
ISSUE FOR COMMENT: DRUGS

This document sets forth the unofficial text of an issue for comment promulgated by the Commission at the public meeting on December 9, 2016, and is provided only for the convenience of the user. Once submitted to the Federal Register, official text of the issue for comment as submitted will be posted on the Commission's website at www.ussc.gov and will be available in a forthcoming edition of the Federal Register.

The issue for comment will be subject to a public comment period running through March 10, 2017. Further information on the submission of public comment will be provided in the forthcoming edition of the Federal Register referred to above. Such information will also be available at www.ussc.gov.

The issue for comment is as follows:

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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 United States Sentencing Commission, “Notice of Final Priorities,” 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 (Methylenedioxypropylone)
- 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, methyline, 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-ecstasymolly>.

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"?