



Billing Code 4410-09-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA-475]

Schedules of Controlled Substances: Temporary Placement of Seven Fentanyl-related Substances in Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Proposed amendment; notification of intent.

SUMMARY: The Administrator of the Drug Enforcement Administration is issuing this notice of intent to publish a temporary order to schedule seven fentanyl-related substances in schedule I. These seven substances are: *N*-(1-phenethylpiperidin-4-yl)-*N*-phenylpentanamide (valeryl fentanyl), *N*-(4-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)butyramide (*para*-fluorobutyryl fentanyl), *N*-(4-methoxyphenyl)-*N*-(1-phenethylpiperidin-4-yl)butyramide (*para*-methoxybutyryl fentanyl), *N*-(4-chlorophenyl)-*N*-(1-phenethylpiperidin-4-yl)isobutyramide (*para*-chloroisobutyryl fentanyl), *N*-(1-phenethylpiperidin-4-yl)-*N*-phenylisobutyramide (isobutyryl fentanyl), *N*-(1-phenethylpiperidin-4-yl)-*N*-phenylcyclopentanecarboxamide (cyclopentyl fentanyl), and *N*-(2-fluorophenyl)-2-methoxy-*N*-(1-phenethylpiperidin-4-yl)acetamide (ocfentanil). This action is based on a finding by the Administrator that the placement of these seven synthetic opioids in schedule I of the Controlled Substances Act (CSA) is necessary to avoid an imminent hazard to the public safety. When it is issued, the temporary

scheduling order will impose the administrative, civil, and criminal sanctions and regulatory controls applicable to schedule I controlled substances under the CSA on the manufacture, distribution, reverse distribution, possession, importation, exportation, research, and conduct of instructional activities, and chemical analysis of these synthetic opioids.

DATES: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The DEA’s three-factor analysis is available in its entirety under “Supporting and Related Material” of the public docket for this action at www.regulations.gov under Docket Number DEA-475.

FOR FURTHER INFORMATION CONTACT: Michael J. Lewis, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (202) 598-6812.

SUPPLEMENTARY INFORMATION: This notice of intent contained in this document is issued pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h). The Drug Enforcement Administration (DEA) intends to issue a temporary scheduling order (in the form of a temporary amendment) to add valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil to schedule I of the Controlled Substances Act.¹ The temporary scheduling order will be published in the *Federal Register*, but will not be issued before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

¹ Though DEA has used the term “final order” with respect to temporary scheduling orders in the past, this notice of intent adheres to the statutory language of 21 U.S.C. 811(h), which refers to a “temporary scheduling order.” No substantive change is intended.

Legal Authority

Section 201 of the Controlled Substances Act (CSA), 21 U.S.C. 811, provides the Attorney General with the authority to temporarily place a substance in schedule I of the CSA for two years without regard to the requirements of 21 U.S.C. 811(b) if he finds that such action is necessary to avoid an imminent hazard to the public safety. 21 U.S.C. 811(h)(1). In addition, if proceedings to control a substance are initiated under 21 U.S.C. 811(a)(1), the Attorney General may extend the temporary scheduling for up to one year. 21 U.S.C. 811(h)(2).

Where the necessary findings are made, a substance may be temporarily scheduled if it is not listed in any other schedule under section 202 of the CSA, 21 U.S.C. 812, or if there is no exemption or approval in effect for the substance under section 505 of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 355. 21 U.S.C. 811(h)(1); 21 CFR part 1308. The Attorney General has delegated scheduling authority under 21 U.S.C. 811 to the Administrator of the DEA. 28 CFR 0.100.

Background

Section 201(h)(4) of the CSA, 21 U.S.C. 811(h)(4), requires the Administrator to notify the Secretary of the Department of Health and Human Services (HHS) of his intention to temporarily place a substance in schedule I of the CSA.² The Administrator transmitted notice of his intent to place valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl,

² As discussed in a memorandum of understanding entered into by the Food and Drug Administration (FDA) and the National Institute on Drug Abuse (NIDA), the FDA acts as the lead agency within the HHS in carrying out the Secretary's scheduling responsibilities under the CSA, with the concurrence of NIDA. 50 FR 9518, Mar. 8, 1985. The Secretary of the HHS has delegated to the Assistant Secretary for Health of the HHS the authority to make domestic drug scheduling recommendations. 58 FR 35460, July 1, 1993.

