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112TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 112–295
Part 2

SYNTHETIC DRUG CONTROL ACT OF 2011

NOVEMBER 22, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1254]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1254) to amend the Controlled Substances Act to place synthetic drugs in Schedule I, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The Amendment

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Synthetic Drug Control Act of 2011".

SEC. 2. ADDITION OF SYNTHETIC DRUGS TO SCHEDULE I OF THE CONTROLLED SUBSTANCES ACT.

(a) CANNABIMIMETIC AGENTS.—Schedule I, as set forth in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) is amended by adding at the end the following:

"(d)(1) Unless specifically exempted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of cannabimimetic agents, or which contains their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

"(2) In paragraph (1):

"(A) The term 'cannabimimetic agents' means any substance that is a cannabinoid receptor type 1 (CB1 receptor) agonist as demonstrated by binding studies and functional assays within any of the following structural classes:

"(i) 2-(3-hydroxycyclohexyl)phenol with substitution at the 5-position of the phenolic ring by alkyl or alkenyl, whether or not substituted on the cyclohexyl ring to any extent.

"(ii) 3-(1-naphthoyl)indole or 3-(1-naphthylmethane)indole by substitution at the nitrogen atom of the indole ring, whether or not further substituted on the indole ring to any extent, whether or not substituted on the naphthoyl or naphthyl ring to any extent.

"(iii) 3-(1-naphthoyl)pyrrole by substitution at the nitrogen atom of the pyrrole ring, whether or not further substituted in the pyrrole ring to any extent, whether or not substituted on the naphthoyl ring to any extent.

"(iv) 1-(1-naphthylmethylene)indene by substitution of the 3-position of the indene ring, whether or not further substituted in the indene ring to any extent, whether or not substituted on the naphthyl ring to any extent.

"(v) 3-phenylacetylindole or 3-benzoylindole by substitution at the nitrogen atom of the indole ring, whether or not further substituted in the indole ring to any extent, whether or not substituted on the phenyl ring to any extent.

"(B) Such term includes—

"(i) 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP–47,497);

"(ii) 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol or CP–47,497 C8-homolog);

"(iii) 1-pentyl-3-(1-naphthoyl)indole (JWH–018 and AM678);

"(iv) 1-butyl-3-(1-naphthoyl)indole (JWH–073);

"(v) 1-hexyl-3-(1-naphthoyl)indole (JWH–019);

"(vi) 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH–200);

"(vii) 1-pentyl-3-(2-methoxyphenylacetyl)indole (JWH–250);

"(viii) 1-pentyl-3-[1-(4-methoxynaphthoyl)]indole (JWH–081);

"(ix) 1-pentyl-3-(4-methyl-1-naphthoyl)indole (JWH–122);

"(x) 1-pentyl-3-(4-chloro-1-naphthoyl)indole (JWH–398);

"(xi) 1-(5-fluoropentyl)-3-(1-naphthoyl)indole (AM2201);

"(xii) 1-(5-fluoropentyl)-3-(2-iodobenzoyl)indole (AM694);

"(xiii) 1-pentyl-3-[(4-methoxy)-benzoyl]indole (SR–19 and RCS–4);

"(xiv) 1-cyclohexylethyl-3-(2-methoxyphenylacetyl)indole (SR–18 and RCS–8); and

"(xv) 1-pentyl-3-(2-chlorophenylacetyl)indole (JWH–203).".

(b) OTHER DRUGS.—Schedule I of section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) is amended in subsection (c) by adding at the end the following:

"(18) 4-methylmethcathinone (Mephedrone).

"(19) 3,4-methylenedioxypyrovalerone (MDPV).

"(20) 3,4-methylenedioxymethcathinone (methylone).

"(21) Naphthylpyrovalerone (naphyrone).

"(22) 4-fluoromethcathinone (flephedrone).

"(23) 4-methoxymethcathinone (methedrone; Bk–PMMA).

"(24) Ethcathinone (N-Ethylcathinone).

"(25) 3,4-methylenedioxyethcathinone (ethylone).

"(26) Beta-keto-N-methyl-3,4-benzodioxyolybutanamine (butylone).

"(27) N,N-dimethylcathinone (metamfepramone).
"(28) Alpha-pyrrolidinopropiophenone (alpha-PPP).
"(29) 4-methoxy-alpha-pyrrolidinopropiophenone (MOPPP).
"(30) 3,4-methylenedioxy-alphapyrrolidinopropiophenone (MDPPP).
"(31) Alpha-pyrrolidinovalerophenone (alpha-PVP).
"(32) 6,7-dihydro-5H-indeno-(5,6-d)-1,3-dioxol-6-amine) (MDAI).
"(33) 3-fluoromethcathinone.
"(34) 4'-Methyl-α-pyrrolidinobutiophenone (MPBP).
"(35) 2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C–E).
"(36) 2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C–D).
"(37) 2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C–C).
"(38) 2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C–I).
"(39) 2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C–T–2).
"(40) 2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C–T–4).
"(41) 2-(2,5-Dimethoxyphenyl)ethanamine (2C–H).
"(42) 2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C–N).
"(43) 2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine (2C–P).".

SEC. 3. TEMPORARY SCHEDULING TO AVOID IMMINENT HAZARDS TO PUBLIC SAFETY EXPANSION.

Section 201(h)(2) of the Controlled Substances Act (21 U.S.C. 811(h)(2)) is amended—

(1) by striking "one year" and inserting "2 years"; and
(2) by striking "six months" and inserting "1 year".

Purpose and Summary

This bill places forty-one synthetic chemicals in Schedule I of the Controlled Substances Act (CSA).[1] It also defines the term "cannabimimetic agents" to enable Federal law to include and proscribe future, emerging synthetic marijuana drugs. This bill increases the amount of time during which the Attorney General can temporarily place drugs in Schedule I of the CSA.[2]

Background and Need for the Legislation

This bill concerns the imminent and emerging threats posed by three classes of synthetic drugs. These drugs have no medical benefit, are abused by adolescents and adults on an increasing and sometimes deadly scale, and are manufactured and distributed without adherence to any safety standards.

Synthetic stimulants are substitutes for cocaine, methamphetamine and the club-drug Ecstasy. These drugs are intentionally mislabeled by their manufacturers as "bath salts" or "plant food" to trick the purchaser into thinking the drugs are mild or innocuous, and are labeled "not for human consumption" to circumvent Federal law. In fact, they are not bath salts or a bath product. Their only know purpose is for consumption as a recreational drug. On October 21, 2011, the Drug Enforcement Administration (DEA) exercised its emergency scheduling authority to control three of the most abused synthetic stimulants seen today.

