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Written Testimony of Richard Nephew
Senior Research Scholar, Center on Global Energy Policy
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Thank you, Chairman Crapo, Ranking Member Brown and other distinguished members of this Committee for inviting me to speak here today. It is a privilege to offer my thoughts with respect to an issue that is so important to the United States, namely the use of U.S. sanctions policy to address the problem of fentanyl abuse in the United States and how those sanctions might affect U.S. relations with China.

The scope of the Committee's inquiry today is much broader than the Fentanyl Sanctions Act (FSA) or, for that matter, the use of sanctions in general in addressing policy differences with the People's Republic of China. But, it may be an important part of this larger whole and I appreciate the opportunity to discuss these issues with you today. I am also honored to join my fellow panelists here today who have long experience in issues germane to this Committee's consideration.

I'm particularly grateful that the Committee has decided to study and debate the issue of fentanyl sanctions rather than leap immediately into the business of applying sanctions against entities in China or, for that matter, any other country in which there are entities involved in fentanyl trafficking. I think the decision to explore sanctions as a possible means of securing additional leverage to manage the supply of fentanyl to the United States – and sanctions' active use in other foreign policy contexts with China – is fitting given the established utility of sanctions in managing other policy problems. However, as I have written about extensively since I left government in 2015, sanctions should neither be the only nor the dominant tool in managing every foreign policy problem. There are real dangers in the overuse of sanctions and in the reduction of U.S. policy interests with key countries – China foremost among them – to a sanctions management exercise.

That concern notwithstanding, I do think that the Fentanyl Sanctions Act is an appropriate step forward in the redress of our concerns with China in this regard. It has sound, clearly articulated objectives. It offers a flexible approach that provides substantial discretion to the Executive Branch. It provides for proportional and limited sanctions, and in a manner that is distinct from the existing sanctions structure, including the Kingpin Act. It can facilitate a diplomatic approach, especially in that it is not limited solely to China as a target. And, it is complemented by other steps – including the creation of a Commission, establishment of an intelligence program dedicated to the problem,

and the provision of funding – that can help to create a "whole of government" approach to the problem.

In this written testimony, I will outline further the key tests for the development of a sanctions campaign that I believe the FSA passes as well as some legitimate concerns and challenges that exist for its successful use and placement within the broader range of U.S.-China relations.

SANCTIONS TESTS

The FSA passes several tests for what I deem necessary in the development of a sanctions program. I should emphasize that my assessment is as a matter of sanctions design and implementation. I am not an expert in synthetic opioids or their trafficking, about which I would defer to others. I have found the community writing about this problem to be insightful and want to acknowledge, in particular, the writings of Liana Rosen and Susan Lawrence of the Congressional Research Service[1], J. Stephen Morrison and Emily Foecke Munden of CSIS[2], and Vanda Felbab-Brown of Brookings[34]. Of course, the conclusions I reach regarding FSA are my own.

First and foremost, the FSA has a specific objective in mind that it states clearly in Section 2's findings on the scourge of synthetic opioid use in the United States. In paragraph two, FSA states that "the objective of preventing the proliferation of synthetic opioids though [sic] existing multilateral and bilateral initiatives requires additional efforts to deny illicit actors the financial means to sustain their markets and distribution networks." In paragraphs 5-7, the FSA acknowledges the "important strides" made by the United States, China, Mexico and Canada in combating the illicit flow of opioids but also that these efforts have been insufficient. It concludes with a call for "precision economic and financial sanctions policy tools" to complement these efforts as well as other sanctions tools presently on the books.

By establishing a clear predicate as well as a sense of purpose, the text of the FSA offers a rationale for sanctions as well as their limited use. Sanctions provided in the FSA are, by extrapolation, not intended to address non-opioid foreign policy problems nor are they intended to be used in the pursuit of broader political, economic, or social interests with respect to China, Mexico, or any other country for that matter. As a consequence, were the FSA to pass and become law, the United States would be able to offer exceptionally clear guidance as to why sanctions may become necessary, their rationale and their purpose.

Second, the FSA is also clear in identifying the targets of the sanctions – the companies, financial institutions, other entities, and individuals involved in illicit trafficking of synthetic opioids – and the steps that the governments responsible for those companies can take to avoid the imposition of sanctions. In this way, the Act would grant substantial flexibility to the Executive Branch to

undertake a diplomatic campaign that is both multilateral in scope (the UN, G-7 and other bodies are explicitly identified) as well as bilateral. The Act's explicit authorization of a broad, 12-month waiver of sanctions with respect to financial institutions in countries identified as closely cooperating with multilateral efforts to prevent trafficking is valuable, as is the ability of the Executive Branch to invoke U.S. national security, humanitarian or U.S. pharmaceutical needs in order to waive sanctions. This waiver is proportional and useful for sanctions implementation purpose, especially as it serves to incentivize cooperation at the highest multinational level. A similar waiver for companies – in addition to financial institutions – that are operating in closely cooperating countries would also be useful and would help harmonize implementation.

Third, the FSA permits the Executive Branch to decide which sanctions would be most appropriate in which contexts rather than be limited to a specific, pre-chosen menu. This may allow the President to decide to tailor implementation to be comparatively lighter – as part of an inducement for cooperation – or comparatively harsher, in egregious cases. Either way, taken in combination with the waivers, the Executive Branch will be able to ensure that the use of sanctions matches the policy objective of preventing the trade rather than seeking punishment for punishment's sake.

I should note in this context the important role that the Kingpin Act can play in managing this crisis but also the distinction that I see between it and the FSA. The Kingpin Act is a very aggressive sanctions tool in that its one penalty is the blocking of assets and thereby the complete denial of economic access to the United States of any entity or individual designated under it. For many narcotics traffickers, this may be an entirely appropriate tool: many such individuals or entities are involved in widespread narcotics trafficking and may be unlikely to moderate their behavior if presented with a more modest sanctions threat. Moreover, the method of removing sanctions is likewise stark: designations can be rescinded but, otherwise, sanctions imposed are usually sanctions that remain. Licenses can be granted to facilitate any necessary transactions but, otherwise, the application of the Kingpin Act is blanket and comprehensive in its effect.

The FSA, by contrast, is a far more flexible tool in both the sanctions that can be applied and in their method of relief. As noted, the FSA offers many different paths for sanctions to be set aside, including for countries that demonstrate a serious and dedicated effort to address our fundamental concerns regarding the behavior of their entities. Additionally, though a formal designation and inclusion on the U.S. Specially Designated Nationals and Blocked Persons (SDN) list remains an option for sanctions under the FSA, there are also more discrete tools that can be employed, including prohibitions on imports, denial of investment, and sanctions on the principal officers of companies involved. The FSA, therefore, gives the U.S. government a wider, deeper toolbox to apply in addressing this problem that, when coupled with a diplomatic strategy, may be more effective than simple reliance on the Kingpin Act. And, of course, Kingpin is not going away: it can still be used in the most egregious cases as well.

Fourth, and perhaps most important, though there is a heavy emphasis on China and Mexico in the findings, as well as in the context of our discussions here today (at least with regard to China), the bill itself does not focus on those two countries to the exclusion of the rest of the world. In this way, though China is an obvious country of attention, the sanctions proposed would have utility in addressing similar problems that either have or may emerge with other countries. This is important in the context of potentially changing supply circumstances, especially if China makes good on its commitments to reduce the illicit trade in fentanyl. Traffickers may adapt to Chinese implementation by sourcing their wares elsewhere and, in my research for this hearing, experts in fentanyl trafficking believe this may soon occur. The FSA wisely avoids being overly prescriptive in its selection of targets in this context. Moreover, by not explicitly singling out China for sanctions, at least some of the diplomatic blow that might otherwise be felt by the Chinese can be reduced, thereby preserving space for negotiations on the topic itself.

Last, the bill also provides a path away from sanctions. As noted previously, the diplomatic route is explicitly marked for countries that may find themselves the target of these sanctions. Implementation of the measures outlined in the bill will itself take time, enabling diplomacy and avoiding the necessity for sanctions enforcement in theory and, ideally, in practice. In this context, it would be helpful if the bill included explicit terms for the termination of sanctions against designated individuals and entities. As written, the bill would allow for designations to be removed every 180 days, with the submission of new reports on entities and individuals of concern. This may be sufficient, but additional flexibility could be useful in a negotiation. The FSA's invocation of IEEPA sections 203 and 205 (which include licensing and regulatory authorities) can help address this need, if amendment of the bill itself is not desirable.

SANCTIONS IN CONTEXT

Of course, sanctions should not merely be evaluated on the basis of their nuts and bolts but also in their proper policy context. A sanctions bill that is well designed and executed may still not be desirable, if used in a context that is otherwise disadvantageous to the United States in some fashion. The question needs to be not whether "sanctions work" but rather whether sanctions are the right tool for the job at hand.

In my view, there are three considerations or challenges that need to be addressed in deciding whether to proceed with the FSA and the diplomatic strategy that it would intend to support. (As this hearing is primarily focused on China and U.S.-China relations, I will concentrate on this relationship specifically.) The three considerations and challenges are:

1. How FSA sanctions should be placed in the broader U.S.-China relationship;

2. How FSA sanctions would be calibrated with other U.S. sanctions priorities; and,
3. Whether FSA contributes to the problem of sanctions overuse.

BILATERAL RELATIONS

One critique of the FSA is that it is adding to an already full roster of policy priorities with respect to China and that it would be unwise to create new problems in the relationship. In my opinion, this would be fair if the FSA was picking up an issue with China that had either been resolved satisfactorily or was sufficiently distant so as not to be a source of immediate concern. It would also be fair if the FSA's sanctions demands were so onerous as to make it practically impossible for progress to be reached on the broader priority while sanctions were pending in this area.

In my view, neither of these factors is present today. The FSA is seeking to address a current problem for the United States that, according to a variety of sources, is affecting the lives of millions of Americans. Though I am not an expert in fentanyl, the materials I consulted prior to this testimony underscore the degree to which overdoses and the complications that are created in the families and communities of fentanyl's users are a crucial problem for the United States. Moreover, this is a problem that has already been the subject of intense diplomacy between the United States and China and where progress has been made even in the context of a tense relationship. Chinese officials are already aware of U.S. concerns in this regard and have taken steps to address some core U.S. demands, such as scheduling the various fentanyl analogues that might have similar characteristics.

True, if U.S. sanctions were to be eventually imposed on a variety of large Chinese financial or pharmaceutical firms, then the FSA could exacerbate existing tensions and difficulties. However, this is not the intent of the legislation, as I understand it. The intent is instead to convince China of U.S. seriousness and to persuade Chinese officials, as well as the Chinese private sector, to take steps to address U.S. concerns in this regard and to ensure that Chinese regulations on the same are fully enforced. In fact, it is arguable that our sanctions approach is complementary to China's own efforts to crack down on this trade given recent changes in how China schedules and controls opioids. It is for this reason that I believe the flexibility and discretion provided in the FSA is essential, but also why I believe sanctions in this area can be accommodated with broader U.S. interests in China.

CALIBRATING WITH OTHER SANCTIONS

A slightly different issue is where the FSA fits in the broader scheme of U.S. sanctions involving China.

To put things mildly, the sanctions picture with regard to China is congested. The United States has a wide range of sanctions in place that affect Chinese interests, significantly so in some cases. A short list includes:

- North Korea sanctions;
- Iran sanctions, particularly with respect to oil exports;
- Human rights sanctions, including Global Magnitsky measures;
- Technology sanctions, including the newly announced Executive Order measures against Huawei;
- Russia sanctions, particularly with respect to energy trade and financing;
- Nonproliferation sanctions; and,
- Syria sanctions.

To put things in some context, there are 152 individuals or entities identified as being "Chinese" for purposes of U.S. sanctions on the Specially Designated Nationals and Blocked Persons (SDN) list. There are 174 North Korean entries. Another way of looking at the issue: in 2018, China was the number one trading partner of the United States according to the U.S. Census Bureau.[5] Canada, Mexico, Japan, and Germany round out the top five. With the exception of Mexico – which has a very large number of resident narcotics traffickers subject to U.S. sanctions – U.S. designations of Chinese persons are nearly double the total number of designations from the rest of the top five. This is a relatively weak way to assess the volume and impact of U.S. sanctions decisions, particularly as some measures imposed against China have not included an SDN designation. But, between the number of programs touching upon China and the number of explicit designations, the picture is still one of a country that is subject to a diverse range and fairly robust scale of U.S. sanctions.

The point is simple: for such a significant trading partner of the United States as well as a significant economy internationally, the United States has imposed a lot of sanctions against China and certainly plans to do more. For example, in this context, I take note of the recent bill introduced by Senators Rubio and Cardin – with a number of cosponsors – that would threaten sanctions against Chinese entities for their involvement in China's activities in the South China Sea.[6]

I recognize that it is beyond the scope of this hearing to debate the wisdom of some of the sanctions decisions that we have already made with respect to Chinese interests or what may be planned (or, indeed, not planned as the case may be). That said, it is necessary to step back and consider whether, in the broader sanctions policy context, we would be over-burdening the sanctions agenda with respect to China if the FSA were to become law.

As I have written extensively about since I left the U.S. government in 2015, there are reasons to be concerned about the use of sanctions against China in particular (as well as overuse, in general, as I

discuss below)[7] beyond the overall foreign policy context. For instance, at the most elementary level, the more the United States imposes sanctions against China and Chinese entities or individuals (for whatever reason), the greater the likelihood that China will itself elect to impose sanctions against U.S. interests. For better or worse, we have shown China that it is possible to maintain a trading relationship with a country while still imposing targeted sanctions against particular entities and individuals located within it. The Iran case is particularly salient, as the United States has designated dozens of entities and individuals in countries that range from U.S. allies like Germany to close partners like Israel and the UAE. China has applied this lesson itself, though usually involving discrete issues and obviously smaller economies than the United States, and using different means (e.g., with respect to the soft sanctions with respect to South Korea's Lotte Group and Chinese citizen travel to South Korea after the THAAD deployment in 2016[8]). Adding more sanctions to this saturated space will do nothing to convince China that it should not develop similar capacities and continue to apply its economic muscle.

The tit-for-tat nature of the trade war may already be reinforcing this dynamic. A senior academic in China, Associate Dean Jin Canrong of the School of International Studies at Renmin University, published an editorial on 15 May that explicitly encourages China to impose specific sanctions against the United States in response to the tariff decision made by the President in mid May 2019.[9] They echo measures previously employed by China, such as a reduction on the export of rare earths to the United States, as well as suggest restrictions on U.S. companies' access to China. Regardless of what happens in trade talks, the fact that Chinese academics are beginning to discuss more seriously the idea of sanctions against the United States underscores the degree to which we ought to be careful when considering measures against China ourselves.

That said, there are sanctions and then there are sanctions. The measures proposed by the FSA are, as I've noted, proportional, modest and flexible. They are of a very different character than, for example, a broad prohibition on the import of Iranian oil or on providing banking services to Russian oligarchs. The ramifications for China are different from these types of sanctions than what is envisioned under the FSA. Moreover, as noted previously, there are enough off-ramps to sanctions that, if implemented alongside a patient, deliberate, and concerted diplomatic strategy, the actual imposition of measures can and should be avoided.

Furthermore, the acknowledgement of other sanctions priorities that exist should not and need not be an argument against having the ability to impose measures against illicit traffickers of fentanyl. Instead, this is a reason for the United States to be more diligent and careful in its consideration of sanctions priorities more generally. I do believe that we cannot impose sanctions against Chinese entities on a constant basis and expect to avoid repercussions that can affect our broader interests. But, this is as much an argument for not imposing sanctions in those other areas as it is for denying the development of sanctions tools to deal with fentanyl; indeed, I could suggest a few sanctions

choices made by this Administration that I would suggest that they reconsider if needed to provide space for fentanyl-related measures.

SANCTIONS OVERUSE

Beyond China specifically, there is a broader issue about whether the United States is overusing the tool of sanctions more generally. I have been outspoken in my concern that we are turning the U.S. economy into an increasingly difficult operating environment given the complexity of U.S. compliance demands and the ever-changing nature of our sanctions policies. A quick count of U.S. sanctions programs available of OFAC's website underscores how many different sanctions regimes exist -- 30[10] -- and this does not include programs administered by the State or Commerce Departments, much less the requirements of U.S. export controls. As I wrote with former Secretary Jack Lew in *Foreign Affairs* last year, the United States is not in imminent danger of losing its economic primacy or becoming too difficult to do business with, but the over-use of sanctions can contribute to the development of mechanisms that avoid the United States and its rules to the extent possible.[11] That is not good for the U.S. economy or the power of U.S. sanctions.

