

Emerging Drug Threats Rapid Scheduling Act of 2026

Cover memorandum — revision 5

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Cover Memorandum: Emerging Drug Threats Rapid Scheduling Act of 2026

October 6, 2026 · Collin B. George, CISSP, National Security Advisor, Sanctir LLC · cgeorge@sanctir.com

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The bill lets DEA control a new synthetic opioid, peptide opioid, or anabolic agent as a class within 15 days, instead of one compound at a time after 30 days' notice. It controls dermorphin and other qualifying peptide opioids on enactment, and removes the "not for human consumption" label as a defense. It extends existing federal enforcement authority to the new category and creates one interagency function to find new substances early. It grants no new collection authority, sets penalties below Schedule I and II levels, and does not criminalize simple possession.

The problem

Federal law controls new drugs one compound at a time, after they appear. Suppliers change the compound faster than DEA can act. Four gaps produce that result.

Scheduling is compound-specific and slow. Temporary scheduling under 21 U.S.C. 811(h) requires 30 days' notice and names individual substances. Since 2025 DEA has controlled nitazenes, designer benzodiazepines, and three 7-hydroxymitragynine-related compounds by separate orders; 7-hydroxymitragynine itself remains at the notice-of-intent stage. Only fentanyl-related substances are controlled as a class, by the HALT Fentanyl Act (Pub. L. 119–26). A supplier can ship a new variant before the order on the last one takes effect.

The Analogue Act does not reach peptides. 21 U.S.C. 802(32) requires a structure “substantially similar” to a Schedule I or II drug. A peptide that acts on the same receptor as fentanyl resembles no scheduled small molecule. Dermorphin is the clearest example: uncontrolled, sold openly, and repeatedly detected in racehorses.

The label defeats prosecution. The Analogue Act reaches only substances “intended for human consumption” (21 U.S.C. 813). Vendors label products “for research use only” and sell them in dosed vials. Each case must disprove the label, and *McFadden v. United States*, 576 U.S. 186 (2015), adds a knowledge element on top.

The evidence sits in separate agencies. Laboratory identifications, border seizures, overdose deaths, financial records, and foreign intelligence are held by DEA, CBP, CDC, FinCEN, FDA, and the intelligence community. No office assembles them into the record a scheduling order or a prosecution needs.

The tariff option is gone. In *Learning Resources, Inc. v. Trump*, 607 U.S. 229 (2026), the Court held 6–3 that IEEPA does not authorize tariffs. The holding rests on IEEPA’s text and reaches tariffs only; it leaves IEEPA blocking and sanctions authority intact. Pressure on foreign suppliers now runs through designation, export control, and criminal process.

What the bill does

GAP	PROVISION	EFFECT
Compound-by-compound scheduling	Sec. 4 — new 21 U.S.C. 811(k)	DEA controls a class, defined by structure or by receptor activity, in 15 days (immediately on a stated finding), for 3 years plus 1, with D.C. Circuit review
Schedule I too blunt for interim control	Sec. 5 — new CSA §202A and §401A	Interim control at Schedule III penalty levels; no mandatory minimums; no possession offense; no medical-use finding required
Analogue Act cannot reach peptides	Secs. 3, 7	Mu- and delta-opioid agonists defined by function, not structure; dermorphin and nine named peptides in Schedule I; unknown qualifying peptides controlled on enactment
“Not for human consumption” label	Secs. 6, 8(d)	Label is no defense; trier of fact may infer intent from research chemical marketing; such marketing becomes an FDCA prohibited act
Mail and online sales	Sec. 8	Joint CBP–DEA–FDA–USPS interdiction using STOP Act advance data; marketplace civil liability with a knowledge element, a takedown safe harbor, and an express Section 230 override
Foreign suppliers	Sec. 9	Treasury designation under E.O. 14059 and the FEND Off Fentanyl Act; 31 U.S.C. 5318A special measures; Commerce Entity List; DOJ prosecution under 21 U.S.C. 959
Evidence held separately	Secs. 10, 12	DEA-led fusion function with CBP, FinCEN, FDA, CDC, State, and IC participation; national early-warning system; forensic laboratory grants and published reference spectra
Research burden	Sec. 11	HALT Fentanyl Act registration procedures, extended past HALT’s IND and HHS/DoD/VA limits, with provisional substances treated as Schedule I so the procedures attach; exemptions for reference standards, small-quantity reagents, IND/INAD work, and veterinary use
Unchecked agency power	Secs. 4(7), 13	Judicial review, GAO and Inspector General review, 6-year sunset