"Bath salts" can have very harmful effects on its users. Users have reported impaired perception, reduced motor control, extreme paranoia and violent episodes. These synthetic drugs have been popular among teens and young adults, and are sold at retail outlets and over the Internet.

In March 2011, a Pennsylvania man, high on bath salts, entered a monastery and stabbed a priest in the face. In May 2011, a 23-year old Florida man died due to a bath salts overdose. In April

[1] 21 U.S.C. § 812(c).
[2] 21 U.S.C. § 811(h)(2).

2011, following a 3-day bath salts binge, another Pennsylvania man was injured after jumping out of second story window, fleeing from imaginary intruders. Recently, the epidemic use of bath salts has led to several suicides and homicides throughout the United States. According to data provided by the American Association of Poison Control Centers, there were 303 calls to poison control centers in 2010 reporting exposures to bath salts. In the first half of 2011, there were 4,137 calls—a 2,600 percent increase of such calls in just one year.

Synthetic cannabinoids are man-made marijuana. Organic plant matter is typically sprayed with a combination of dangerous synthetic chemicals. These products are produced without any quality control leading to widely varying dosages. These drugs, sometimes branded as "K2" or "Spice" are frequently labeled "herbal incense" to deceive the purchaser. In March 2011, the DEA exercised its emergency scheduling authority to temporarily place five synthetic cannabinoids in schedule I.

There are many cases nationwide where people suffered from high blood pressure, vomiting, extreme anxiety, tremors, hallucinations, seizures and death after ingesting synthetic cannabinoids. There were 2,915 calls to U.S. poison control centers for exposure to synthetic cannabinoids for 2010. In just the first half of 2011, there were 3,787 calls, on course for a 150% increase in just one year.

Synthetic hallucinogens are sometimes referred to as "2C" compounds. They are chemical analogs of a class of drugs which exert hallucinogenic and stimulant effects similar to mescaline, only they are much more potent. Some 2C compounds are already proscribed under Schedule I.

The 2C chemicals in this bill are unique and represent another emerging synthetic drug problem causing an imminent danger to the public health. Based on reports of individual uses of these compounds and what is known of their pharmacology, they have a high potential for abuse. They have been implicated in dangerous side effects such as hallucinations and death. The DEA has classified them as drugs of significant concern, comparable to synthetic stimulants and synthetic cannabinoids.

In March 2011, a mass overdose on 2C hallucinogens resulted in a teenager's death and ten more teens taken to local hospitals in Blaine, Minnesota, after a spring-break house party. The seller of these 2C synthetic drugs was charged with third degree murder for causing the teen's death.

These three classes of synthetic drugs have triggered severe consequences. The effects on individuals vary widely, from psychotic episodes to death. Permanent neurological disorders have been documented in some users. The costs to health care systems are also severe. Emergency room admissions have increased significantly, frequently leading to patient transfers to costly intensive care units. The Food and Drug Administration (FDA) has not approved any of these synthetic drugs for human consumption or for medical use.

Synthetic stimulants and cannabinoids are illegal in several states. As of October 2011, approximately 37 states have enacted legislation prohibiting synthetic stimulants, and 41 states have enacted legislation prohibiting synthetic cannabinoids. A Federal ban

would permit the enforcement of Federal drug trafficking laws, particularly with regards to interstate trafficking of these substances, and enhance the authority to seize these synthetic drugs as they enter the United States.

The CSA permits the Attorney General to temporarily place new and emerging drugs in Schedule I when they imminently endanger the public health.[3] During the temporary scheduling period, several agencies including the FDA and the National Institute on Drug Abuse conduct tests to assess the dangers of these drugs. The bill seeks to double the time available to place emerging drugs on Schedule I and to enhance the tools available to law enforcement to combat the abuse of new and emerging drugs.

Opponents of the bill, including many minority members of the Committee, denounce the role of Congress in legislatively scheduling these synthetic drugs, arguing instead that the Administration should be the sole scheduling authority. This assertion flies in the face of the legislative intent of the CSA and over forty years of precedent. The CSA, by design, classifies controlled substances on one of five schedules, each with varying degrees of authorized distribution and use. This structure is not trivial or haphazard. It is intended to allow the law to conform to the ever-fluctuating controlled substances market. More importantly, it was designed to specifically allow for both legislative and administrative scheduling. In fact, in the past 20 years, Congress has legislatively scheduled over 50 controlled substances—the Executive Branch has scheduled 31 substances.

Opponents also argue that placement of these synthetics on Schedule I prohibits any further research on the substances. This misstates the law. The CSA and its regulations clearly and specifically allow for approved research of substances listed in Schedule I.[4] As of October 2011, nearly 4,000 individuals or entities, those being manufacturers, bona fide researchers and analytical laboratories, are authorized by the DEA to handle Schedule I drugs for scientific and investigative purposes. There are 325 researchers with credentials approved by the DEA who may conduct tests on schedule I drugs. Research and analysis of these synthetic drugs may be conducted subject to the conditions already in place for all highly addictive and dangerous drugs classified in Schedule I of the Controlled Substances Act.

Hearings

H.R. 1254, the Synthetic Drug Control Act of 2011, was introduced by Mr. Dent on March 30, 2011. The bill was referred to the Energy and Commerce Committee and secondarily to the House Committee on the Judiciary. The Energy and Commerce Committee, Health Subcommittee held a hearing on July 21, 2011. The Health Subcommittee marked up and reported the bill on July 26, 2011. The Energy and Commerce Committee marked up and reported the bill on July 28, 2011. The House Committee on the Judiciary held no hearings on H.R. 1254.

[3] 21 U.S.C. § 811(h)(2).
[4] 21 USC § 823(f); 21 CFR 1301.18.

Committee Consideration

On October 6, 2011, the Subcommittee on Crime, Terrorism and Homeland Security discharged the bill. On October 27, 2011 and November 3, 2011, the Committee met in open session and mark-up sessions were held. On November 3, 2011, the Committee met in open session and ordered the bill H.R. 1254 favorably reported with an amendment, by a voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 1254.

1. An amendment to strike Section 3, which doubles the length of time the Attorney General can temporarily schedule a drug in emergency situations. Amendment #3 by Mr. Cohen (TN) failed 6-13.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot			
Mr. Issa		X	
Mr. Pence			
Mr. Forbes			
Mr. King			
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle			
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler			
Mr. Scott			
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez	X		
(Vacant)			
Total	6	13	

2. An amendment to exclude simple possession offenses from the ambit of this bill. Amendment #6 by Mr. Scott (VA) failed 6-14.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle			
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson			
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez			
(Vacant)			
Total	6	14	

3. An amendment to require the Attorney General to consult a peer-reviewed independent scientific body before making any change to the drug schedules. Amendment #13 by Mr. Cohen (TN) failed 5-14.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle			
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson			
Mr. Pierluisi			
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez			
(Vacant)			
Total	5	14	

4. An amendment ordering an evaluation and report to Congress regarding the drug scheduling process and the existing drug control schedules. Amendment #4 by Mr. Nadler (NY) failed 4-14.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle			
Mr. Amodei		X	

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen			
Mr. Johnson			
Mr. Pierluisi			
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez			
(Vacant).			
Total	4	14	

5. An amendment to exclude the synthetic drugs added to Schedule I by this bill from the application of mandatory minimum sentences. Amendment #7 by Mr. Scott (VA) failed 6-16.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King			
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle			
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson			
Mr. Pierluisi			
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch			

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Ms. Sánchez			
(Vacant)			
Total	6	16	

6. Motion to table the appeal of the ruling of the Chair passed 13-4. Amendment 8 by Mr. Scott (VA).

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes			
Mr. King			
Mr. Franks	X		
Mr. Gohmert			
Mr. Jordan	X		
Mr. Poe			
Mr. Chaffetz	X		
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross			
Ms. Adams	X		
Mr. Quayle			
Mr. Amodei	X		
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt			
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Cohen			
Mr. Johnson			
Mr. Pierluisi			
Mr. Quigley			
Ms. Chu		X	
Mr. Deutch			
Ms. Sánchez			
(Vacant)			
Total	13	4	

7. Motion to table the appeal of the ruling of the Chair passed 13-4. Amendment #10 by Ms. Jackson Lee (TX).

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King			
Mr. Franks			
Mr. Gohmert			
Mr. Jordan	X		
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle			
Mr. Amodei	X		
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt			
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Cohen		X	
Mr. Johnson			
Mr. Pierluisi			
Mr. Quigley			
Ms. Chu			
Mr. Deutch			
Ms. Sánchez			
(Vacant)			
Total	13	4	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1254, the following estimate and comparison prepared

by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 9, 2011.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1254, the "Synthetic Drug Control Act of 2011."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1254—Synthetic Drug Control Act of 2011.

As ordered reported by the House Committee on the Judiciary on November 3, 2011

CBO estimates that implementing H.R. 1254 would have no significant cost to the Federal Government. Enacting the bill could affect direct spending and revenues; therefore, pay-as-you-go procedures apply. However, CBO estimates that any effects would be insignificant for each year.

H.R. 1254 would expand the list of substances regulated under the Controlled Substances Act (title II of Public Law 91-513, the Comprehensive Drug Abuse Prevention and Control Act of 1970) to include cannabimimetic agents, chemicals that are commonly known as synthetic drugs. As a result, the government might be able to pursue cases involving drug use that it otherwise would not be able to prosecute. CBO expects that H.R. 1254 would apply to a relatively small number of additional offenders, however, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 1254 could be subject to criminal fines, the Federal Government might collect additional fines if the legislation is enacted. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent. CBO expects that any additional revenues and direct spending would not be significant because of the small number of cases likely to be affected.

H.R. 1254 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on State, local, or tribal governments.

H.R. 1254 would impose private-sector mandates, as defined in UMRA, on manufacturers, sellers, and consumers of certain synthetic chemicals. CBO estimates that the cost of complying with those mandates would probably exceed the annual threshold established in UMRA for private-sector mandates in the first year after enactment ($142 million in 2011, adjusted annually for inflation).

By adding selected chemical compounds to schedule I of the Controlled Substances Act, the bill would prohibit the sale, distribution, or use of those chemicals without a permit issued by the Drug Enforcement Administration (DEA). The cost of that prohibition would be the forgone income from lost sales and the value of the inventory of the banned products. Because of the nature of the market being regulated, the scope of sales affected is difficult to determine. Some industry experts estimate that the profits generated by the sale of products containing such synthetic chemicals amount to billions of dollars annually.

However, based on information from industry and law enforcement experts, CBO expects that, by the date of the legislation's enactment, most vendors will have largely replaced the banned substances with new products because many States have already passed legislation banning some or all of the compounds listed in the bill and because the DEA has already issued emergency rules temporarily banning five cannabimimetic agents and three synthetic stimulants. Thus, the cost of the mandate would be much smaller than the profits currently being earned in the industry. Given the estimated magnitude of industry profits, however, it would only require about a 5 percent to 10 percent decrease in profits for the costs to exceed the annual threshold for private-sector mandates. Consequently, CBO estimates that the cost of the mandate would probably exceed the annual threshold in the first year following enactment. Thereafter, costs would be minimal, CBO estimates.

The bill also would impose a mandate by prohibiting the unregistered possession of the banned compounds, requiring individuals and facilities that wish to use or handle the chemicals to register with the DEA. Individuals who are unable to obtain DEA approval would have to dispose of the banned chemicals in their possession. CBO expects that the cost to those individuals would be small. Because some of those compounds have been temporarily placed under schedule I of the Controlled Substances Act by two emergency rules issued by the DEA in 2011, most researchers investigating those synthetic compounds have already registered with the DEA. The legislation would not require them to register again with the DEA; therefore, CBO expects the cost of the mandate to private research facilities to be small.

On October 14, 2011, CBO transmitted a cost estimate for H.R. 1254, the "Synthetic Drug Control Act of 2011," as ordered reported by the House Committee on Energy and Commerce on July 28, 2011. The two versions of the bill are similar, and the estimated costs are the same.

The CBO staff contacts for this estimate are Mark Grabowicz (for Federal costs) and Michael Levine (for the impact on the private sector). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1254 places several synthetic drugs in Schedule I of the Controlled Substances Act and increases the Attorney General's authority to temporarily schedule future, emerging drugs.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1254 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Sec. 1: Short Title

Section 1 provides that the short title of H.R. 1254 is the "Synthetic Drug Control Act of 2011."

Sec. 2: Addition of Synthetic Drugs to Schedule I of the Controlled Substances Act.

Section 2(a) places 15 synthetic marijuana drugs in Schedule I. It also defines the term "cannabimimetic agents" as substances which have a certain effect on receptors in the brain. This will enable Federal law to include and proscribe future, emerging synthetic marijuana drugs. Section 2(b) places 26 synthetic stimulant drugs and synthetic hallucinogenic drugs in Schedule I.

Sec. 3: Temporary Scheduling to Avoid Imminent Hazards to Public Safety Expansion.

Section 3 doubles the amount of time during which the Attorney General can temporarily place drugs in Schedule I of the Controlled Substances Act. Currently, if the Attorney General finds that scheduling on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may do so for up to one year and may extend for up to six months. This section would permit temporary scheduling for up to two years with a possible one-year extension.

Agency Views

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 30, 2011

The Honorable F. James Sensenbrenner Jr.
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter provides the Department of Justice's views on H.R. 1254, as amended by the Committee on Energy and Commerce, titled the "Synthetic Drug Control Act of 2011." The bill would amend the Controlled Substances Act (CSA) to address the growing use and misuse of synthetic drugs by placing a number of substances in schedule I and by extending the length of time that a drug may be temporarily placed in schedule I.

We support the bill as drafted, but believe it can be strengthened with the addition of the "2C family" of drugs listed in an appendix to this letter and in S. 839. The Department also supports the goals of S. 605, Dangerous Synthetic Drug Control Act of 2011 or the "David Mitchell Rozga Act"; S. 839, Combating Designer Drugs Act of 2011; and S. 409, Combating Dangerous Synthetic Stimulants Act of 2011. H.R. 1254 already contains many provisions included in S. 605 and S. 409, and we urge that the bill be expanded to include the provisions of S. 839.

The Threat of Synthetic Drugs

In recent years, a growing number of dangerous products have been introduced into the U.S. marketplace. Products labeled as "herbal incense" have become increasingly popular, especially among teens and young adults. These products consist of plant materials laced with synthetic cannabinoids which, when smoked, mimic the deleterious effects of delta-9-tetrahydrocannabinols (THC), the principal psychoactive constituent in marijuana. To underscore the scope and breadth of the synthetic cannabinoid problem, a recent report prepared by the United Nations Office on Drugs and Crime (UNODC) notes that more than 100 such substances have been synthesized and identified to date.[1]

There is also growing evidence demonstrating the abuse of a number of substances labeled as "bath salts" or "plant foods" which, when ingested, snorted, smoked, inhaled, or injected, produce stimulant and other psychoactive effects. These synthetic stimulants are based on a variety of compounds and are purported to be alternatives to the controlled substances cocaine, amphetamine, and Ecstasy (MDMA). These drugs have been distributed and abused in

[1] UNODC, Synthetic cannabinoids in herbal products, SCITEC/24, April 2011: p. 5.

Europe for several years and have since appeared here in the United States. According to a recent National Drug Intelligence Center report, poison control centers and medical professionals around the country have reported an increase in the number of individuals suffering adverse physical effects associated with abuse of these drugs.

There are other newly developed drugs that also pose a significant threat to the public. This includes the "2C family" of drugs (dimethoxyphenethylamines), which are generally referred to as synthetic psychedelic/hallucinogens. Recently, a 19-year-old male in Minnesota died of cardiac arrest after allegedly ingesting 2C-E, one of the substances within this class of drugs. We note that the 2C substances listed in the attached Appendix are included in the list of substances covered by S. 839. The Department supports the addition of the 2C family of substances listed in the Appendix to H.R. 1254.

Products containing synthetic drugs are dangerous and represent a growing challenge to law enforcement. Apart from the wide array of harmful or even lethal side effects of many of the listed substances, neither the products nor their active ingredients have been approved by the Food and Drug Administration for use in medical treatment, and manufacturers and retailers of the products containing these substances do not disclose that there are synthetic drugs in their products. Synthetic drug abusers may endanger not only themselves but others: some become violent when under the influence of these substances, and abusers who operate motor vehicles after using synthetic drugs likely present similar dangers as those under the influence of controlled substances.

With the exception of the five substances recently controlled by the Drug Enforcement Administration (DEA) pursuant to its temporary scheduling authority, the listed synthetic cannabinoids and synthetic stimulants are not currently in any schedule under the CSA.

Efforts to Control Synthetic Drugs

Congress created an interagency process for placing new and emerging drugs into one of five schedules of the CSA (21 U.S.C. 811 *et seq.*). One such mechanism, temporary scheduling (21 U.S.C. 811(h)), was specifically designed to enable the Department to act in an expeditious manner if such action is necessary to avoid an imminent hazard to the public safety. In response to the growing threat posed by known synthetic cannabinoids, on March 1, 2011, the DEA temporarily placed the following five synthetic cannabinoids in schedule I: JWH-018, JWH-073, JWH-200, CP-47, 497, and CP-47, 497 C8 homologue.[2]

The DEA is currently gathering scientific data and other information about synthetic cathinones as well as evaluating their psychoactive effects to support administrative action to schedule these substances under the CSA. To temporarily schedule these stimulants, the DEA must find that placement in schedule I is necessary to avoid an imminent hazard to the public

[2] 76 FR 11075. Published March 1, 2011.

safety, a finding that requires the DEA to consider the following three factors: history and current pattern of abuse; the scope, duration, and significance of abuse; and what, if any, risk there is to the public health, including actual abuse; diversion from legitimate channels; and clandestine importation, manufacture, or distribution. Once data have been gathered to meet the statutory criteria to temporarily schedule these cathinones, the Department will initiate an action to temporarily place them into schedule I. In fact, on September 8, 2011, the DEA published a notice of intent in the Federal Register (21 FR 55616) to temporarily place mephedrone, methylone and MDPV in schedule I.

Unfortunately, however, the distribution and abuse of synthetic drugs cannot be fully addressed by temporary scheduling because as law enforcement investigates, researches, and develops evidence to support such action, illicit drug makers create *new* synthetic drugs for the purpose of evading federal law. Scheduling via legislation is an additional tool to promote public health and safety.

Purpose of Legislation

Placing synthetic cannabinoid and synthetic stimulant substances in schedule I would expose those who manufacture, distribute, possess, import, and export synthetic drugs without proper authority to the full spectrum of criminal, civil, and administrative penalties, sanctions, and regulatory controls. Unless authorized by the DEA, the manufacture and distribution of these substances, and possession with intent to manufacture or distribute them, would be a violation of the CSA and/or the Controlled Substances Import and Export Act.

H.R. 1254, as well as S. 409, would amend the CSA by expanding the list of substances in schedule I of the CSA (21 U.S.C. 812(c)). To address synthetic cannabinoid abuse, the bill names 15 unique substances that would be placed in schedule I; this list includes those temporarily scheduled by the DEA. Additionally, the bill creates five structural classes of substances collectively referred to as "cannabimimetic agents." In order for a substance to be a cannabimimetic agent, the substance must: 1) bind to the CB1 receptor[3]; and 2) meet any of the definitions for those structural classes. If both criteria are met, that substance will be a schedule I cannabimimetic agent controlled substance.

To address emerging synthetic stimulant abuse, H.R. 1254 names 17 unique substances that would be placed in schedule I. These substances have either been encountered by law enforcement here in the United States or are most likely to be encountered by law enforcement in the United States based on their use and misuse in Europe, which is likely where the use and misuse originated.

[3] The CB1 receptor is located mainly in the brain and spinal cord and is responsible for the typical physiological and psychotropic effects associated with marijuana use.

Finally, the bill seeks to double the amount of time allowed for the Department to temporarily schedule new and emerging drugs by amending 21 U.S.C. 811(h). In this regard, the bill seeks to enhance the tools available to the Department to combat the abuse of new drugs that will appear in the future.

For these reasons, the Justice Department supports H.R. 1254 and recommends that the Committee consider strengthening it in the ways we have proposed.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: Robert "Bobby" Scott
Ranking Member
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary

Charles W. Dent
U.S. House of Representatives

Appendix

Additional Synthetic Drugs for Inclusion in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)

- Redline of H.R. 1254, as amended by Energy and Commerce on July 28, 2011 –

"(35) 2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C-E).

(36) 2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C-D).

(37) 2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C-C).

(38) 2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C-I).

(39) 2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-2).

(40) 2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-4).

(41) 2-(2,5-Dimethoxyphenyl)ethanamine (2C-H).

(42) 2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C-N).

(43) 2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine (2C-P)."

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

CONTROLLED SUBSTANCES ACT

TITLE II—CONTROL AND ENFORCEMENT

* * * * * * *

PART B—AUTHORITY TO CONTROL; STANDARDS AND SCHEDULES

AUTHORITY AND CRITERIA FOR CLASSIFICATION OF SUBSTANCES

SEC. 201. (a) * * *

* * * * * * *

(h)(1) * * *

(2) The scheduling of a substance under this subsection shall expire at the end of [one year] *2 years* from the date of the issuance of the order scheduling such substance, except that the Attorney General may, during the pendency of proceedings under subsection (a)(1) with respect to the substance, extend the temporary scheduling for up to [six months] *1 year*.

* * * * * * *

SCHEDULES OF CONTROLLED SUBSTANCES

SEC. 202. (a) * * *

* * * * * * *

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 201, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule I

(a) * * *

* * * * * * *

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) * * *

* * * * * * *

(18) 4-methylmethcathinone (Mephedrone).
(19) 3,4-methylenedioxypyrovalerone (MDPV).
(20) 3,4-methylenedioxymethcathinone (methylone).
(21) Naphthylpyrovalerone (naphyrone).

(22) 4-fluoromethcathinone (flephedrone).
(23) 4-methoxymethcathinone (methedrone; Bk–PMMA).
(24) Ethcathinone (N-Ethylcathinone).
(25) 3,4-methylenedioxyethcathinone (ethylone).
(26) Beta-keto-N-methyl-3,4-benzodioxyolybutanamine (butylone).
(27) N,N-dimethylcathinone (metamfepramone).
(28) Alpha-pyrrolidinopropiophenone (alpha-PPP).
(29) 4-methoxy-alpha-pyrrolidinopropiophenone (MOPPP).
(30) 3,4-methylenedioxy-alphapyrrolidinopropiophenone (MDPPP).
(31) Alpha-pyrrolidinovalerophenone (alpha-PVP).
(32) 6,7-dihydro-5H-indeno-(5,6-d)-1,3-dioxol-6-amine) (MDAI).
(33) 3-fluoromethcathinone.
(34) 4'-Methyl-α-pyrrolidinobutiophenone (MPBP).
(35) 2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C–E).
(36) 2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C–D).
(37) 2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C–C).
(38) 2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C–I).
(39) 2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C–T–2).
(40) 2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C–T–4).
(41) 2-(2,5-Dimethoxyphenyl)ethanamine (2C–H).
(42) 2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C–N).
(43) 2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine (2C–P).

(d)(1) Unless specifically exempted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of cannabimimetic agents, or which contains their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

(2) In paragraph (1):

(A) The term "cannabimimetic agents" means any substance that is a cannabinoid receptor type 1 (CB1 receptor) agonist as demonstrated by binding studies and functional assays within any of the following structural classes:

(i) 2-(3-hydroxycyclohexyl)phenol with substitution at the 5-position of the phenolic ring by alkyl or alkenyl, whether or not substituted on the cyclohexyl ring to any extent.

(ii) 3-(1-naphthoyl)indole or 3-(1-naphthylmethane)indole by substitution at the nitrogen atom of the indole ring, whether or not further substituted on the indole ring to any extent, whether or not substituted on the naphthoyl or naphthyl ring to any extent.

(iii) 3-(1-naphthoyl)pyrrole by substitution at the nitrogen atom of the pyrrole ring, whether or not further substituted in the pyrrole ring to any extent, whether or not substituted on the naphthoyl ring to any extent.

(iv) 1-(1-naphthylmethylene)indene by substitution of the 3-position of the indene ring, whether or not further substituted in the indene ring to any extent, whether or not substituted on the naphthyl ring to any extent.

(v) 3-phenylacetylindole or 3-benzoylindole by substitution at the nitrogen atom of the indole ring, whether or not further substituted in the indole ring to any extent, whether or not substituted on the phenyl ring to any extent.

(B) Such term includes—

(i) 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP–47,497);

(ii) 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol or CP–47,497 C8-homolog);

(iii) 1-pentyl-3-(1-naphthoyl)indole (JWH–018 and AM678);

(iv) 1-butyl-3-(1-naphthoyl)indole (JWH–073);

(v) 1-hexyl-3-(1-naphthoyl)indole (JWH–019);

(vi) 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH–200);

(vii) 1-pentyl-3-(2-methoxyphenylacetyl)indole (JWH–250);

(viii) 1-pentyl-3-[1-(4-methoxynaphthoyl)]indole (JWH–081);

(ix) 1-pentyl-3-(4-methyl-1-naphthoyl)indole (JWH–122);

(x) 1-pentyl-3-(4-chloro-1-naphthoyl)indole (JWH–398);

(xi) 1-(5-fluoropentyl)-3-(1-naphthoyl)indole (AM2201);

(xii) 1-(5-fluoropentyl)-3-(2-iodobenzoyl)indole (AM694);

(xiii) 1-pentyl-3-[(4-methoxy)-benzoyl]indole (SR–19 and RCS–4);

(xiv) 1-cyclohexylethyl-3-(2-methoxyphenylacetyl)indole (SR–18 and RCS–8); and

(xv) 1-pentyl-3-(2-chlorophenylacetyl)indole (JWH–203).

* * * * * * *

Dissenting Views

INTRODUCTION

H.R. 1254, the "Synthetic Drug Control Act of 2011," represents an end-run around existing law for criminalizing new substances. This bill would add more than 40 synthetic chemical compounds to Schedule I of the Controlled Substances Act ("CSA") with virtually no empirical evidence to demonstrate that such scheduling is warranted. Adding dozens of substances to Schedule I, the schedule that carries the most serious prohibitions and penalties for drug crimes, without the benefit of any meaningful process, is a mistake. H.R. 1254 will seriously hinder legitimate research, subject low-level users to Federal prosecution, waste resources, and do little to further its purported goal of reducing substance abuse.

