



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Lindsey Graham
Chairman
Subcommittee on Crime and Terrorism
Committee on the Judiciary
United States Senate
Washington, DC 20510

MAY 11 2018

The Honorable Tom Cotton
United States Senate
Washington, DC 20510

Dear Chairman Graham and Senator Cotton:

This letter presents the views of the Department of Justice (the Department) on S. 2635, a bill to amend the Controlled Substances Act and the Controlled Substances Import and Export Act to modify the offenses relating to fentanyl, and for other purposes. The bill would lower the quantities of fentanyl and fentanyl analogues required to trigger statutory mandatory minimum penalties in drug trafficking offenses. Such changes are long overdue and the Department supports the very important goals of this legislation. Please see below for additional comments and recommendations.

The Department is committed to combatting the opioid epidemic, and it is a top priority for the Attorney General. Opioid overdoses have ravaged our communities, and we are still learning of the extent to which fentanyl is involved. According to the Centers for Disease Control and Prevention (CDC), there were more than 63,600 drug overdose deaths during 2016,¹ two thirds of these 63,600 deaths were caused by opioids,² and the sharp increase in drug overdose deaths between 2015 to 2016 was fueled by a surge in fentanyl and fentanyl analogues: 72% of all opioid overdose deaths in 10 states involved fentanyl or a fentanyl analogue.³

¹ Drug Overdose Deaths in the United States, 1999–2016, NCHS Data Brief No. 294, December 2017, *Centers for Disease Control and Prevention*, <https://www.cdc.gov/nchs/products/databriefs/db294.htm>. This increased number of deaths has contributed to a decrease in life expectancy for all Americans. See *Mortality in the United States, 2016*, NCHS Data Brief No. 293, December 2017, *Centers for Disease Control and Prevention*, <https://www.cdc.gov/nchs/data/databriefs/db293.pdf>.

² *Id.*

³ Fentanyl involved in over half of opioid overdose deaths in 10 states, *Centers for Disease Control and Prevention*, <https://www.cdc.gov/media/releases/2017/s1027-fentanyl-deaths.html>.

Current mandatory minimum penalties for fentanyl and fentanyl analogues are not adequate because they are not proportionate to their public health hazard. A 10-year mandatory minimum sentence is triggered for a drug trafficking offense involving 400 or more grams of a mixture or substance containing a detectable amount of fentanyl, and a 5-year mandatory minimum sentence is triggered by 40 grams. Yet, for most people, the average lethal dose for pure fentanyl is about 2 *milligrams* (or 0.002 gram). In comparison, the average lethal dose for heroin is about 200 milligrams (0.2 gram). The 400 grams of a mixture or substance containing a detectable amount of fentanyl triggering a 10-year minimum sentence under current statute thus could contain up to 200,000 potentially lethal doses, and the 40 grams triggering a 5-year sentence could contain up to 20,000 potentially lethal doses.⁴ These quantities were set many years ago,⁵ and they are an inadequate deterrent given the tremendous harms to public health and safety associated with these quantities.

In addition, these quantities are not consistent with quantity thresholds for heroin, and as a result, current federal statutes (and sentencing guidelines) have the perverse effect of encouraging drug traffickers to substitute fentanyl for heroin, contributing only further to the national overdose epidemic. Whereas 400 grams of a mixture or substance containing a detectable amount of fentanyl triggers a mandatory minimum sentence of 10 years, the quantity of a mixture or substance containing a detectable amount of heroin triggering a 10-year mandatory minimum sentence is 1 kilogram. It does not make sense that the same 10-year mandatory minimum penalty applies to both 400 grams of a mixture or substance containing a detectable amount of fentanyl, which may be sufficient for up to 200,000 lethal doses and up to four million therapeutic doses, and 1 kilogram of a mixture or substance containing a detectable amount of heroin, which may be sufficient for up to 5,000 lethal doses and up to 10,000 street level doses.⁶

Another consideration is that, because of the potency of fentanyl, traffickers are shipping and dealing in quantities below those required by current federal law for even the five-year mandatory minimum penalty. The ability to charge more cases triggering mandatory minimum sentences would allow prosecutors to enhance public safety and would more appropriately address the purpose of just punishment for those who peddle in this deadly poison for profit.

⁴ As another comparison, whereas 400 grams of fentanyl triggers a mandatory minimum of 10 years, the quantity of heroin triggering a ten year mandatory minimum is 1 kilogram. (See 21 U.S.C. §§ 841(b)(1)(A)(i).) Assuming that the average lethal dose for heroin is about .2 grams, 1 kilogram of heroin contains about 5000 potential lethal doses. It appears incongruous that 200,000 potential lethal doses of fentanyl should trigger the same penalties as 5000 grams of heroin. (The European Monitoring Center for Drugs and Drug Addiction, "Heroin drug profile, Pharmacology," <http://www.emcdda.europa.eu/publications/drug-profiles/heroin>.)

⁵ See Public Law 99-570 (OCT. 27, 1986), 100 STAT. 3207-2, Title I (Narcotics Penalties and Enforcement Act of 1986).

⁶ Note in addition that illicit fentanyl is less expensive than heroin by an order of magnitude.

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The Department of Justice generally supports the bill's efforts to provide resources to stop shipments of fentanyl and other synthetic opioids arriving from overseas and has no objection to the Directive to the Sentencing Commission.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in cursive script that reads "Prim Escalona".

Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary