69(3) EUR. J. CLINICAL PHARMACOLOGY 373 (2013); Amy L. Patton et. al., *K2 Toxicity: Fatal Case of Psychiatric Complications Following AM-2201 Exposure*, 58(6) J. FORENSIC SCI. 1676 (2013). The synthetics MDPV, Mephedrone, Methylone, and JWH-018 were temporarily placed in Schedule I by the Drug Enforcement Administration (DEA) in 2011 through rulemaking authority, and all but Methylone were permanently placed into Schedule I by the Food and Drug Safety and Innovation Act of 2012 (FDSIA), signed into law on July 9, 2012. For JWH-018, see Temporary Placement of Five Synthetic Cannabinoids into Schedule I, *supra* note 11. For MDPV, Mephedrone, and Methylone, see Temporary Placement of Three Synthetic Cathinones into Schedule I, *supra* note 11. See also Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, § 1152, 1130 Stat. 126 (2012). Pursuant to rulemaking authority, the DEA Administrator permanently placed Methylone into Schedule I effective April 12, 2013. See Placement of Methylone into Schedule I, *supra* note 11.

¹⁵See WROBLEWSKI, *supra* at 14.

regulatory system. In other contexts in the guidelines the use of sophisticated means would result in enhanced sentences.

In addition, the Commission should also consider that these two synthetic cannabinoids are a much greater threat to public health than marijuana, and their production and distribution should be met with a greater consequence. Providing comparatively enhanced penalties for these cannabinoids as compared to marijuana would be consistent with the Commission's treatment of fentanyl and its analogues in the Guidelines' Drug Quantity Table. The table provides that one quarter the amount of fentanyl analogue triggers the same base offense level as Fentanyl.¹⁶

Setting these equivalencies will demonstrate that the Commission takes these substances seriously, and telegraph a message of deterrence to would be offenders. Finally, publishing such equivalencies will provide notice and consistency in sentencing.

The Public Health Concerns of MDPV, Mephedrone, Methyone, JWH-018, and AM-2201 Justify Commission Action

The Centers for Disease Control and Prevention and the Substance Abuse and Mental Health Services Administration have reported on the incidence of emergency room visits resulting from the consumption of synthetic cannabinoids: between January and May 2015, U.S. poison centers in 48 states reported receiving 3,572 calls related to synthetic cannabinoid use, a 229 percent increase from the 1,085 calls received during the same January through May period in 2014.¹⁷ Further, the American Association of Poison Control Centers has reported receiving thousands of calls every year since 2011 regarding serious adverse effects resulting from the ingestion of synthetic cannabinoids: most recently 5369 from January through August 17th 2015.¹⁸

The ingestion of synthetic cannabinoids can result in serious adverse health effects including death.¹⁹ Adverse health effects following ingestion of JWH-018 have been reported to include short-term memory defects, hypertension, delusions, chest pain, intractable abdominal pain, nausea, vomiting, tachycardia, anxiety, paranoia, auditory and visual hallucinations,

¹⁶ U.S. SENTENCING GUIDELINES MANUAL §2D1.1 (c) (Drug Quantity Table) (U.S SENTENCING COMM'N 2015). Fentanyl and its Analogue are first listed at Base Offense Level 12, where less than four grams of fentanyl receives the same offense level as less than one gram of a fentanyl analogue. This ratio continues throughout the table to Level 38, where 36KG of Fentanyl receives the same base offense level as 9KG of a Fentanyl Analogue.

¹⁷ Royal Law et al., *Notes from the Field: Increase in Reported Adverse Health Effects Related to Synthetic Cannabinoid Use — United States, January–May 2015*, MORBIDITY AND MORTALITY WEEKLY REPORT, June 12, 2015, at 64(22);618-619, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6422a5.htm?s_cid=mm6422a5_w; Donna M. Bush & David A. Woodwell, *Update: Drug-Related Emergency Department Visits Involving Synthetic Cannabinoids*, THE CBHSQ REPORT October 16, 2014, <http://www.samhsa.gov/data/sites/default/files/SR-1378/SR-1378.pdf>.

¹⁸ AMERICAN ASS'N OF POISON CONTROL CTRS., SYNTHETIC MARIJUANA DATA (2015), https://aapcc.s3.amazonaws.com/files/library/Syn_Marijuana_Web_Data_through_8.12.15_EzSJJxV.pdf (reporting 6968 calls in 2011, 5230 calls in 2012, 2668 in 2013, 3682 in 2014, and 5369 from January 1st through August 17th, 2015). Recent law enforcement data indicates some declines in the use of the leading synthetic drugs.

¹⁹ Bush and Woodwell, *supra* note 16.

seizure, coma and death.²⁰ Adverse effects following ingestion of AM2201 have been reported to include convulsions, intractable abdominal pain, nausea, vomiting, confusion, disorientation, psychiatric complications including self-induced lethal trauma and death.²¹

Adverse effects associated with the consumption of methylone, mephedrone and MDPV include palpitations, hyperthermia, seizures, hyponatremia, bruxism, sweating, hypertension, tachycardia, headache, thirst, mydriasis, tremor, fever, confusion, psychosis, paranoia, hallucinations, combativeness, agitation, and death.²² Excited delirium, a condition characterized by agitation, aggression, acute distress and sudden death,²³ is also associated with MDPV.

The Administration is concerned about these psychoactive substances because of their composition of highly dangerous substances that elicit serious and even lethal outcomes. This danger, coupled with easy access, has made them responsible for an unprecedented amount of hospital emergency department admissions and Medical Examiner reports.²⁴ Acting Administrator of the DEA Chuck Rosenberg used three simple words to describe the propagation for these substances to Senate Judiciary Committee: vile, volatile, and lethal.²⁵

The FDA has developed significant research over the harmful nature of these substances and the necessary need for regulation.²⁶ The Synthetic Drug Abuse Act Prevention Act (SDAPA), which is part of the FDA Safety and Innovation Act of 2012,²⁷ permanently placed 26 substances into Schedule I of the Controlled Substances (CSA).²⁸ All, but one of the compounds recommended for marijuana equivalency in this letter are classified into Schedule I through SDAPA.

²⁰ Gurney SMR, Scott KS, Kacinko SL, Presley BC, Logan BK (2014), 26(1) *Pharmacology, Toxicology, and Adverse Effects of Synthetic Cannabinoid Drugs*, FORENSIC SCI. REV. 54-78.

²¹ *Id.*

²² J.M. Pearson et al., *Three Fatal Intoxications Due to Methylone*, 36 J. ANALYTICAL TOXICOLOGY 444-451 (2012); B. Warrick et al., *Lethal Serotonin Syndrome After Methylone And Butylone Ingestion*, 8 J. MED. TOXICOLOGY 65-68 (2012); B. Cawrse et. al., *Distribution of Methylone in Four Postmortem Cases*, J. OF ANALYTICAL TOXICOLOGY 36, 434-439 (2012); ; J. Wyman et al., *Postmortem Tissue Distribution of MDPV Following Lethal Intoxication by "Bath Salts"*, J. OF ANALYTICAL TOXICOLOGY 37, 182-185 (2013); B. Murray et. al., *Death Following Recreational Use Of Designer Drug "Bath Salts" Containing 3,4-Methylenedioxypropylone (MDPV)*, J. MED. TOXICOLOGY 8, 69-75 (2012); K. Kesha et al., *Methylenedioxypropylone ("Bath Salts"), Related Death: Case Report And Review Of The Literature*, J. OF FORENSIC SCI. 58, 1654-1659 (2013).

²³ Takeuchi A, Ahern T, Henderson S, *Excited Delirium*, WEST J. EMERG. MED. 12(1): 77-83 (2011).

²⁴ *Deadly Synthetic Drugs: The Need to Stay Ahead of the Poison Peddlers Before the Sen. Comm. On the Judiciary*, 114th Cong. 2 (2016) [hereinafter *Deadly Synthetic Drugs*] (testimony of Dr. Douglass Throckmorton, Deputy Director for Regulatory Programs, Center for Drug Evaluation and Research, Food and Drug Administration NY).

²⁵ *Deadly Synthetic Drugs*, supra note 22, (testimony of Chuck Rosenberg, Acting Administrator, Drug Enforcement Administration).

²⁶ Often, these drugs are labelled with captions reading, "not for human consumption", to mask their intended purpose and avoid Food and Drug Administration (FDA) regulatory oversight of the manufacturing process and and prosecution under the analogue provisions of the CSA.

²⁷ Food and Drug Administration Safety and Innovation Act, P.L. 112-144 Sub D §1151, "Synthetic Drug Abuse and Prevention Act of 2012." (2012).

²⁸ *Deadly Synthetic Drugs*, supra note 22 at 11 (testimony of Michael Botticelli Director, Office of National Drug Control), <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Botticelli%20Testimony.pdf>.

The Congress and the Administration's initiatives to schedule these substances, through SDAPA, and via temporary and permanent scheduling efforts before SDAPA was enacted, and in cases where SDAPA did not schedule them, indicate their support for an increased level of control and clarity regarding these dangerous substances. The FDA conducts a scientific and medical evaluation, involving an 8-factor analysis, considering the pharmacological makeup and physiological effects of these synthetic substances. The FDA's and the DEA's internal processes have determined that there is a critical need to protect the public from the dangers posed by these substances.²⁹ None of the five drugs recommended for equivalency guidelines have known legitimate medical or industrial uses and are not approved by the FDA for use in medicine.³⁰

Why Equivalencies Are Necessary for these Specific Synthetics

It is true that creating guidelines for these five substances will not address the potentially hundreds of variations of synthetic substances that exist today or may exist in the future. However, specific equivalencies will go a long way at remedying problems that arise from these particularly troublesome substances.

According to the DEA in its 2011 report analyzing mephedrone, methylone, and MDPV and recommending temporary scheduling under schedule I, these drugs were “the most commonly encountered synthetic cathinone. . . represent[ing] more than 98% (1,401 of 1,429) of the synthetic cathinones that have been encountered by law enforcement.”³¹ The report also observed that at the time of its publishing, the abuse of these drugs was growing, with poison control centers receiving 4,137 calls in forty-seven states and the District of Columbia relating to these three specific products.³² Indeed, these specific substances are the object of intense international drug smuggling. As the Federal Register observed in the final order before the scheduling of JWH-018, that drug was extensively “encountered by U.S. customs and Border Protection in 2010. One enforcement operation encountered five shipments of JWH-018 totaling over 50 kilograms[.]”³³

As to whether the problem persists, Cathy Lanier, Chief of the Washington D.C. Police Department, in her testimony before the Senate Judiciary Committee on June 7, 2016, observed that drugs like those at issue here have a “higher impact than other drugs frequently used on the street,” causing side effects like “extreme anxiety, paranoia, panic attacks, psychotic episodes,

²⁹ *Deadly Synthetic Drugs*, *supra* note 22, at 2-4 (testimony of Dr. Douglass Throckmorton, Deputy Director for Regulatory Programs, Center for Drug Evaluation and Research, Food and Drug Administration), <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Throckmorton%20Testimony.pdf>

³⁰ *Deadly Synthetic Drugs*, *supra* note 22, at 1- 2 (testimony of Chuck Rosenberg, Acting Administrator, Drug Enforcement Administration).

³¹ *Background, Data and Analysis of Synthetic Cathinones: Mephedrone (4-MMC), Methylone (MDMC) and 3,4-Methylenedioxypyrovalerone (MDPV)*, DEA, 4 (Aug. 2011). www.regulations.gov/document?=DEA-2011-0008-0002. The report also notes that “Of all the reports, (1,429) of synthetic cathinones recorded by NFLIS from January 2009 to June 2011, 55% (791) were MDPV, 23% (331) were mephedrone, and 20% (279) were methylone.” *Id.*

³² *Id.* at 11.