These problems, as well as numerous other concerns, have prompted ten organizations to oppose the bill, including the American Civil Liberties Union, Drug Policy Alliance, Justice Policy Institute, National Association for the Advancement of Colored People, National Association of Criminal Defense Lawyers, National Association of Social Workers, The Sentencing Project, StoptheDrugWar.org, Students for a Sensible Drug Policy,[1] and

[1] *See* Letter to House Committee on the Judiciary Chair Lamar Smith and Ranking Member John Conyers, Jr. from the American Civil American Civil Liberties Union, Drug Policy Alliance, Justice Policy Institute, National Association for the Advancement of Colored People, National Association of Criminal Defense Lawyers, National Association of Social Workers, The Sen-

Families Against Mandatory Minimums ("FAMM").[2] In addition, several researchers from the University of California, Irvine, the University of California, Berkeley, the University of California, San Francisco, and the University of Wisconsin-Madison have also expressed serious concern that H.R. 1254 will impede legitimate, scientific research.[3]

For these reasons, and those described below, we respectfully dissent and urge our colleagues to reject this seriously flawed bill.

DESCRIPTION AND BACKGROUND

H.R. 1254 would place on Schedule I numerous chemical compounds commonly found in a class of synthetic drugs known as K2 and Spice that imitate marijuana, and a second class of synthetic drugs that have stimulant properties and often contain mephedrone. Schedule I is the most restrictive and punitive schedule under the CSA. The bill also doubles the period of time that the Attorney General may temporarily place a substance on Schedule I (from 1 to 2 years) and doubles the length for an extension of temporarily scheduling (from 6 months to 1 year), all without requiring any medical or scientific evidence.[4]

The Judiciary Committee has not held any hearings or subcommittee markups regarding this legislation or the related issues. While the Energy and Commerce Committee did hold a hearing on March 30, 2011 to "Address Bioterrorism, Controlled Substances and Public Health Issues," the sole witness was Representative Dent, the sponsor of the bill. On July 28, 2011, the Energy and Commerce Committee agreed by voice vote to favorably report H.R. 1254 with one technical amendment.

Democratic members of the Judiciary Committee have raised serious concerns regarding the lack of Judiciary Committee process on H.R. 1254. On October 3, 2011 Ranking Member John Conyers, Jr. (D–MI); Crime, Terrorism and Homeland Security Subcommittee Ranking Member Robert C. "Bobby" Scott (D–VA); along with Representatives Steve Cohen (D–TN); Henry C. "Hank" Johnson (D–GA); Melvin L. Watt (D–NC); Pedro R Pierluisi (D–PR); Sheila Jackson Lee (D–TX); and Jerrold Nadler (D–NY) wrote to Chairman Smith and Subcommittee Chairman Sensenbrenner requesting a hearing to consider numerous concerns about this legislation before markup.[5] This request was denied.

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tencing Project, StoptheDrugWar.org, Students for a Sensible Drug Policy (Oct. 4, 2011) ("Sign-On Letter").

[2] *See* Letter to House Committee on the Judiciary Chair Lamar Smith and Ranking Member John Conyers, Jr. from Families Against Mandatory Minimums (Oct. 5, 2011) ("FAMM Letter").

[3] *See* Letter to House Committee on the Judiciary Chair Lamar Smith and Ranking Member John Conyers, Jr. from Richard Chamberlin, Professor of Chemistry and Pharmaceutical Services, Chair of Pharmaceutical Sciences, University of California, Irvine (Oct. 31, 2011) ("UCI Letter"); *see also* "Views on Synthetic Drug Control Act" ("Views Memo") (on file with H.Comm. on the Judiciary, Dem. Staff).

[4] An amendment offered by Rep. Cohen to strike this portion of H.R. 1254 was defeated by a vote of 6–13.

[5] *See* Letter to House Committee on the Judiciary Chair Rep. Lamar Smith and Subcommittee on Crime, Terrorism, and Homeland Security Chair F. James Sensenbrenner, Jr. from House Committee on the Judiciary Ranking Member John Conyers, Jr. *et al.* (Oct. 3, 2011).

CONCERNS WITH H.R. 1254

I. H.R. 1254 CIRCUMVENTS THE NORMAL SCHEDULING PROCESS AND CRIMINALIZES NUMEROUS SUBSTANCES WITHOUT ANY SCIENTIFIC OR MEDICAL EVIDENCE TO SUPPORT DOING SO

Title 21 U.S.C. § 811 sets forth the process for placing a substance on Schedule I. It requires that the Attorney General request from the Secretary of Health and Human Services (Secretary) "a scientific and medical evaluation, and his recommendations, as to whether such drug or other substances should be so controlled. . . ." The Secretary must engage in an eight-factor analysis, which includes an evaluation of "[t]he state of current scientific knowledge regarding the drug or other substance[;] [w]hat, if any, risk there is to the public health[;] [i]ts actual or relative potential for abuse[;] and [i]ts psychic or physiological dependence liability[,]" among other factors.

H.R. 1254 circumvents this statutory process and would place 46 substances on Schedule I, with virtually no science to support the conclusion that these substances need to be criminalized. Even the Director of the Office of the National Drug Control Policy (ONDCP) R. Gil Kerlikowske recognized that there is "a lack of sufficient data regarding the prevalence of bath salt stimulant drugs."[6] Although Representative Adams claimed at the markup that there were boxes of research on the substances at issue, no report or other document with an analysis of the 46 substances was presented at the markup. Moreover, the appropriate forum for such evidence to be presented and discussed is at a hearing, however, the majority denied a request for a hearing to examine these issues.

A decision to federalize a substance and subject individuals to harsh penalties is serious. A bill that allows for Federal prohibition of numerous substances—even some that are not yet present in the United States—is problematic especially without scientific evidence.[7] Several amendments offered by the Minority sought to address the dearth of evidence and refine the scheduling process, but all were defeated. For example, Representative Scott offered an amendment to require empirical evidence before criminalizing these substances, similar to what is required under § 811. His amendment, however, was defeated by voice vote. Representative Cohen offered an amendment that would have required the Attorney General to consult with a peer-reviewed, independent scientific organization before scheduling substances in the future. His amendment was defeated by a vote of 5 to 14. And, Representative Nadler offered an amendment that would have required a study of the scheduling process generally. It was defeated by a vote of 4 to 14.

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[6] Congressional Research Service, Synthetic Drugs: Overview and Issues for Congress, at 12 (Oct. 28, 2011) ("CRS Report").