Section 5(e) is the load-bearing provision. It amends the definition of “controlled substance” in 21 U.S.C. 802(6) so that provisional-schedule substances inherit the existing federal enforcement toolset — forfeiture, administrative subpoenas, extraterritorial jurisdiction, conspiracy, and the money laundering and racketeering predicates — while carving out simple possession and mandatory minimums. Section 5(f) separately amends 18 U.S.C. 2516, which describes drug offenses in freestanding terms and does not define its scope by reference to the CSA, so the 802(6) amendment does not reach wiretap authority on its own.

Section 10 fusion function: six inputs, four actions

Section 10 fusion function: six inputs, four actions. Every input already exists in law. The bill routes them to one office that builds the record for each action.

Two judicial features matter. Orders under the new authority get D.C. Circuit review, and the government may submit classified evidence ex parte and in camera (Sec. 4(7)(C)), so intelligence can support an order without disclosure. Prosecutions keep the *McFadden* knowledge requirement, which makes intelligence that a vendor knew its product was an opioid into trial evidence rather than a lead.

Safeguards

These limits are what make the expanded authority survivable in markup and on review. They are not concessions held in reserve.

- **No new collection authority.** Sec. 10(e)(1) bars use of the bill to acquire communications content, conduct electronic surveillance, or expand FISA or E.O. 12333 authority. Administrative subpoenas reach subscriber, transaction, and shipping records only, and Sec. 10(b)(2) requires a jurisdictional nexus. Letters of domestic origin remain protected by 39 U.S.C. 404(c); inbound mail is governed by the customs laws and 19 U.S.C. 1582.
- **United States persons.** The fusion function retains U.S.-person information under Attorney General procedures approved after consultation with the DOJ Chief Privacy and Civil Liberties Officer. Irrelevant information is purged. The Privacy Act applies, and subpoena counts and compliance incidents are reported annually.
- **Judicial review of every order under the new authority.** Existing 811(h) and the 2014 steroid procedure in 811(i) both deny review. Sec. 4(8) should be narrowed in markup so the new authority is the exclusive route for class-wide control; otherwise the agency retains an unreviewable path to the same result.
- **Calibrated penalties.** Schedule III levels, no mandatory minimums, no possession offense. Manufacturers, importers, and distributors are the target. New Sec. 5(d)(1) also keeps a labeling violation out of the felony import offense in 21 U.S.C. 960(a)(1).
- **Fair notice.** A published list, updated within 30 days of each determination. For an unlisted peptide, the government must prove the defendant knew or represented that it produces opioid effects.
- **Research protection.** Sec. 11 extends HALT's 30-day expedited procedure past its IND and HHS/DoD/VA limits, and deems provisional substances to be in Schedule I so that procedure attaches at all.
- **Expiration.** Order-issuing authority ends after 6 years absent reauthorization. GAO and the DOJ Inspector General report before then.

Legal risk

Two provisions carry real exposure. The rest are low.