³³ Schedules of Controlled Substances: Temporary Placement of Five synthetic Cannabinoids into Schedule I, 76 Fed.Reg. 11075, 11075-11078 (Mar. 1, 2011).

and hallucinations.”³⁴ Moreover, Lanier stressed that a lack of specific sentences encouraged the distribution of these substances—because “penalties were neither swift nor certain . . . small businesses such as gas stations and convenience stores continued to sell synthetic drugs.”³⁵

Creating Sentencing Equivalencies Will Unburden Courts and Prosecutors

Creating sentencing guidelines for these specific controlled substances will unburden the Department of duplicative work at the sentencing phase and free valuable court, prosecutor and scientific resources. Courts must determine that the controlled substance not referenced in the guidelines 1) has a chemical structure that is substantially similar to a controlled substance referenced in the guideline; 2) that the substance has a stimulant, depressant, hallucinogenic effect that is substantially similar to a controlled substance referenced in the guideline; and 3) the quantity of the controlled substance not referenced in the guideline is necessary to produce a substantially similar effect substantially similar to a controlled substance referenced in the guideline.³⁶

In his testimony before the Senate Judiciary Committee on June 7, 2016, DEA Acting Administrator Chuck Rosenberg explained to Senator Grassley how a lack of specific sentencing equivalencies hamstrings law enforcement, without which “prosecutors are required to produce evidence addressing the factors identified in the relevant guidelines,” and that in addition courts must hear from expert witnesses, including DEA scientists who are also responsible for evaluating new substances for scheduling, “at every sentencing hearing . . . a time consuming,

³⁴ *Deadly Synthetic Drugs*, *supra* note 22, at 1 (statement of Cathy L. Lanier, Chief of Police for the District of Columbia).

³⁵ *Id.* at 2.

³⁶ As discussed above, guidelines list only a limited number of substances in a drug quantity table. When a substance is not listed in the drug quantity table, the Court must determine the most closely related controlled substance listed in the guidelines to convert the substance to a “marijuana equivalency,” which is the used to determine the defendant’s base offense level under the guidelines. Application Note 6 to U.S.S.G. § 2D1.1 explains the resource intensive and cumbersome process as follows:

“In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marihuana 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.”

resource intensive, and inefficient process.”³⁷ As noted by Acting Administrator Rosenberg, much of this work is duplicative, and the Commission could alleviate the burden at sentencing by setting specific equivalencies.

Setting Equivalencies Provides Defendants with Notice, Serves as a Deterrent to Drug Traffickers, Provides for Consistency in Sentencing, and Further Legitimizes the Sentences Handed Ordered by Judges

Creating specific sentencing equivalencies will also provide greater consistency to sentences for similarly situated defendants. As observed by the DEA in testimony before the Senate Judiciary Committee: “[d]ifferent courts have reached very different results for the same substance which has resulted in disparate sentences for similarly situated offenders.”³⁸ Because new sentencing equivalencies will provide greater consistency in how similarly situated defendants are treated, it follows this consistency will provide greater notice to criminal defendants about the penalty they can expect for trafficking and distributing these five illegal analogues. This greater notice serves as a deterrent, and helps to effectuate the Department’s effort to decrease and stymie the efforts of drug traffickers. Finally, greater notice also increases the legitimacy of the sentence handed down by the judge.

Equivalencies: MDPV is Comparable to Methcathinone and Methamphetamine but at least as Potent as Methamphetamine

Regarding MDPV, the Department recommends that the Commission begin with the marijuana equivalency currently used for methcathinone, which has a marijuana equivalency ratio of 1:380, but then impose a ratio consistent with both the available scientific information and the harms to the public. The substance 3,4-Methylenedioxy-pyrovalerone (MDPV) is closely related in structure and pharmacology to phenethylamines such as the schedule I and II stimulants amphetamine, methamphetamine, and methcathinone, each of which has a different marijuana equivalency in the guidelines.

Moreover, retrospective studies observing humans admitted to poison centers in Louisiana and Kentucky confirmed defects in patients who had ingested so-called “bath salts” such as MDPV. “The most common clinical effects reported were agitation, combative violent behavior, tachycardia [abnormally accelerated heart rate], hallucinations, confusion, myoclonus [muscle spasms], hypertension, chest pain and mydriasis [dilatation of the pupil].”³⁹

Methylone and Mephedrone as Comparable to MDMA

Regarding the equivalency to be used for methylone and mephedrone, the Department proposes that the Commission use the marijuana equivalency currently used for MDMA, which

³⁷ *Deadly Synthetic Drugs*, supra 22, at 4-5 (statement of Chuck Rosenberg, Acting Administrator, DEA, <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Rosenberg%20Testimony.pdf>). See also *Deadly Synthetic Drugs*, supra 22, at 5 (testimony Michael Botticelli Director, Office of National Drug Control).

³⁸ *Id.* at 5.

³⁹ Declaration of Cassandra Prioleau, Ph.D. at 5i, *United States v. McFadden*, 753 F.3d 432, 445 (4th Cir. 2014) (No. 312CR00009), 2012 WL 12055116.

has a marijuana equivalency ratio of 1:500. This is based both on determinations grounded in court decisions based upon expert testimony, as well as independent scientific research. For example, the Eastern District of New York determined that methylone was comparable to MDMA for sentencing.⁴⁰ The validity of this comparison is supported by independent neuropsychological research, which examined the neurological effect of both methylone and mephedrone on rats. Both “exhibit[ed] potency and selectivity comparable to MDMA[.]”⁴¹ Moreover, the study found methylone to be “about half as potent” as MDMA.⁴² The result of this recommendation is an equivalency of 1:500.⁴³

JWH-018 and AM-2201 are Comparable to THC

Regarding JWH-018 and AM-2201, the Department recommends that the Commission begin the analysis by looking at THC, which has a marijuana equivalency of 1:167. This equivalency would follow the holdings of both the Fifth and Eighth Circuits, which have held that AM-2201 is comparable to THC.⁴⁴ In *United States v. Malone*, the Fifth Circuit upheld the determination by the district court, which relied on expert testimony that rats reacted similarly to both JWH-018 and AM-2201, and that both of these synthetic drugs reacted similarly to THC.⁴⁵ Likewise, in *U.S. v. Carlson*, the Eighth Circuit determined after extensive expert testimony that JWH-018 should be sentenced under the marijuana equivalency for THC.⁴⁶

However, in the World Health Organization’s (WHO) Critical Review Report of AM-2201, the WHO reported that the effects of AM-2201 are more potent than those of THC: “when smoked, AM-2201 produces cannabimimetic effects in doses lower than the doses of Delta-9-tetrahydrocannabinol (THC) needed to produce effects of similar strength (higher potency).”⁴⁷ The WHO also noted in its report the deleterious effects, and complete lack of medical use of AM-2201.⁴⁸

⁴⁰ See *United States v. Chin Chong*, No. 13 Cr. 570, 2014 WL 4773978 (E.D.N.Y. Sept. 24, 2014).