[7] To date, the Drug Enforcement Agency ("DEA") has temporarily scheduled eight synthetic substances. These are the only substances currently present in the United States. Because temporary scheduling, unlike legislative scheduling, requires a partial analysis of the substances by the Attorney General, Rep. Scott offered an amendment to limit H.R. 1254 to placing those eight substances on Schedule I. This amendment was defeated by voice vote.

II. H.R. 1254 WILL HINDER MEDICAL AND SCIENTIFIC RESEARCH

Schedule I designation would hinder ongoing and future research aimed at better understanding these compounds and their possible medical use. This is particularly concerning in the case of synthetic cannabinoids, where research is underway with regard to whether they have the same medicinal benefit as marijuana. Notably, Clemson University Professor John F. Huffman, the first to synthesize cannabinoids, is "against adding synthetic cannabinoids to Schedule I, asserting that there is still much to learn about synthetic cannabinoids and that placing them on Schedule I would create too many hurdles for researchers who need access to these drugs. Professor Huffman has created several synthetic cannabinoids that are seen as showing promise in treating skin cancers, pain, and inflammation."[8]

Several other researchers and scientists have expressed serious concerns that H.R. 1254 would impede research in ways perhaps not intended by supporters of the bill. Researchers at the University of California at Irvine have indicated that scheduling these substances will significantly hinder research.[9] The chair of the chemistry department believes that "classifying a broad list of chemicals as Schedule I would be an outright disaster for biochemical research!"[10] He goes on to note that the same structural components that make very potent drugs of abuse are also found in leading medications and new drug leads for a variety of important diseases such as Parkinson's disease and other neurological disorders.[11] Another professor of chemistry and chair of pharmaceutical sciences said that the problem with the bill's blanket coverage is that all of the compounds on the list have many potential uses as building blocks for other organic molecules with absolutely no relationship to cannabinoid receptors or hallucinogens. . . ."[12] His concerns were echoed by yet another professor who indicated that he and his colleagues "have been repeatedly hampered by the restrictive treatment of mundane 'precursor compounds' such as piperidine" and described the numerous hoops that they must jump through to study them.[13]

Furthermore, a professor of medicine and bioengineering and therapeutic services, and the Chief of the Division of Clinical Pharmacology at the University of California, San Francisco, stated that "scheduling so as to impede access to precursor chemicals in small quantities has the potential to seriously hamper medical research. On balance the faculty are against this measure."[14] Researchers from the University of California, Berkeley also echoed these concerns.[15] Even further, a professor of pharmaceutical sciences and Associate Dean for Research at the School of Pharmacy at the University of Wisconsin-Madison stated that as a result of this bill "the world will get significantly less medical and technical help with a low probability of helping anyone with a substance abuse issue. The list is too broad and does seriously restrict what would other-

[8] CRS Report at 13.
[9] UCI Letter at 1.
[10] *Id.*
[11] *Id.* at 1–2.
[12] *Id.* at 1.
[13] *Id.*
[14] Views Memo at 1.
[15] *Id.*

wise be important and easy experiments."[16] Although the DEA disputes that research will be hampered, the opinions of legitimate and well-established faculty at numerous universities cannot be ignored.

III. BY ADDING NEW SUBSTANCES TO SCHEDULE I, H.R. 1254 WOULD CREATE FEDERAL PENALTIES AND EXPAND A MANDATORY MINIMUM FOR SUBSTANCES ABOUT WHICH WE KNOW VERY LITTLE

Although H.R. 1254 itself does not set forth penalties, all of the substances that will be added to Schedule I will be subject to the already existing penalty structure in Title 21. This includes the expansion of at least one mandatory minimum, 21 U.S.C. § 841(b)(C). In other words, these substances will be treated the same, for purposes of charging and sentencing, as the drugs that they seek to mimic, without any evidence that they possess the same health hazards. This is because, as the DEA acknowledges, little is known at the present time about these substances. Under the normal statutory scheduling process, the DEA, the Food & Drug Administration and the Secretary of Health and Human Services would have the opportunity to determine whether treating these substances in the same fashion as other Schedule I substances is warranted. However, H.R. 1254 completely bypasses this important process.

The problem with mandatory minimums is that they must be imposed regardless of whether the sentencing judge agrees or disagrees with the sentence.[17] In a letter to the Chair and Ranking Member of the Judiciary Committee, Families Against Mandatory Minimums describes an instance where a Federal judge in a case involving 21 U.S.C. § 841(b)(C) felt that the defendant was deserving of a shorter sentence, but had no choice but to impose 20 years in prison.[18] The bill removes discretion from the judge, who is in the best position to determine a fair sentence as he or she has considered all of the evidence and has heard from the parties and the defendant. This concern is heightened when the underlying crime involves synthetic substances that we know very little about. Nevertheless, when Representative Scott offered an amendment to exclude 21 U.S.C. § 841(b)(C) from the application of this bill, it was defeated by a vote of 6 to 16. As an alternative, Representative Scott then offered an amendment that would have allowed a judge to apply 18 U.S.C. § 3553(f) (known as "the safety valve") to cases involving synthetic drugs, it was objected to on germaneness grounds. A motion to table the appeal of the ruling of the chair passed by a vote of 13 to 4.

FAMM is not the only organization that objects to H.R. 1254 because of its stiff penalties and scant scientific evidence to support imposition of such penalties. For instance, the Drug Policy Alliance believes H.R. 1254 "would invariably lead to the prosecution and incarceration of low to mid level offenders who could be prosecuted by the States where treatment or diversion opportunities are available."[19]

Supporters of the bill assert that their goal is to apprehend importers, traffickers, and large distributors of synthetic substances.

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[16] *Id.*
[17] FAMM Letter
[18] *Id.* at 3.
[19] Letter from Drug Policy Alliance ("DPA") at 1 (July 26, 2011) ("DPA Letter").

They also claim to be concerned with young people who may tend to experiment with these substances. It should be noted, however, that these young people are the same individuals who would face prosecution for use and possession under this bill. As the American Civil Liberties Union, Justice Policy Institute, the National Association of Social Workers, and the National Association for the Advancement of Colored People, among others, jointly observed, "Youth would be better served by a proactive effort by Congress to fund studies and evaluations that give the public, lawmakers and health authorities a better understanding of the health implications of synthetic drugs."[20] Nevertheless, when Representative Scott offered an amendment to exclude the offense of simple possession from the bill's applicability, not a single Majority member supported it. It was defeated by a vote of 6 to 14.

