H.R. 2851, SITSA ACT (Rep. Katko)

Status: Passed House Judiciary Committee on voice vote, July 12, 2017
What the Bill Does: The bill

1. Establishes a Schedule A in the Controlled Substances Act for controlled substance analogues and defines controlled substance analogues so broadly that they would be potentially limitless. An analogue must have a "substantially similar" (not defined in bill) chemical structure and effect as drugs currently listed in Schedules I through V. Substances for which investigation and study is permitted under the Federal Food, Drug, and Cosmetic Act are excluded. (Sections 2, 8)
2. Adds 13 chemical analogues of fentanyl to Schedule A (Section 2)
3. Allows the attorney general to determine which substances are listed on Schedule A, both temporarily (lasting for up to 5.5 years) and permanently. Congress may reject a temporary scheduling order within 180 days of its publication in the Federal Register. There is no requirement that Congress enact laws to codify the substances put on Schedule A by the attorney general, and temporary scheduling is unreviewable by courts. (Section 3)
4. Requires a calculation of the costs of the new sentencing proposals (see Section 4) within 2 years of passage of the bill (Section 11)
5. Sets lengthy prison sentences for manufacturing, distributing, or possessing with intent to manufacture or distribute Schedule A substances (Section 4):

	First Offense	If Offender has Prior Felony Drug Conviction	If Death or Serious Bodily Injury (SBI) Results from Use of the Substance*	If Death or SBI Results and Offender has Prior Felony Drug Conviction*
Imprisonment	Up to 10 years	Up to 20 years	Up to 15 years	Up to 30 years
Fine	Up to $500,000 for individuals Up to $2,500,000 for corporations	Up to $1,000,000 for individuals Up to $5,000,000 for corporations	Up to $500,000 for individuals Up to $2,500,000 for corporations	Up to $1,000,000 for individuals Up to $5,000,000 for corporations
Mandatory supervised release	2 years	4 years	2 years	4 years

* This offense has no *mens rea* requirement – the defendant need not have known that the substance could cause injury or death or intend to cause injury or death.

6. Sets lengthy sentences for importing or exporting Schedule A substances (Section 4):

	First Offense	If Offender has Prior Felony Drug Conviction	If Death or SBI Results from Use of the Substance*	If Death or SBI Results and Offender has Prior Felony Drug Conviction*
Imprisonment	Up to 20 years	Up to 30 years	Up to life without parole	Up to life without parole
Fine	Up to $1,000,000 for individuals Up to $5,000,000 for corporations	Up to $2,000,000 for individuals Up to $10,000,000 for corporations	Up to $1,000,000 for individuals Up to $5,000,000 for corporations	Up to $2,000,000 for individuals Up to $10,000,000 for corporations

	First Offense	If Offender has Prior Felony Drug Conviction	If Death or SBI Results from Use of the Substance*	If Death or SBI Results and Offender has Prior Felony Drug Conviction*
Mandatory supervised release	3 years	6 years	3 years	6 years

* This offense has no *mens rea* requirement – the defendant need not have known that the substance could cause injury or death or intend to cause injury or death.

7. Requires the U.S. Sentencing Commission to change the federal sentencing guidelines drug equivalency tables, including
    - Following any equivalencies set by the attorney general
    - Follow equivalencies created in a table in the bill, by Congress (Section 9)
8. Creates civil penalties for retailers who unlawfully sell Schedule A substances or falsely labeled Schedule A substances, at a rate of $1,000 for each packet of the substances (Section 5)
9. Gives the attorney general the power to determine who can become a registered manufacturer or distributor of Schedule A substances, and only if the registration, in the attorney general's opinion, is in the public interest (Section 6)
10. Gives the attorney general the power to deny or revoke registrations for the manufacture or distribution of Schedule A substances, if the attorney general decides it is not, in his opinion, in the public interest (Section 6).

PROBLEMS WITH SITSA ACT

1. **It's unnecessary.** Current law already prohibits and provides lengthy sentences for trafficking and importing analogues – prosecutors simply have to do the work of proving a drug is an analogue. Fentanyl analogues are specifically listed already among the drugs that trigger lengthy mandatory minimum sentences (see 21 U.S.C. § 841). We don't need a new Schedule A, controlled by the attorney general, to punish crimes involving analogues – prosecutors just need to do the work in court.

2. **New, lengthy sentences for these offenses will not deter the production, importation, or distribution of analogues.** There is no evidence that lengthier sentences and more incarceration deters drug offenders generally,[1] and this bill defines analogues so vaguely that it will be impossible for even the most adept legal scholars and chemists to know what substances may or may not run afoul of the law.

3. **Overcriminalization.** The bill permits an administrative agency head, the attorney general, to enact new crimes by deciding what is and is not a controlled substance analogue, with no review permitted by the courts. Congress, not administrative agencies, has the constitutional power to create criminal laws.

4. **Lack of *mens rea* requirements.** Harsh sentences apply regardless of whether the person knew that a substance could cause injury or death, and regardless of whether a person intended to cause injury or death. Importers and exporters, in particular, may face lengthy prison sentences for injuries and deaths they could not possibly foresee, many steps removed from them.

5. **Uninformed drug equivalency tables.** The U.S. Sentencing Commission is currently undergoing an intensive study of controlled substance analogues and synthetic drugs.[2] The Commission should be permitted to finish this work and, based on its consultations with experts, chemists, law enforcement, and practitioners, determine what appropriate equivalencies should be used in the sentencing guidelines. Furthermore, equivalency tables should not be codified in law. What we know about synthetic drugs and

analogues is constantly expanding and changing, and it is better public policy to permit the Commission to do its job and adjust drug equivalency tables in the guidelines to reflect current research and data so that best practices are being used at sentencing.

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[1] Pew Charitable Trusts, Public Safety Performance Project, Letter from Adam Gelb to Chris Christie, The President's Commission on Combating Drug Addiction and the Opioid Crisis, June 19, 2017, http://www.pewtrusts.org/~/media/assets/2017/06/the-lack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf?la=en.

[2] *See* U.S. Sentencing Comm'n, Transcript of Testimony from Public Hearing: Alternatives to Incarceration Court Programs and Synthetic Drugs (Apr. 18, 2017), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/transcript.pdf.