⁴¹ Michael H. Baumann, et al. *The Designer Methcathinone Analogs, Mephedrone and Methylone, are Substrates for Monoamine Transporters in Brain Tissue*, 37 NEUROPSYCHOPHARMACOLOGY 1192, 1194 (2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3306880/>.

⁴² *Id.*

⁴³ It is worth noting that the Eastern District adopted the equivalency of MDMA used by the Southern District of New York, which diverged from the guidelines and instead set the equivalency at 1:200. See *United States v. McCarthy*, No. 09 Cr. 1136, 2011 WL 1991146, at *4 (S.D.N.Y. May 19, 2011); *United States v. Qayyem*, No. 10. Cr. 19(KMW), 2012 WL 92287, at *8 (S.D.N.Y. Jan. 11, 2012). The S.D.N.Y.’s reasoning in for diverging from the Guidelines was that “a 500:1 MDMA-to-marijuana equivalency would give rise to a sentence that is greater than necessary to serve the objectives of sentencing.” *McCarthy*, 2011 WL 1991146, at *1. The Department supports the Commission adopting an approach consistent with existing guidelines.

⁴⁴ See *U.S. v. Stanford*, No. 15–30127, 2016 WL 2909203 (5th Cir. May 18, 2016); *U.S. v. Ramos*, 814 F.3d 910 (8th Cir. Feb. 09, 2016); *U.S. v. Carlson*, 810 F.3d 544 (8th Cir. Jan. 14, 2016); *U.S. v. Malone*, 809 F.3d 251 (5th Cir. 2015).

⁴⁵ *Malone*, 809 F.3d at 255.

⁴⁶ *Carlson*, 810 F.3d at 556.

⁴⁷ EXPERT COMM. ON DRUG DEPENDENCE, WHO, AM-2201 CRITICAL REVIEW REPORT 7 (Jun. 16-20, 2014).

⁴⁸ “AM-2202 is clandestinely manufactured, of especially serious risk to public health and society, and of no recognized therapeutic use by any party. Preliminary data collected from literature and different countries indicated that this substance may cause substantial harm and that it has no medical use.” *Id.* at 8.

As discussed above, adverse health incidents following ingestion of JWH-018 have included, among other things, delusions, paranoia, seizures, coma and death,⁴⁹ and following the ingestion of AM2201 have included convulsions and psychiatric complications including self-induced lethal trauma and death.⁵⁰ In addition, as discussed above, and as discussed recently before Congress, these two substances were manufactured and trafficked specifically to skirt our laws and regulations and to evade the reach of law enforcement and the courts.

The Department therefore recommends that the Commission provide for an increase to the equivalency for JWH-018 and AM-2201 as compared to THC, by a factor of four, consistent with how fentanyl and fentanyl analogue are currently treated in guidelines,⁵¹ and how fentanyl and fentanyl analog are treated in the Controlled Substances Act.⁵² The result is a marijuana equivalency of 1:668.

III. Simplify the Guidelines by Eliminating the Misleading Term “Marijuana Equivalency”

As discussed in excruciating detail above, for drugs not listed in the Drug Quantity Table, the guidelines require the computation of “marijuana equivalencies.” For example, in the case of opium, the guidelines instruct that rather than convert it to heroin, it must be converted to a marijuana equivalency.⁵³ This results in great confusion for those not versed in the guidelines, as the first question that comes to mind is “why are we comparing this drug to marijuana, given that they have so little in common?”

We do not dispute that the Drug Quantity Table must have a reference category. But as the Commission notes, “equivalent” is a term of art.⁵⁴ As such, the Department recommends that the Commission eliminate the term “marijuana equivalency.” As demonstrated in the discussion above on the creation of marijuana equivalencies, the term is misleading, and, as acknowledged by the Commission, is a term of art. The Commission could instead use the term “equivalency unit.” This would simplify the guidelines so that individuals not fully versed in their inner workings can better understand and follow the way guidelines ranges are calculated for a given substance.

IV. Knowing Endangerment for Offenses Involving the Clean Water Act, the Resource Conservation and Recovery Act, and the Clean Air Act

From major environmental catastrophes like the BP Deepwater Horizon disaster to significant incidences of polluted water, air, and land over the last several decades, federal environmental regulation has served as the foundation for enforcing basic public health

⁴⁹ Gurney *et. al.*.

⁵⁰ *Id.*

⁵¹ See §2D1.1(c) (Drug Quantity Table).

⁵² See 21 U.S.C. § 841 (b)(1)(A)(vi) and (B)(vi).

⁵³ See U.S. SENTENCING COMM’N., DRUG PRIMER, 10 (March 2013), http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Drug.pdf.

⁵⁴ *Id.*

protections. While varying forms of pollution have long been federal offenses, it wasn't until the 1980s that Congress enacted the knowing endangerment provisions to three of our Nation's pollution statutes – the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act.⁵⁵ Most recently, in June of 2016, a knowing and willful endangerment provision was added to the Toxic Substances Control Act.⁵⁶

The Clean Water Act limits the discharge of pollutants into navigable waters; the Clean Air Act regulates the emission of hazardous air pollutants; the Resource Conservation and Recovery Act governs the control, management and disposal of hazardous wastes; and the Toxic Substances Control Act addresses the production, importation, use and disposal of dangerous chemicals.⁵⁷ The knowing endangerment provision of these laws apply where the defendant knowingly violates the underlying statute while also knowing that the violation puts another person in imminent danger of death or serious bodily injury.⁵⁸ Culpable individuals face a maximum term of incarceration of fifteen years, an enhanced penalty that reflects a rational and necessary effort to protect public safety. However, the sentencing guideline applicable to these offenses does not come close to providing for the maximum term of incarceration in any circumstance, and is therefore at odds with the intent of Congress in passing these provisions. Increasing the base offense level for §2Q1.1 (Knowing Endangerment Resulting from Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) would address this discrepancy.

The knowing endangerment provisions are assigned to §2Q1.1,⁵⁹ A defendant sentenced for a knowing endangerment violation has a base offense level of 24 under §2Q1.1. There are no specific offense characteristics.⁶⁰ The sentencing guidelines range for such a defendant with a criminal history category of I would be 51 – 63 months, nowhere near the statutory maximum. Assuming that Congress intended the statutory maximum to be reached only for defendants with extensive criminal history (rather than the circumstances of the offense), the sentencing guidelines range for a defendant within the highest criminal history category of VI would be 100 – 125 months, over four and one-half years short of the fifteen year maximum term of incarceration.