IV. H.R. 1254 REPRESENTS A RUSH TO CRIMINALIZE SUBSTANCES, WHEN THERE IS NO EVIDENCE THAT CRIMINALIZATION WILL ACTUALLY REDUCE DEMAND OR PREVENT DEATHS

There is little evidence that criminalizing these substances will result in favorable outcomes for public health and safety. The United Kingdom's experience is instructive. In 2010, the United Kingdom added mephedrone to its schedule of prohibited substances in an effort to curb its use. An article, however, published in *The Lancet,* a British medical journal, described a survey of mephedrone users completed in June 2010, and compared this survey with a previous survey completed in 2009. The results of these surveys on what occurred after the scheduling of mephedrone in the United Kingdom were the following: (1) most survey respondents stated that they would continue to use the same amount of mephedrone; (2) prices on average had doubled; and (3) illegal sellers made greater profits as a result of the price increase.[21] In other words, adding these substances to the schedule of prohibited substances will not curb use, but will simply put more money in the pockets of sellers and traffickers.

Moreover, the public reaction and media reports about the effects of synthetic drugs on individuals and the safety hazards of these substances echoes the crack cocaine hysteria of the 1980's. When Congress rushed to act then, it passed a law that devastated the African-American community and took two decades to remedy. Congress only partially repealed this unfair law last year, with the passage of the Fair Sentencing Act. We should be cautious not to make a similar fear-driven mistake with synthetic drugs, as it too could have far-reaching, unintended consequences. In recognition of the fact that little is known about the effects of this bill, Representative Jackson Lee offered an amendment requiring the Attorney General, in consultation with the National Institute on Drug Abuse, to conduct a demographic study of users of synthetic drugs. Her amendment, however, was ruled non-germane and a motion to table the appeal of the ruling passed by a vote of 13 to 4.

Proponents of H.R. 1254 point to press accounts of tragedies that have befallen individuals who have abused synthetic substances as justification for criminalizing these substances. As was revealed

[20] Sign-On Letter at 2.
[21] *Mephedrone: Still Available and Twice the Price,* The Lancet, Vol. 136 (Nov. 6, 2010).

during the markup, however, criminalization by states of these substances has not prevented deaths.[22] There is simply no reason to believe, nor any evidence to indicate, that Federal scheduling will achieve any different results. It would be much more prudent for Congress to develop education campaigns and ad councils to raise awareness of the dangers of synthetic drugs, rather than criminalize these substances.

V. H.R. 1254 PROVIDES AN EXPENSIVE FEDERAL SOLUTION TO A FUNDAMENTALLY LOCAL PROBLEM

The need for Federal intervention is particularly questionable when at least 30 states have already enacted legislation criminalizing synthetic drugs, and more states have legislation pending. States are assessing the situation and enacting laws accordingly. Nonetheless, proponents fail to justify why the Federal Government must act or why state laws are inadequate. As the Drug Policy Alliance notes, "Prohibiting these substances at the Federal level would expand the reach of the Federal Government into the territory reserved for state governments."[23] Nonetheless, for cases that warrant Federal prosecution, the DEA can utilize the analog statute, 21 U.S.C. § 813. This statute allows the DEA to prosecute substances that are chemically and pharmacologically similar to a substance already on a schedule (e.g., synthetic cocaine). This is an appropriate option in serious and large trafficking cases, where there may be an interest that is served in prosecuting the matter federally, rather than locally.

Passage of this proposal would also stifle efforts by state lawmakers to tailor policy to fit the needs of their communities. For example, a number of states have implemented an array of creative and innovative approaches designed to divert low-level offenders from arrest or incarceration. H.R. 1254, on the other hand, would compel, and in some cases require, state lawmakers to adopt criminal penalties identical to those mandated under the CSA. Accordingly, this bill overrides state law and ties the hands of state lawmakers from pursuing more effective policies and evidence-based approaches to respond to the emergence of synthetic drugs. Lawmakers in the sixteen states with medical marijuana policies in place are also increasingly seeking resolution of the federal-state conflict that has undermined local efforts. This legislation would introduce more conflict and confusion at the state and local level.

In addition, the arrests and prosecutions that will result from this legislation will require the allocation of new funding at a time when Congress is focusing on reducing government spending and prison populations. H.R. 1254 does not provide offsets for the new spending it would require or any estimate of the scope of this additional spending. Although the Congressional Budget Office ("CBO") concludes that the effects of this bill would be insignificant,[24] it fails to address the hidden costs of arrest, prosecution, and corrections (incarceration and supervision). Given that a single mari-

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[22] *See, e.g.,* "How 'bath salts' led to suicide, Virginia Gazette (October 8, 2011), *available at* http://www.vagazette.com/articles/2011/10/08/news/doc4e8f78d6557cf829866915.txt (last visited November 17, 2011) (noting that the Virginia Assembly passed legislation earlier this year making substances at issue in this article illegal).

[23] DPA Letter.

[24] Cong. Budget Office Cost Estimate for H.R. 1254 at 1 (November 9, 2011).

juana arrest (along with subsequent prosecution and punishments) costs taxpayers more than $10,000 on average,[25] and that the bill adds 46 new substances to Schedule I, the CBO's conclusion is not realistic.

As Congressional Research Service notes in its report on this topic, "The growing Federal prison population and prison crowding continue to be concerns for the Bureau of Prisons (BOP) as well as for policymakers."[26] It is important, given our current fiscal crisis, to fully consider the economic cost of implementing this legislation. In response to these concerns, Representative Jackson Lee offered an amendment requiring the Government Accountability Office to conduct a fiscal analysis of the bill and its enforcement. Her amendment, however, was defeated by voice vote.

CONCLUSION

H.R. 1254 represents an ill-advised rush to criminalize synthetic substances about which little is known. The unintended consequences of this legislation are substantial. It will seriously hinder legitimate research and encourage prosecution of low-level users, both which do nothing to address the public safety issues that supporters of the bill seek to address. Rather than focus on a punitive law enforcement oriented response, the public would be better served by measures that address the root causes of substance abuse, expand substance abuse treatment, and create public awareness campaigns to educate the community, particularly youth, about the dangers of abusing synthetic drugs. For these reasons, we must respectfully dissent.

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MELVIN L. WATT
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[25] John B. Gettman, *Crimes of Indiscretion: Marijuana Arrests in the United States,* GEORGE MASON UNIVERSITY SCHOOL OF PUBLIC POLICY (2005).

[26] CRS Report at 12. The report further notes:

> The number of inmates held in BOP facilities grew from 125,560 in FY 2000 to 180,725 as of September 2011. From FY2000–FY2010, prison overcrowding grew from 32% over rated capacity to 37% over rated capacity, despite the fact that the number of facilities operated by BOP increased from 97 to 116. The growing Federal prison population has not only resulted in more crowded prisons, but it has also strained BOP's ability to properly manage and care for Federal inmates. Given that a majority of the Federal prison population is incarcerated for drug-related offenses, Congress may question the potential effect on the prison population and crowding should it move to schedule additional substances. It is unknown whether BOP, in the current fiscal environment, is able to accommodate increases in the number of inmates and the number of inmates requiring special services.