PROVISION	ATTACK	MITIGATION	ASSESSMENT
Sec. 7(a)(11) — unknown peptides controlled on enactment	Vagueness and fair notice	Functional-activity requirement; endogenous exclusion; knowledge-or-representation element; published list	Highest. Expect markup to narrow it to listed peptides, with unknowns handled by 811(k) orders
Sec. 4 — class-wide, effects-based orders	Nondelegation	<i>Touby v. United States</i> , 500 U.S. 160 (1991); enumerated evidence; HHS consultation; substantial-evidence review; duration cap; sunset	Likely survives. <i>FCC v. Consumers' Research</i> , 606 U.S. 656 (2025), reaffirmed the intelligible-principle test 6–3 and declined a stricter standard. The effects-based class definition still draws the facial challenge
Sec. 6 — inference of intent for human consumption	Due process, if read as a mandatory presumption	Permissive inference; express no-burden-shift clause	Low to moderate
Sec. 4(7)(C) — classified evidence ex parte	Due process for petitioners who cannot see the record	Unclassified summary required; IEEPA model (50 U.S.C. 1702(c))	Low. <i>Holy Land Found. v. Ashcroft</i> , 333 F.3d 156 (D.C. Cir. 2003), and <i>Global Relief Found. v. O'Neill</i> , 315 F.3d 748 (7th Cir. 2002), uphold ex parte review; <i>Al Haramain Islamic Found. v. Treasury</i> , 686 F.3d 965 (9th Cir. 2012), requires adequate notice and mitigation, which the summary supplies
Sec. 5 — provisional schedule	Mens rea and sentencing	<i>McFadden</i> codified; Schedule III levels; no minimums	Low legally; expect political pressure for higher penalties

PROVISION	ATTACK	MITIGATION	ASSESSMENT
Sec. 5(c) — scope of the definitional amendment	Expressio unius, if read as an exhaustive list	Stated as a general rule with an illustrative “including,” per the House and Senate drafting manuals; 2516 handled separately in 5(f)	Low as redrafted
Sec. 10(b) — subpoenas to platforms	Fourth Amendment, third-party records	Non-content records only; jurisdictional nexus in 10(b)(2); existing 21 U.S.C. 876 authority; annual reporting	Low. <i>Carpenter</i> did not disturb the administrative subpoena doctrine
Sec. 8(c) — marketplace liability	Section 230 immunity; Seventh Amendment under <i>SEC v. Jarkesy</i> , 603 U.S. 109 (2024)	Express Section 230 override in 8(c)(4), on the FOSTA model; penalty recovered in district court rather than assessed administratively; knowledge element in 8(c)(1); takedown safe harbor	Low legally once both are in. Expect the override to be the most contested line in the bill
Sec. 11 — research pathway	None of substance	Built on enacted HALT provisions, with the Schedule I treatment in 11(b) that makes them attach	Lowest on the merits, but this pathway has now failed twice on mechanics. Re-verify against codified text before introduction

Open items before transmittal

- Fill dollar placeholders: marketplace civil penalty (Sec. 8(c)(2)); appropriations (Secs. 10(f), 12(e)).
- Set the research-reagent quantity limit (Sec. 11(d)(3)).
- Confirm peptide names in Sec. 7 against DEA Diversion Control and IUPAC nomenclature, and pair each entry with a full systematic name. This verification should come from a forensic chemist who can be cited in a hearing record.
- Re-pull 21 U.S.C. 802 and 812 and 18 U.S.C. 1961 against live Office of the Law Revision Counsel text. The third-pass verification ran while that site was under maintenance and rests on search excerpts and GovInfo Code editions. 18 U.S.C. 2516(1)(e) has since been confirmed against the GovInfo 2024 Code edition.
- Decide whether Sec. 7(a)(11) stays self-executing or narrows to the published list.
- Decide whether new 811(k) becomes the exclusive route for class-wide control.
- Decide the three hardening options left open in the adversarial review: extending the Sec. 7(b) knowledge element to civil and administrative consequences; recasting Sec. 8(d) so research chemical marketing is evidence of intended use rather than an element of the prohibited act; and requiring production of the administrative record within 30 days where an order takes effect on publication.
- Re-check H.R. 1266, which passed the House September 15, 2026 and sits on Senate Calendar No. 623; the WHO review of medetomidine and etomidate on which FDA sought comment; and the pending 7-hydroxymitragynine notice of intent. Each strengthens the findings if completed. If H.R. 1266 is enacted first it occupies 21 U.S.C. 802(60) with xylazine, requiring renumbering.

Out of scope by design. Non-opioid research peptides reach only the FDCA misbranding provision in Sec. 8(d). Scheduling them would require abuse-liability findings most cannot support. If control is wanted, a separate FDCA distribution offense modeled on 21 U.S.C. 333(e) is the better vehicle.

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