⁵⁵ These provisions are found in the Clean Water Act, 33 U.S.C. § 1319(c)(3); the Clean Air Act, 42 U.S.C. § 7413(c)(5); and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(e), which deals with hazardous waste. Under both the Clean Water Act and the Clean Air Act, a second violation under the knowing endangerment provision carries a maximum term of thirty years.

⁵⁶ See H.R. 2567, Frank Lautenberg Chemical Safety for the 21st Century Act, Title I, Section 12. This new endangerment provision in the Toxic Substances Control Act has not yet been assigned to a guideline. Currently, all of the violations of the Toxic Substances Control Act fall under §2Q1.2. The new endangerment provision is the only felony in that statute.

⁵⁷ 33 U.S.C. § 1251(a), 42 U.S.C.A. § 7401(b)(1), 42 U.S.C. § 6902(b), 15 U.S.C. § 2601(a).

⁵⁸ *Id.*

⁵⁹ While §2Q1.2 lists all Clean Air Act criminal violations and §2Q1.1 does not include the Clean Air Act's knowing endangerment provision, Appendix A shows that provision as assigned to §2Q1.1. The Clean Water Act and RCRA knowing endangerment provisions were assigned to §2Q1.1 when the sentencing guidelines were initially created. Other violations of those two statutes fall under either §2Q1.2 or §2Q1.3, depending upon the nature of the pollutant. The knowing endangerment provision in the Clean Air Act was not enacted until 1990. However, all of the criminal provisions of that Act including knowing endangerment remained attached to §2Q1.2 or §2Q1.3, although Appendix A suggests otherwise. This oversight should be corrected.

⁶⁰ The Application Note to USSG §2Q1.1 does allow for an upward departure “[i]f death or serious bodily injury resulted . . .” Application Note 6 to USSG §2Q1.2 has similar language.

In contrast, an offense level calculation under §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for the same set of facts but not charged as knowing endangerment could result in a higher sentencing guidelines range than that available under §2Q1.1. Depending on the specific offense characteristics present, a defendant with the lowest criminal history category could face a sentencing guidelines range of 37 – 46 months (offense level of 21) to 108 – 135 months (offense level of 31).⁶¹ The base offense level of 24 for §2Q1.1 would expose an offender only to approximately one-third the maximum statutory incarceration before any consideration of aggravating factors or departures.

To illustrate, take a defendant with a criminal history category of III convicted knowing disposal of a hazardous waste without a permit under the Resource Conservation and Recovery Act.⁶² If the defendant were charged and convicted of knowing disposal of a hazardous waste without a permit and not a knowing endangerment violation, his sentence would be calculated under §2Q1.2. However, while a knowing disposal of hazardous waste without a permit could result in a recommended sentencing guidelines range of 135 – 168 months (offense level of 31, criminal history of III), the statutory maximum term of incarceration is five years, and so the sentence cannot exceed 60 months. On the other hand, if the defendant were charged and convicted of Resource Conservation and Recovery Act knowing endangerment, even though he is subject to a statutory maximum of 15 years, the recommended guidelines range under §2Q1.1 would be 63 - 78 months (offense level of 24, criminal history of III).

Sentencing guidelines for the worst offenders should result in a calculation at or near the statutory maximum; yet §2Q1.1 does not result in a sentencing range that includes the maximum fifteen year term of incarceration even for defendants with the most extensive criminal histories.⁶³ With a criminal history score of VI, an offense level of 29 results in a recommended guideline range of 151-188 months, or 12.6 – 15.7 years. We ask the Commission to increase the base offense level for §2Q1.1 to 29, so that the maximum of the guideline range properly reflects the heightened fifteen year maximum term of incarceration provided by statute. Increasing the offense level for §2Q1.1 to 29 would reflect the intent of Congress when it enacted the knowing endangerment provisions of these statutes. It would allow for a progressively higher term of incarceration at each criminal history level, to nearly the statutory maximum of fifteen years. It also would reflect that such offenses are taken more seriously and that just as the knowing endangerment statutory provisions carry a higher maximum term of incarceration, the sentencing guidelines should also result in a higher sentencing range.

V. Amend the Guidelines for Tax Offenses Involving Hidden Offshore Bank Accounts

⁶¹ USSG §2Q1.2(b)(2) calls for an increase of nine levels “[i]f the offense resulted in a substantial likelihood of death or serious bodily injury.”

⁶² 42 U.S.C. § 6928(d)(2) (1976).

⁶³ § 13.02 *Offenses Involving the Environment*, in PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES (David Debold, et al. eds., 5th ed., 2014).

A top priority for the Department of Justice is combating the use of secret offshore bank accounts to violate the tax laws. Increased technical sophistication of financial instruments and the widespread use of the Internet have made it increasingly easy to move money around the world. According to reports, the use of secret offshore accounts to evade U.S. tax laws costs the Treasury at least \$100 billion annually.⁶⁴ The United States has cracked down on tax evasion through criminal and civil enforcement actions, including successful enforcement actions against dozens of Swiss banks. Prompted by the threat of criminal prosecution, thousands of U.S. individuals have come forward voluntarily to disclose offshore accounts and pay back taxes and penalties.

On May 5, 2016, the Administration announced several important steps intended to strengthen the global financial system and provide greater transparency, in an effort to combat money laundering, corruption, and offshore tax evasion.⁶⁵ The announcements included new rules to increase transparency and disclosure requirements that will enhance law enforcement's ability to detect, deter, and disrupt money laundering, terrorist finance, and tax evasion.⁶⁶ The Administration also noted that disclosure of the so-called "Panama Papers" – millions of leaked documents reportedly revealing the use of anonymous offshore shell companies – not only brought the issues of illicit financial activity and tax evasion into the spotlight, but underscored the importance of deterring criminals and tax cheats from hiding their funds offshore. The Administration called upon Congress to take additional action to address these critical issues.

