

ONE HUNDRED SEVENTEENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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September 14, 2022

The Honorable Anne Milgram  
Administrator  
Drug Enforcement Administration  
U.S. Department of Justice  
8701 Morrissette Drive  
Springfield, VA 22152

Dear Administrator Milgram:

The Committee is seeking information about how the temporary scheduling authority for fentanyl-related substances has assisted the fight against the opioid crisis. The DEA has repeatedly stonewalled our requests for basic information.<sup>1</sup> Drug overdose deaths are at an all-time high, and the emergency class-wide scheduling order for fentanyl-related substances expires on December 31, 2022.<sup>2</sup> Yet again, inaction from the Biden-Harris Administration put the fentanyl-related substances scheduling authority at risk.

Our country's drug crisis continues to worsen. According to data from the Centers for Disease Control and Prevention (CDC), 93,655 fatal drug overdoses occurred in 2020—a 30 percent increase over the prior year.<sup>3</sup> In 2021, fatal drug overdoses increased to over 107,622 deaths, which represents a life lost every five minutes on average.<sup>4</sup> Of those deaths, 71,238 are attributed to synthetic opioids, primarily illicit fentanyl.<sup>5</sup> Just last month, on August 30, 2022, the DEA warned the public of a new trend of rainbow fentanyl targeting children and young people.<sup>6</sup> The DEA and its law enforcement partners “seized brightly-colored fentanyl and

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<sup>1</sup> Email from H. Comm. on the Judic. staff (Feb. 7, 2022 11:58 AM); Email from H. Comm. on the Judic. staff (Feb. 16, 2022 3:32 PM); Email from H. Comm on the Judic. staff (Mar. 2, 2022 4:09 PM); Email from H. Comm. on the Judic. staff (May 9, 2022 11:14 AM); Email from June 8, 2022 11:13 AM). Additionally, on June 16, 2022, during a joint briefing with the House Foreign Affairs Committee staff about an unrelated matter, Committee staff again reiterated requests for information to multiple DEA officials.

<sup>2</sup> Pub. L. 117-103.

<sup>3</sup> Centers for Disease Control and Prevention, *U.S. Overdose Deaths in 2021 Increased Half as Much as in 2020 – But Are Still Up 15%* (May 11, 2022).

<sup>4</sup> *Id.*; The White House, Press Release, *Statement from Dr. Rahul Gupta on Tuesday's CDC Overdose Data* (May 11, 2022) (“It is unacceptable that we are losing a life to overdose every five minutes around the clock.”).

<sup>5</sup> Centers for Disease Control and Prevention, *U.S. Overdose Deaths in 2021 Increased Half as Much as in 2020 – But Are Still Up 15%* (May 11, 2022).

<sup>6</sup> Drug Enforcement Admin., Press Release, *DEA Warns of Brightly-Colored Fentanyl Used to Target Young Americans* (Aug. 30, 2022).

fentanyl pills in 18 states,” and “this trend appears to be a new method used by drug cartels to sell highly addictive and potentially deadly fentanyl made to look like candy to children and young people.”<sup>7</sup>

Despite the urgent need to address fentanyl-related substances, the Biden-Harris Administration only supports a permanent class-wide scheduling of fentanyl-related substances into Schedule I of the Controlled Substances Act if it is tied to certain anti-law enforcement policies.<sup>8</sup> One such proposal is to exempt fentanyl analogue offenders from mandatory minimum penalties.<sup>9</sup> The Administration should not use the permanent class-wide scheduling of fentanyl-related substances—a change that would greatly assist our efforts against the opioid crisis—as a cynical bargaining tool to reduce or remove criminal penalties for drug dealers.

In addition, the Administration’s rationale for opposing mandatory minimum penalties associated with fentanyl analogue trafficking—that because the relative potency of fentanyl-related substances varies, a criminal defendant could receive an unjustly harsh sentence if found in possession of a substance with a low potential for abuse<sup>10</sup>—is unconvincing. For example, benzylfentanyl, one substance that some believe to have a low potential for abuse,<sup>11</sup> is controlled as a List I chemical because it is a precursor chemical used to produce fentanyl.<sup>12</sup> The Administration has also pointed to mirfentanil, which is a substance that meets the structural definition of fentanyl-related substances and has been shown to have a low potential for abuse.<sup>13</sup> However, the Administration fails to note that at *higher* potency levels, mirfentanil may actually have adverse effects.

If the Biden-Harris Administration’s unrelated radical proposals are implemented, they would significantly undermine law enforcement efforts to combat drug traffickers.<sup>14</sup> The Committee must fully examine these considerations as Congress considers the permanent class-

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<sup>7</sup> *Id.*

<sup>8</sup> The White House, Press Release, *Biden-Harris Administration Provides Recommendations to Congress on Reducing Illicit Fentanyl-Related Substances*, (Sept. 2, 2021).

<sup>9</sup> *Id.*

<sup>10</sup> See *An Epidemic within a Pandemic: Understanding Substance Use and Misuse in America: Hearing before the Energy & Commerce Health Subcommittee*, 117th Cong. (Apr. 14, 2021) (testimony of Patricia L. Richman, National Sentencing Resource Counsel, Federal Public and Community Defenders); see also *The Countdown: Fentanyl Analogues & the Expiring Emergency Scheduling Order: Hearing before the S. Comm. on the Judiciary*, 116th Cong. (June 4, 2019) (Responses to Questions for the Record at 3, Kemp L. Chester, Ass. Dir., Nat’l Heroin Coordination Group, Off. of Nat’l Drug Control Policy).

<sup>11</sup> *The Overdose Crisis: Interagency Proposal to Combat Illicit Fentanyl-Related Substances: Hearing before the Energy and Commerce Subcommittee on Health* at 5, 117th Cong. (Dec. 2, 2021) (testimony of Nora D. Volkow, Director of the National Institute on Drug Abuse) [hereinafter Volkov].

<sup>12</sup> Designation of Benzylfentanyl and 4-Anilinopiperidine, Precursor Chemicals Used in the Illicit Manufacture of Fentanyl, as List I Chemicals, 85 Fed. Reg. 73 (Apr. 15, 2020). (“On September 13, 2019, DEA published an NPRM [a Notice of Proposed Rulemaking] proposing control of benzylfentanyl and 4-anilinopiperidine as list I chemicals due to their use in clandestine laboratories to illicitly manufacture the schedule II controlled substance fentanyl.”); see also Government Accountability Office, *Synthetic Opioids, Considerations for the Class-Wide Scheduling of Fentanyl-Related Substances* at 3 (Apr. 2021).

<sup>13</sup> Volkov, *supra* note 11, at 5.

<sup>14</sup> Letter from National Association of Assistant United States Attorneys, to Chairwoman Anna Eshoo, Subcommittee on Health Committee on Energy and Commerce (Nov. 30, 2021).

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wide scheduling of fentanyl-related substances before the temporary expiration in December 2022. Therefore, to help inform our consideration, we once again request that you provide the following information:

1. Provide a detailed graphical table of known fentanyl-related substances with specific bioactivity levels and mu-opioid receptor stimulation figures in comparison to fentanyl, morphine, and any other substances deemed appropriate by DEA's diversion control division.
2. Explain whether there are any known fentanyl-related substances that are non-bioactive or do not stimulate opioid receptors. If so, provide all examples.
3. Explain whether the following substances are considered to be a fentanyl-related substance and whether they may have bioactivity levels:
  - a. Benzylfentanyl;
  - b. Mirfentanil;
  - c. Imodium; and
  - d. AT202.
4. Explain whether any other substances have been excluded from the classification of fentanyl-related substances due to a lack of bioactivity levels. If so, provide all examples.

Please provide this information as soon as possible, but no later than 5:00 p.m. on September 28, 2022. After you have provided this information in writing, we ask that the DEA provide a staff-level briefing on this topic.

The House Committee on the Judiciary has jurisdiction pursuant to Rule X of the Rules of the House of Representatives to conduct oversight of matters concerning "criminal law enforcement and criminalization."<sup>15</sup> To schedule the briefing or if you have any questions about this request, please ask your staff to contact House Judiciary Committee staff at (202) 225-6909. Thank you for your prompt attention to this matter.

Sincerely,



Jim Jordan  
Ranking Member



Scott Fitzgerald  
Member of Congress

cc: The Honorable Jerrold L. Nadler, Chairman  
The Honorable Merrick B. Garland, Attorney General, U.S. Department of Justice

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<sup>15</sup> Rules of the House of Representatives, R. X, 117th Cong. (2021).