Moreover, this is no mere theory: in the case of Iran sanctions, we are seeing today a concerted attempt by U.S. allies in Europe to deal with U.S. sanctions they oppose by setting up structures that seek to avoid conventional banking methods and thereby dilute the impact of U.S. secondary sanctions. Regardless of how one feels about this development (or its likely efficacy), this is a problem if institutions eventually develop that have this as their central mission. The value of U.S. sanctions – particularly those involving financial means – is that it is too hard to avoid U.S. institutions and too profitable to use them. This is not a static situation and commercial decisions could be different if the cost/benefit equation were to shift. If other options exist, then – in time – U.S. sanctions will lose their potency. It is not in our interest for such instruments to exist or to get practice in operations.

Notwithstanding this point, the sanctions outlined in the FSA are unlikely to serve as the trigger for construction of such mechanisms. As an abstract matter, the FSA will contribute to an unhelpful trendline by being yet another complication for companies operating in the United States and with potentially targeted firms. But, the discrete nature of the sanctions envisioned and, importantly, the desire to avoid their use by instead prioritizing diplomatic efforts with China (and others) can help to minimize this danger. There are sanctions regimes currently in place that will likely prove far more consequential in steering foreign behavior with respect to sanctions over-use concerns, not least being U.S. sanctions against Iran. That said, the broader issue merits study and examination, especially by the U.S. Congress. I understand there are proposals under consideration by various members and committees on Capitol Hill that would examine U.S. sanctions policy writ large and

encourage assessment of sanctions' use, misuse, overuse, and best practices. In my opinion, these proposals have considerable merit.

CONCLUSION

Altogether, though I believe that there are legitimate questions of both efficacy and broader policy focus surrounding the FSA, I believe that it is a reasonable next step to take in our efforts to redress our concerns regarding the supply of fentanyl to this country. The sanctions proposed are proportional, reasonable, subject to executive discretion, consistent with a diplomatic approach, and manageable in the overall policy context. In an ideal world, no sanctions measures included in the FSA would ever need to be used, as their mere existence would contribute momentum to ongoing diplomatic efforts to confront the challenge of illicit fentanyl trade. Even if sanctions had to be imposed, I believe there are mechanisms in the FSA to manage their deleterious impacts as well as to provide relief in the context of future diplomatic progress. There are some modest changes to the text that would be advisable – specifically, with respect to an explicit termination clause as well as expanding the scope of "cooperating country" waivers to cover companies – but as written, these issues can be accommodated regardless.

I appreciate the opportunity to speak with you today and to offer my testimony. I look forward to your questions.

Thank you.

Endnotes

[1] https://fas.org/sgp/crs/row/IF10890.pdf
[2] https://www.csis.org/analysis/fentanyl-opens-grave-new-health-security-threat-synthetic-opioids
[3] https://www.brookings.edu/blog/order-from-chaos/2018/04/30/how-synthetic-opioids-can-radically-change-global-illegal-drug-markets-and-foreign-policy/
[4] https://www.brookings.edu/wp-content/uploads/2019/03/FP_20190322_mexico_crime-2.pdf

[5] https://www.census.gov/foreign-trade/statistics/highlights/top/top1812yr.html
[6] https://www.rubio.senate.gov/public/_cache/files/80e0c63e-b521-4929-a48c-db042c096d6a/26BE75C8B05BC1ECB3636E0C2AA42902.south-china-sea.pdf
[7] https://energypolicy.columbia.edu/research/report/future-economic-sanctions-global-economy
[8] https://www.reuters.com/article/us-lotte-china-analysis/with-china-dream-shattered-over-missile-land-deal-lotte-faces-costly-overhaul-idUSKBN1CT35Y
[9] http://www.globaltimes.cn/content/1150061.shtml
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