The success of that initiative, however, depends in large part in criminally prosecuting those who do not voluntarily disclose. The linchpin of that effort is 31 U.S.C. § 5314 (records and reports on foreign financial agency transactions), which obligates U.S. citizens and resident aliens to report financial accounts in a foreign country with an aggregate value of more than \$10,000.⁶⁷ When a defendant earns income from an offshore account and willfully conceals the existence of the account from the Government in order to avoid paying taxes on the income, the Tax Division charges violations of § 5314 under § 5322 (criminal penalties), which provides for a maximum penalty of 5 years, and an increased penalty of 10 years "while violating another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period."⁶⁸

Appendix A of the guidelines references § 5322 to USSG §2S1.3 (Money Laundering and Monetary Transaction Reporting). Section 2S1.3 provides a base offense level of 6, plus the number of offense levels from the table in §2B1.1 corresponding to the total amount that went unreported.⁶⁹ Significantly, however, §2S1.3(b)(3) provides that the offense level is reset back to 6 if the funds were income from a legal source and no sentencing enhancement under §2S1.3 applies.

⁶⁴ See, e.g., STAFF REP. S. PERM. SUBCOMM. ON INVESTIGATIONS, 111th Cong., TAX HAVEN BANKS AND U.S. TAX COMPLIANCE, at 1 (July 17, 2008).

⁶⁵ See Fact Sheet: Obama Administration Announces Steps to Strengthen Financial Transparency, and Combat Money Laundering, Corruption, and Tax Evasion (May 5, 2016), <https://www.whitehouse.gov/the-press-office/2016/05/05/fact-sheet-obama-administration-announces-steps-strengthen-financial>.

⁶⁶ *Id.*

⁶⁷ 31 U.S.C. § 5314 (2012).

⁶⁸ 31 U.S.C. § 5322(b) (2012).

⁶⁹ USSG §2S1.3(a)(2).

Notably, §2S1.3(b)(2) was added in 2002 in response to statutory amendments providing for the enhanced criminal penalty provisions under 31 U.S.C. § 5322(b).⁷⁰ Yet the guideline omits the language in the statute "while violating another law of the United States," thus failing to capture the full Congressional intent. As a result, if a defendant is sentenced as though the funds in the undisclosed foreign bank account were amassed legally and used for a lawful purpose, the Government's ability to avoid the reset to offense level 6 is largely limited to proving that the enhancement under §2S1.3(b)(2) applies; i.e., that the defendant "committed the [Title 31] offense as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period."

It is the Department's litigating position that a defendant's failure to pay tax on the income generated by unreported funds in an unreported foreign account satisfies the "pattern of unlawful activity" requirement because the conduct would violate both the tax laws and the offshore-account reporting requirement. But we believe adding the phrase "while violating another law of the United States" to §2S1.3(b)(2) would remove any ambiguity on that point, thus fulfilling the provision's purpose of "giv[ing] effect to the enhanced penalty provisions under 31 U.S.C. § 5322(b)."

Our proposed fix is simple and straightforward. We ask that the Commission amend USSG §2S1.3 so it matches the currently enacted statutory enhancement at 31 U.S.C. § 5322(b). The sentencing enhancement at §2S1.3(b)(2) should apply if the defendant committed a Title 31 offense "while violating another law of the United States or as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period." Such an amendment would ensure that the guidelines are consistent with current statute and that they properly reflect the intent of Congress.

VI. Clarification of § 2T1.1 (offenses involving income taxes and gift taxes, among other things), Application Note 1

We also ask that the Commission amend §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), Application Note 1, to make clear that loss in tax cases includes penalties and interest not only where a defendant's willful non-payment offense is charged under 26 U.S.C. § 7201 or § 7203, but also where such conduct is charged under a different statute, such as under 18 U.S.C. § 371 (Conspiracy).

Application Note 1 to §2T1.1 states that "tax loss" is defined in subsection (c), which states that "the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)." Application Note 1 also states that "[t]he tax does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203." Application Note 7 to §1B1.3 (Relevant Conduct), in turn, instructs that although "[a] particular

⁷⁰ See USSG app. C, vol. II, amend. 637, supp. at 244 (2002).

guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute,” “use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute.” “An example of this usage,” the Application Note states, “is found in §2A3.4(a)(3) (‘if the offense involved conduct described in 18 U.S.C. § 2242’).”

In *United States v. Black*, a Seventh Circuit panel initially held that Application Note 1 to §2T1.1 categorically barred the inclusion of penalties and interest as the defendant had been convicted under 26 U.S.C. 7212(a) (corrupt or forcible interference with internal revenue laws), not § 7201 or § 7203; but the court held on panel rehearing that penalties and interest could be included because the defendant’s obstructive conduct was intended to evade the payment of his tax debt (which also included penalties and interest), and thus “was tantamount to 26 U.S.C. § 7201 and § 7203 conduct.”⁷¹ In so ruling, the court stated while “it is not clear whether the ‘cases under 26 U.S.C. § 7201 or § 7203’ language requires at least a charge, “the absence of a statement in the guidelines asserting that the indictment must contain a charge under either statute supports our interpretation that it does not.”⁷²

To provide the clarity the Seventh Circuit noted was missing, Application Note 1 to §2T1.1 should be amended so it states that “[t]he tax does not include interest or penalties, except *where the offense involved* willful evasion of payment conduct described in 26 U.S.C. § 7201 *or* willful failure to pay conduct described in 26 U.S.C. § 7203.” (Emphasis supplied to also suggest the disjunctive “or” is more appropriate.) Adding that language will make clear that, where the object of a defendant’s tax crime was to evade the payment of a tax debt that included not only tax but penalties and interest, “what being evaded is what’s owed,” irrespective of the particular tax statute used.⁷³

VII. Amend the Sophisticated Means Enhancement in §2T1.1(b)(2) and §2T1.4(b)(2) to Conform to the 2015 Amendment Narrowing the Enhancement for Sophisticated Means in §2B1.1(b)(1)(C)

In November 2015, the Sentencing Commission made a number of amendments related to fraud. One amendment was to the commentary for §2B1.1(b)(10)(C), the sophisticated means enhancement. The amendment to §2B1.1(b)(10)(C) narrowed the adjustment to cases in which the “defendant intentionally engaged in or caused conduct constituting sophisticated means”; previously the enhancement applied if “the offense otherwise involved sophisticated means.” For clarity and consistency, the Commission should make conforming amendments to the commentary of the sophisticated means enhancements in §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or

⁷¹ 815 F.3d 1048, 1055 (2016) *amending* 798 F.3d 570 (2015).