cyclopentyl fentanyl, and ocfentanil in schedule I on a temporary basis to the Assistant Secretary for Health of HHS by letter dated October 20, 2017. The Assistant Secretary responded to this notice of intent by letter dated November 8, 2017 and advised that based on a review by the Food and Drug Administration (FDA), there are currently no investigational new drug applications or approved new drug applications for valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil. The Assistant Secretary also stated that the HHS has no objection to the temporary placement of these seven substances in schedule I of the CSA. Valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil are not currently listed in any schedule under the CSA, and no exemptions or approvals are in effect for these seven substances under section 505 of the FDCA, 21 U.S.C. 355.

To find that placing a substance temporarily in schedule I of the CSA is necessary to avoid an imminent hazard to the public safety, the Administrator is required to consider three of the eight factors set forth in 21 U.S.C. 811(c): the substance's history and current pattern of abuse; the scope, duration and significance of abuse; and what, if any, risk there is to the public health. 21 U.S.C. 811(h)(3). Consideration of these factors includes actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution. 21 U.S.C. 811(h)(3).

A substance meeting the statutory requirements for temporary scheduling may only be placed in schedule I. 21 U.S.C. 811(h)(1). Substances in schedule I are those that have a high potential for abuse, no currently accepted medical use in treatment in the

United States, and a lack of accepted safety for use under medical supervision. 21 U.S.C. 812(b)(1).

The recent identification of valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil in forensic evidence indicates that these substances are being misused and abused. No approved medical use has been identified for these seven substances, nor have they been approved by the FDA for human consumption.

Available data and information for valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil, summarized below, indicate that these substances have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. The DEA's three-factor analysis is available in its entirety under "Supporting and Related Material" of the public docket for this action at www.regulations.gov under Docket Number DEA-475.

Factor 4. History and Current Pattern of Abuse

The recreational abuse of fentanyl-related substances continues to be a significant concern. These substances are distributed to users, often with unpredictable outcomes. Evidence suggests that the pattern of abuse of these fentanyl-related substances parallels that of heroin and prescription opioid analgesics. Valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil are fentanyl-related substances that have been encountered by law enforcement and/or reported in the scientific literature by public

health officials. Adverse health effects and outcomes related to the abuse of fentanyl-related substances have been documented in previous temporary scheduling actions (see DEA 3-Factor Analysis).

On October 1, 2014, the DEA implemented STARLiMS (a web-based, commercial laboratory information management system) to replace the System to Retrieve Information from Drug Evidence (STRIDE) as its laboratory drug evidence data system of record. DEA laboratory data submitted after September 30, 2014, are reposted in STARLiMS. Data from STRIDE and STARLiMS were queried on November 2, 2017. STARLiMS registered the following reports: valeryl fentanyl (15), *para*-fluorobutyryl fentanyl (5), isobutyryl fentanyl (116), and cyclopentyl fentanyl (1). These identifications were made beginning in 2015.

The National Forensic Laboratory Information System (NFLIS) is a national drug forensic laboratory reporting system that systematically collects results from drug chemistry analyses conducted by other federal, state, and local forensic laboratories across the country. NFLIS was queried on November 3, 2017³ and the following substances (number of drug reports) were identified from state and local forensic laboratories since 2015: valeryl fentanyl (69), *para*-fluorobutyryl fentanyl (220), *para*-methoxybutyryl fentanyl (1), and isobutyryl fentanyl (4). The identification in other countries of *para*-fluorobutyryl fentanyl (Poland and Sweden), *para*-methoxybutyryl fentanyl (Sweden), ocfentanil (Belgium and Switzerland), cyclopentyl fentanyl (Sweden), and *para*-chloroisobutyryl fentanyl (Sweden) in toxicological samples associated with fatal and non-fatal overdoses was reported in the scientific literature.

³ Data are still being collected for July 2017 – October 2017 due to the normal lag period for labs reporting to NFLIS.

Factor 5. Scope, Duration and Significance of Abuse

Fentanyl-related substances have recently re-emerged on the illicit market (*see* DEA 3-Factor Analysis for full discussion). Valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil have been identified in evidence submitted to law enforcement and/or reported in the scientific literature by public health forensic laboratories.

The identification of valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil in forensic evidence indicates that these substances are intended to be replacements for controlled synthetic opioids, heroin, and/or prescription opioids. Because abusers of these fentanyl-related substances obtain these substances through unregulated sources, the identity, purity, and quantity are uncertain and inconsistent, thus posing significant adverse health risks to the end user. Individuals who initiate (i.e., use a drug for the first time) abuse of these substances are likely to be at risk of developing substance use disorder, overdose, and death similar to that of other opioid analgesics (e.g., fentanyl, morphine).

Factor 6. What, if Any, Risk There Is to the Public Health

With no legitimate medical use, valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil have emerged on the illicit drug market. Substances within this chemical structural class have demonstrated pharmacological profiles similar to that of fentanyl and other μ -opioid receptor agonists (*see* DEA 3-Factor Analysis). The abuse of

these fentanyl-related substances poses significant adverse health risks when compared to abuse of pharmaceutical preparations of opioid analgesics, such as morphine and oxycodone. The toxic effects of substances within this structural class in humans are demonstrated by overdose fatalities described in previous scheduling actions.

Based on information received by the DEA, the misuse and abuse of valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil lead to, at least, the same qualitative public health risks as heroin, fentanyl and other opioid analgesic substances. As with any non-medically approved opioid, the health and safety risks for users are high. The public health risks attendant to the abuse of heroin and opioid analgesics are well established and have resulted in large numbers of drug treatment admissions, emergency department visits, and fatal overdoses.

Finding of Necessity of Schedule I Placement to Avoid an Imminent Hazard to the Public Safety

In accordance with 21 U.S.C. 811(h)(3), based on the available data and information, summarized above, the uncontrolled manufacture, distribution, reverse distribution, importation, exportation, conduct of research and chemical analysis, possession, and abuse of valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil, resulting from the lack of control of these substances, pose an imminent hazard to the public safety. The DEA is not aware of any currently accepted medical uses for these seven fentanyl-related substances in the United States. A substance meeting the statutory requirements for temporary scheduling, 21 U.S.C. 811(h)(1), may only be placed in

schedule I. Substances in schedule I are those that have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. Available data and information for valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil indicate that these substances have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. As required by section 201(h)(4) of the CSA, 21 U.S.C. 811(h)(4), the Administrator, through a letter dated October 20, 2017, notified the Assistant Secretary of the DEA's intention to temporarily place these substances in schedule I.

Conclusion

This notice of intent provides the 30-day notice pursuant to section 201(h) of the CSA, 21 U.S.C. 811(h), of DEA's intent to issue a temporary scheduling order. In accordance with the provisions of section 201(h) of the CSA, 21 U.S.C. 811(h), the Administrator considered available data and information, herein set forth the grounds for his determination that it is necessary to temporarily schedule valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil in schedule I of the CSA, and finds that placement of these seven fentanyl-related substances into schedule I of the CSA is necessary in order to avoid an imminent hazard to the public safety.

The temporary placement of valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil in schedule I of the CSA will take effect pursuant to

a temporary scheduling order, which will not be issued before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Because the Administrator hereby finds that it is necessary to temporarily place valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil in schedule I to avoid an imminent hazard to the public safety, the temporary order scheduling these substances will be effective on the date that order is published in the *Federal Register*, and will be in effect for a period of two years, with a possible extension of one additional year, pending completion of the regular (permanent) scheduling process. 21 U.S.C. 811(h)(1) and (2). It is the intention of the Administrator to issue a temporary scheduling order as soon as possible after the expiration of 30 days from the date of publication of this notice. Upon publication of the temporary order, valeryl fentanyl, *para*-fluorobutyryl fentanyl, *para*-methoxybutyryl fentanyl, *para*-chloroisobutyryl fentanyl, isobutyryl fentanyl, cyclopentyl fentanyl, and ocfentanil will be subject to the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, reverse distribution, importation, exportation, research, conduct of instructional activities and chemical analysis, and possession of a schedule I controlled substance.

The CSA sets forth specific criteria for scheduling a drug or other substance. Regular scheduling actions in accordance with 21 U.S.C. 811(a) are subject to formal rulemaking procedures done “on the record after opportunity for a hearing” conducted pursuant to the provisions of 5 U.S.C. 556 and 557. 21 U.S.C. 811. The regular scheduling process of formal rulemaking affords interested parties with appropriate process and the government with any additional relevant information needed to make a determination. Final decisions

that conclude the regular scheduling process of formal rulemaking are subject to judicial review. 21 U.S.C. 877. Temporary scheduling orders are not subject to judicial review. 21 U.S.C. 811(h)(6).

Regulatory Matters

Section 201(h) of the CSA, 21 U.S.C. 811(h), provides for a temporary scheduling action where such action is necessary to avoid an imminent hazard to the public safety. As provided in this subsection, the Attorney General may, by order, schedule a substance in schedule I on a temporary basis. Such an order may not be issued before the expiration of 30 days from (1) the publication of a notice in the *Federal Register* of the intention to issue such order and the grounds upon which such order is to be issued, and (2) the date that notice of the proposed temporary scheduling order is transmitted to the Assistant Secretary of HHS. 21 U.S.C. 811(h)(1).

Inasmuch as section 201(h) of the CSA directs that temporary scheduling actions be issued by order and sets forth the procedures by which such orders are to be issued, the DEA believes that the notice and comment requirements of section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, do not apply to this notice of intent. In the alternative, even assuming that this notice of intent might be subject to section 553 of the APA, the Administrator finds that there is good cause to forgo the notice and comment requirements of section 553, as any further delays in the process for issuance of temporary scheduling orders would be impracticable and contrary to the public interest in view of the manifest urgency to avoid an imminent hazard to the public safety.

Although the DEA believes this notice of intent to issue a temporary scheduling order is not subject to the notice and comment requirements of section 553 of the APA, the

DEA notes that in accordance with 21 U.S.C. 811(h)(4), the Administrator took into consideration comments submitted by the Assistant Secretary in response to notice that DEA transmitted to the Assistant Secretary pursuant to section 811(h)(4).

Further, the DEA believes that this temporary scheduling action is not a “rule” as defined by 5 U.S.C. 601(2), and, accordingly, is not subject to the requirements of the Regulatory Flexibility Act (RFA). The requirements for the preparation of an initial regulatory flexibility analysis in 5 U.S.C. 603(a) are not applicable where, as here, the DEA is not required by section 553 of the APA or any other law to publish a general notice of proposed rulemaking.

Additionally, this action is not a significant regulatory action as defined by Executive Order 12866 (Regulatory Planning and Review), section 3(f), and, accordingly, this action has not been reviewed by the Office of Management and Budget.

This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Federalism) it is determined that this action does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, the DEA proposes to amend 21 CFR part 1308 as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

1. The authority citation for part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), unless otherwise noted.

2. In § 1308.11, add paragraphs (h)(23) through (29) to read as follows:

§ 1308.11 Schedule I

* * * * *

(h) * * *

(23) *N*-(1-phenethylpiperidin-4-yl)-*N*-phenylpentanamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: valeryl fentanyl).....(9804)

(24) *N*-(4-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)butyramide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: *para*-fluorobutyryl fentanyl).....(9823)

(25) *N*-(4-methoxyphenyl)-*N*-(1-phenethylpiperidin-4-yl)butyramide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: *para*-methoxybutyryl fentanyl).....(9837)

(26) *N*-(4-chlorophenyl)-*N*-(1-phenethylpiperidin-4-yl)isobutyramide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: *para*-chloroisobutyryl fentanyl).....(9826)

(27) *N*-(1-phenethylpiperidin-4-yl)-*N*-phenylisobutyramide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: isobutyryl fentanyl).....(9827)

(28) *N*-(1-phenethylpiperidin-4-yl)-*N*-phenylcyclopentanecarboxamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: cyclopentyl fentanyl).....(9847)

(29) *N*-(2-fluorophenyl)-2-methoxy-*N*-(1-phenethylpiperidin-4-yl)acetamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: ocfentanil).....(9832)

Dated: December 5, 2017

Robert W. Patterson,
Acting Administrator

[FR Doc. 2017-26854 Filed: 12/12/2017 8:45 am; Publication Date: 12/13/2017]