

March 17, 2021

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Durbin and Ranking Member Grassley:

We, the undersigned organizations, write to urge you to extend the Drug Enforcement Administration's (DEA) temporary classwide scheduling order for fentanyl-related substances before it expires on May 6, 2021.

Preliminary data from the Centers for Disease Control and Prevention (CDC) indicates there were an estimated 50,000 deaths from synthetic opioids, including fentanyl-related overdoses, between July 2019 and July 2020.¹ The agency has also warned about an alarming trend of polysubstance use, in which fentanyl is mixed with other illicit drugs such as heroin or cocaine, leading to more potent drug combinations.² In one 10-state study, CDC researchers found that "almost 57% of people who died from an overdose tested positive for fentanyl and fentanyl analogues also tested positive for cocaine, methamphetamine, or heroin."³ Much of the illicit fentanyl responsible for this tragic death toll in the United States is manufactured abroad, particularly in China or using Chinese-made precursor chemicals.

DEA's temporary classwide order, extended by P.L. 116-114 until May 6th, 2021, has played a significant role in curbing the flow of Chinese-origin fentanyl-related substances into the United States as noted by the Department of Justice (DOJ):

"The Chinese scheduling action, coupled with DEA's regulatory authority, enacted on February 6, 2018, which placed all non-scheduled fentanyl-related substances in Schedule I temporarily, on an emergency basis, for two years, has resulted in a significant decrease in *direct* Chinese-origin fentanyl-related substances being encountered in the United States since Fiscal Year 2019."⁴

¹ CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS: VITAL STATISTICS RAPID RESPONSE: PROVISIONAL DRUG OVERDOSE DEATH COUNTS (Feb. 7, 2021), <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>.

² CENTERS FOR DISEASE CONTROL AND PREVENTION: FENTANYL CONTAMINATION OF OTHER DRUGS IS INCREASING OVERDOSE RISK (Jan. 26, 2021), <https://www.cdc.gov/drugoverdose/data/otherdrugs.html#fentanyl>.

³ CENTERS FOR DISEASE CONTROL AND PREVENTION: FENTANYL CONTAMINATION OF OTHER DRUGS IS INCREASING OVERDOSE RISK (Jan. 26, 2021), <https://www.cdc.gov/drugoverdose/data/otherdrugs.html#fentanyl>.

⁴ *Fentanyl Analogues: Perspectives on Classwide Scheduling: Hearing Before Subcomm. on Crime, Terrorism, and Homeland Security*, 116th Cong. (Jan. 28, 2020) (Statement of Amanda Liskamm, Director, Opioid Enforcement and Prevention Efforts, Office of the Deputy Attorney General, U.S. Department of Justice), <https://docs.house.gov/meetings/JU/JU08/20200128/110392/HHRG-116-JU08-Wstate-LiskammA-20200128.pdf>.

DOJ has also noted a 50-percent reduction in law-enforcement encounters with fentanyl-related substances when comparing the two years (2016 and 2017) before DEA’s order with the two years (2018 and 2019) after its implementation.⁵

In the absence of the classwide order, law enforcement would likely face a surge of new, rapidly-emerging fentanyl-related substances as they did prior to the classwide scheduling order; “...from 2016 to 2018, [Customs and Border Protection] encountered either a new fentanyl analogue, a non-fentanyl opioid, or a fentanyl substance utilizing a molecular deletion nearly every single month (33 total).”⁶ These fentanyl-related substances would have to be scheduled on a substance-by-substance basis, which can take up to three years when previously scheduled under emergency authority. This reactive posture would amount to a game of whack-a-mole between law enforcement and transnational criminal organizations (TCOs). Meanwhile, fentanyl-related deaths, including from polysubstance use, would increase.

While some suggest that the *Federal Analogue Act* is sufficient to address the fentanyl-related substances, history has demonstrated that this Act does little to prevent new fentanyl-related substances from proliferating the market. Moreover, that law produces inconsistent jury verdicts, even for the same substance. For example, in the 2014 case, *U.S. v. Bays, et al.* (3:13-CR-357-B), the defendant was convicted of *Federal Analogue Act* violations because the jury found the substance XLR-11 to be a controlled substance analogue. Four years later, a jury, in the same courthouse acquitted the defendant in *U.S. v. Gas Pipe, Inc.*, (3:14-cr-298-M), on *Federal Analogue Act* charges because they did not find XLR-11 to be a controlled substance analogue. These inconsistencies in jury verdicts undermine trust in the judicial system while also making it difficult to prosecute TCOs engaged in illicit drug trafficking and manufacturing.

To help save American lives, we urge you to extend DEA’s classwide scheduling order for fentanyl-related substances before it expires on May 6, 2021.

Sincerely,

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⁵ *Fentanyl Analogues: Perspectives on Classwide Scheduling: Hearing Before Subcomm. on Crime, Terrorism, and Homeland Security*, 116th Cong. (Jan. 28, 2020) (Statement of Amanda Liskamm, Director, Opioid Enforcement and Prevention Efforts, Office of the Deputy Attorney General, U.S. Department of Justice), <https://docs.house.gov/meetings/JU/JU08/20200128/110392/HHRG-116-JU08-Wstate-LiskammA-20200128.pdf>.

⁶ *The Countdown: Fentanyl Analogues and the Expiring Emergency Scheduling Order: Hearing Before Committee on the Judiciary, United States Senate*, 116th Cong. (June 4, 2019) (Statement of Kemp L. Chester, Assistant Director, National Opioids and Synthetics Coordination Group, Office of National Drug Control Policy), <https://www.judiciary.senate.gov/imo/media/doc/Chester%20Testimony.pdf>

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