⁷² *Id.* *Accord* *United States v. Thomas*, 635 F.3d 13, 17-18 (1st Cir. 2011) (Application Note 1 to USSG § 2T1.1 does not limit the inclusion of penalties and interest to defendants convicted of willful evasion of payment under 26 U.S.C. § 7201 or willful failure to pay under 26 U.S.C. § 7203).

⁷³ *United States v. Josephberg*, 562 F.3d 478, 503 (2d Cir. 2009).

Other Documents) and §2T1.4 (Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud).

VIII. Circuit Split Concerning Defendants Who Fraudulently Obtain Government Contracts Under the Small Business Administration by Misrepresenting Their Qualifications as a Small Disadvantaged Business (SDB)

Under the Small Business Jobs Act of 2010,⁷⁴ Federal agencies are to set-aside a certain proportion of contracts for “socially and economically disadvantaged individuals.”⁷⁵ There is now a circuit split regarding whether courts should deduct from the sentencing loss calculation the fair market value of services rendered under contracts set aside for minority-owned businesses that have been obtained fraudulently.⁷⁶ The Commission should amend §2B1.1 (Theft, Property Destruction, and Fraud) to clarify that the “government benefits rule”⁷⁷ applies to these cases, and to clarify that the “credits against loss rule”⁷⁸ does not.

In contrast to the Department’s proposed solution, some courts are allowing defendants to deduct from the loss calculation the value of the services rendered. In *Harris*, the defendant was convicted under 18 U.S.C. § 1343 (Fraud by wire, radio or television) in connection with a scheme to obtain government procurement contracts set aside by the Small Business Administration for minority-owned small businesses.⁷⁹ The Fifth Circuit held that the district court should have applied the “general rule for loss,” such that the loss amount reflected not the total contract price, but rather the contract price less the fair market value of services rendered.⁸⁰

⁷⁴ Pub. L. No. 111-240, 124 Stat. 2504 (2010).

⁷⁵ 15 U.S.C.A. §644(g)(2)(A)-(B) (2015). “Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudices or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities.” 13 C.F.R. §124.103(a). Racial and ethnic minorities are presumed socially disadvantaged. §124.103(b).

⁷⁶ Compare *United States v. Harris*, No. 15-50106, 2016 WL 1720046, at *12-14 (5th Cir. Apr. 28, 2016) (rejecting the government benefits rule for procurement contracts) and *United States v. Martin*, 796 F.3d 1101, 1109 (9th Cir. 2015) (same), with *United States v. Maxwell*, 579 F.3d 1282, 1306 (11th Cir. 2009) (applying the government benefits rule in this context); *United States v. Leahy*, 464 F.3d 773, 789-790 (7th Cir. 2006) (same), *cert. denied*, 552 U.S. 811 (2007); and *United States v. Brothers Constr. Co. of Ohio*, 219 F.3d 300, 317-318 (4th Cir.) (same), *cert. denied*, 531 U.S. 1037 (2000).

⁷⁷ Set forth in USSG §2B1.1 cmt. n.3(F)(ii)(Government Benefits).

⁷⁸ As described in USSG §2B1.1 cmt. n.3 (E) (Credits Against Loss).

⁷⁹ *Harris*, a retired U.S. Army colonel, was a senior vice president with Luster, a defense contractor. Luster obtained two “set aside” government contracts, for \$1.3 million, under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1)(A)-(B), (a)(4) which applies to small businesses owned and controlled by “socially and economically disadvantaged individuals.” Luster did not qualify as such a business, so *Harris* used a “pass-through vehicle”—an SBA-approved Section 8(a) company called Tropical—to obtain the contracts. It was never intended that Tropical would do any work under the contracts. This was wire fraud, and the jury found *Harris* guilty and the court of appeals found the evidence sufficient to support the convictions. The advisory Guidelines range was 70 to 87 months, and the district court varied downward and sentenced *Harris* to 24 months.

⁸⁰ The general rule for loss is found at USSG §2B1.1 cmt. n.3(C) (Estimation of Loss), and it provides that judges have discretion in making a “reasonable estimate of the loss,” and that the estimate shall be based upon available information such as the “fair market value of the property unlawfully taken.” Since §2B1.1 cmt. n.3(E) (Credits Against Loss), further provides that “[l]oss shall be reduced by . . . the money returned, and the fair market value of the property returned and the services rendered,” the result of applying the general rule in this context is that if the defendant completes the contract, there is virtually no loss.

In most of these cases (of lying about qualifying as a small disadvantaged business), this rule will result in a loss calculation of zero, no matter the size of the contract awarded, nor the profit gained.⁸¹

Other courts have applied the government benefits rule⁸² and have not deducted from the loss calculation the value of the services rendered. In *United States v. Maxwell*, a large contracting corporation with offices nationwide was ineligible to apply for a procurement contracts set-aside for small businesses owned or operated by socially or economically disadvantaged individuals. To get around this obstacle, the firm illicitly employed a much smaller business that was qualified to apply for the specialized contracts. After the contract was procured, the ineligible larger firm performed all of the work, and the smaller firm served no commercially useful purpose. The smaller, qualifying firm would receive the payments and pass them onto the larger, non-qualifying firm, and receive a kickback as a result.⁸³

The Eleventh Circuit opinion noted that two of its sister circuits had previously held that the government benefits rule should apply to fraud under this SBA program,⁸⁴ that a number of other courts came to the same conclusion,⁸⁵ applied the government benefits rule, and held that the district court should have applied the full value of the contract to the loss for purposes of §2B1.1.⁸⁶ Adding to the confusion, in *United States v. Nagle*, the Third Circuit declined to decide whether the government benefits rule applies, but held nevertheless that the loss was the face value of the contracts minus the fair market value of the services the defendants provided under the contracts.⁸⁷

We brought this issue to the attention of the Commission in 2014, and we highlighted the fact that the Small Business Jobs Act of 2010⁸⁸ amended 15 U.S.C. § 632 to provide that the loss to the United States is to be based on the total amount expended on the contract whenever a

⁸¹ When no loss applies, USSG §2B1.1 provides for a base offense level of 7 (6 in some circumstances), which, before a three level reduction for pleading guilty, results in a recommended sentence range of 0-6 months for defendants with up to one criminal history point, which usually results in a sentence of probation.

⁸² The special rule for government benefits at USSG §2B1.1 cmt. n.3 (F)(ii) (Government Benefits) provides that “In a case involving a government benefit . . . loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as they case may be.”

⁸³ *United States v. Maxwell*, 579 F.3d 1282, 1289-1290 (11th Cir. 2009).

⁸⁴ “At least two of our sister circuits have held that the DBE program or a similarly structured municipal program are Government Benefits programs for purposes of § 2B1.1. *See United States v. Leahy*, 464 F.3d 773, 790 (7th Cir. 2006) (holding a city minority contracting program was a Government Benefits program under § 2F1.1 before it was consolidated with § 2B1.1); *United States v. Bros. Constr. Co. of Ohio*, 219 F.3d 300, 317-18 (4th Cir. 2000) (holding the fraudulent receipt of DBE funds involved the diversion of Government Benefits under the Sentencing Guidelines).” *Maxwell*, 579 F.3d at 1306.

⁸⁵ *Id.* at 1306 (citing to *United States v. Tulio*, 263 Fed. Appx. 258, 263 (3d Cir. 2008) (the Government Benefits provision of §2B1.1 applies to DBE funded contracts “because DBE and similar programs are “affirmative action program[s] aimed at giving exclusive opportunities to certain women and minority businesses,” thus making them entitlement program payments.”)); *United States v. Leahy*, 464 F.3d at 790; *Bros. Constr. Co. of Ohio*, 219 F.3d at 317-18; and *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 217 (2000) (“Congress has adopted a policy that favors contracting with small businesses owned and controlled by the socially and economically disadvantaged.”).

⁸⁶ *Maxwell*, 579 F.3d at 1306 (“Thus, the appropriate amount of loss here should have been the entire value of the CSBE and DBE contracts that were diverted to the unintended recipient.”).

⁸⁷ 803 F.3d 167, 179-183 & n.9 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1238 (2016).

⁸⁸ Pub. L. No. 124 Stat. 2504 (2010). *See Wroblewski, supra* at 14.

small business concern receives a government contract by misrepresentation. As we suggested in 2014, applying this “credits against loss” rule⁸⁹ to these cases is inconsistent with the policy objectives of the Small Business Administration, with current statute 15 U.S.C. § 632, with the Small Business Jobs Act of 2010, and with the intent of Congress.

The Commission should amend the commentary in §2B1.1 to clarify that the government benefits rule applies to cases in which defendants fraudulently obtain contracts by misrepresentation about their qualifications as a small disadvantaged business, and to clarify that the general rule and the credits against loss rule do not apply. This will ensure that those who defraud competitors and the Small Business Administration will be penalized for the whole cost of the contract they fraudulently obtain, which will properly disincentive such behavior.

IX. Commission Research: Re-sentencings Following *Johnson v. United States*

As the Commission is well aware, a number of issues remain unresolved following the Supreme Court’s Decision in *Johnson v. United States*,⁹⁰ and, despite the recent amendments this year by the Commission to the definition of a crime of violence,⁹¹ uncertainty remains. It would be helpful to the Department, and most likely for Congress as well, if the Commission studied and kept a record of all re-sentencings under *Johnson*. As you know, Congress has been evaluating various options for addressing federal statutes which include the language affected by the decision in *Johnson*, and we would like to work with the Commission to assist in the legislative process.

X. Commission Research: Suspended Sentences for Prior Convictions for Sexual Abuse of a Minor, Sexual assault, and Assault

We also ask that the Commission add to the many valuable studies it conducts each year the study of how suspended sentences for prior convictions for sexual abuse of a minor, sexual assault, and assault are being used to compute guideline ranges in illegal reentry offenses. We highlighted our concerns regarding suspended sentences during this year’s amendments to the illegal reentry guideline, when we recommended that convictions which result in probated or suspended sentences, which often receive no criminal history points under the guidelines, should nevertheless not be excluded from receiving enhancements under the illegal reentry guideline (§2L1.2).⁹² In our experience, many judges, in particular state court judges, will suspend a sentence if they know that a defendant is going to be deported by the Department of Homeland Security. It would be helpful to see how suspended sentences are incorporated within the new illegal reentry guideline, in practice.

⁸⁹ USSG §2B1.1 cmt. n. (3)(E) (Credits Against Loss).

⁹⁰ 576 U.S. ___, 135 S. Ct. 2551 (2015).

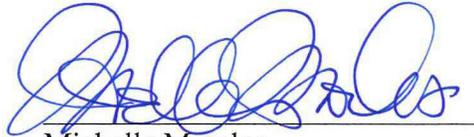
⁹¹ See Amendment to the Sentencing Guidelines, January 21, 2016, http://www.usc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf (effective August 1, 2016).

⁹² MICHELLE MORALES, ACTING DIRECTOR, OFFICE OF POLICY AND LEGISLATION, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, COMMENT LETTER TO PATTI B. SARIS, CHAIR, U.S. SENTENCING COMM’N, 18 (Mar. 14, 2016), http://www.usc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160316/20160316_DOJ.pdf.

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We appreciate the opportunity to provide the Commission with our views, comments, and suggestions and look forward to working with the Commission on the above projects and proposals.

Sincerely,



Michelle Morales
Acting Director, Office of Policy and Legislation

cc: Commissioners
Ken Cohen, Staff Director
Kathleen Grilli, General Counsel

APPENDIX A: Data from the National Forensic Laboratory Information System

(Note on source of data:⁹³)

Number of Cases Involving Particular Controlled Substances

		2011	2012	2013	2014	Total
Synthetic Cannabinoids	JWH-018 1-Pentyl-3-(1- (1-Naphthoyl)Indole)	3,274	1,112	368	124	4,878
	AM-2201 (1-(5-Fluoropentyl)-3-(1- Naphthoyl)Indole)	7,483	14,678	1,250	312	23,723
Synthetic Cathinones	MDPV Methylenedioxypropylone	3,678	3,694	1,118		8,816
	Methylone N-Methyl-3,4- Methylenedioxycathinone	1,816	4,257	10,621	3,843	20,537
	4-MMC,Mephedrone	338	71	33	6	448

⁹³ NFLIS queried March 19, 2015. Category query, Federal, state, and local forensic laboratories, by submission date, all drugs reported. DEA/OD/ODE/ODED.