



National Association of Assistant United States Attorneys

Safeguarding Justice for All Americans

Board of Directors

Lawrence J. Leiser
President (E.D. VA)

Steven B. Wasserman
Vice President (DC)

Adam E. Hanna
Vice President
(S.D. IL)

Marc Wallenstein
Treasurer
(HI)

David A. Marye
Secretary
(E.D. KY)

Patricia Booth
(S.D. TX)

Kevan Cleary
(E.D. NY)

Karen Escobar
(E.D. CA)

Lisa Hasday
(N.D. TX)

Joseph Koehler
(AZ)

Mark Vincent (UT)

Clay West
(W.D. MI)

Geoffrey Wilson
(E.D. CA)

Executive Director
Robert O. Patterson

Washington Reps.
Jason Briefel
Natalia Castro

Counsel
Debra Roth

Fentanyl Scheduling Charge and Response

Topline: Maintaining the emergency scheduling order issued by the Drug Enforcement Administration to place fentanyl-related substances in Schedule I of the Controlled Substances Act is critical for the prosecution of fentanyl analogue dealers. Fentanyl and fentanyl analogues remain among the most dangerous drugs in the world and are often misrepresented as they move through criminal networks, posing a unique risk to both the public and law enforcement. This is not a fear-based response, but rather an evidence-based response. To clarify disinformation regarding the federal prosecution of fentanyl and fentanyl analogues, we respond to several common charges.

Charge: The emergency scheduling of fentanyl and fentanyl analogues fails to decrease the supply of these drugs.

Response: The increase in prosecutions since the emergency scheduling order does not reflect increase supply of fentanyl and fentanyl analogues, but rather, an increased capacity to prosecute cases previously unavailable through prosecutions under the controlled substance analogue provisions of the Controlled Substances Act. Additionally, the Drug Enforcement Administration (DEA) reports a drastic reduction in encounters with new fentanyl analogue substances since the emergency scheduling order. DEA reports an almost 90 percent decline in total encounters of fentanyl-related substances. Under the class-wide scheduling order, traffickers lack an incentive to invent new analogues as they are unable to use slight chemical changes to avoid penalties.

Charge: Extending the emergency scheduling of fentanyl and fentanyl analogues further perpetuates known problems with mandatory minimums imposed on non-violent drug users.

Response: Congress has already provided various safety valves for allowing non-violent drug offenders to avoid mandatory minimums in an effort to maintain focus on the most dangerous drug criminals. [18 U.S.C. § 3553\(f\)](#) permits a sentencing court to disregard statutory minimum sentences for low-level, nonviolent, and cooperative defendants. This safety valve was expanded under the First Step Act of 2018 to provide additional relief from mandatory minimums for defendants with minimal prior criminal records.

Maintaining the existing mandatory minimums on fentanyl and fentanyl analogues, as well as the emergency scheduling order, allows prosecutors to work with defendants to avoid harsher sentences and provide insight on criminal networks. Due to the various safety valves in place, mandatory minimums have been applied much less frequently for fentanyl and fentanyl analogue cases. In FY 2019, the DEA reports mandatory minimum statutory penalties were applied for 52% of

fentanyl and fentanyl analogue cases. However, for all other drug cases mandatory minimum statutory penalties were applied in 66% of cases.

Charge: Most fentanyl and fentanyl analogue prosecutions are prosecutions of street-level or other minor role offenders.

Response: With the exception of crimes occurring in the special jurisdiction of the United States (such as the National Park Service), federal prosecutors do not pursue simple possession charges. Drug trafficking charges involving the distribution or manufacture of controlled substances are brought. Lower-level drug dealers are often encouraged to cooperate or provide substantial assistance to law enforcement authorities in order to combat large-scale criminal drug trafficking enterprises. In exchange for such assistance, lower-level dealers are typically rewarded with a substantial sentencing reduction without regard to the statutory mandatory minimum penalty.

Charge: Class-wide scheduling harms public health considerations and scientific research on fentanyl and its analogues.

Response: According to the [U.S. Sentencing Commission's January 2021 report](#) on fentanyl and fentanyl analogues, in fiscal year 2019, fentanyl or fentanyl analogue offenders accounted for almost three-quarters (74.7%) of all drug trafficking offenders sentenced where the offense of conviction established that death or serious bodily injury resulted from the substance's use. As little as 2 milligrams of fentanyl is considered a lethal dose; therefore, a trafficker with just one kilogram of fentanyl could distribute nearly 500,000 lethal doses. Impeding the proper prosecution of fentanyl and fentanyl analogue distributors is a public health hazard.

Further, class-wide scheduling of fentanyl analogues does not harm scientific research involving Schedule I drugs. To date, DEA has approved nearly 800 researchers nationwide to perform research with Schedule I controlled substances – twice as many approved researchers than five years ago.

Charge: The Drug Enforcement Administration should consult with the Department of Health and Human Services (HHS) and the Food and Drug Administration (FDA) prior to scheduling additional fentanyl analogues.

Response: Drug traffickers consistently make small alterations to fentanyl analogues to evade criminal penalties. In the absence of a class-wide emergency scheduling order, the DEA must engage in a burdensome and time-consuming eight factor analysis for each new analogue uncovered before scheduling may be considered– in spite of the fact that the Sentencing Commission has found fentanyl analogue offenses, as a whole, result in user death twice as often as regular fentanyl cases. A drug trafficker need only make slight alterations to an analogue to delay the scheduling process and avoid a more severe sentence. This severely hampers a prosecutor's ability to combat the distribution of fentanyl analogues in real time and encourages experimentation by drug traffickers at the expense of consumers who end up ingesting unknown, novel substances.

Charge: Fentanyl and fentanyl analogues can be effectively prosecuted under the controlled substance analogue provisions of the Controlled Substance Act, making the emergency scheduling order unnecessary and duplicative.

Response: Prosecuting a fentanyl analogue under the Controlled Substances Act requires prosecutors to prove not only that the substance is substantially chemically and pharmacologically similar to fentanyl but that the drug trafficker knew of such similarity. Given the speed at which fentanyl analogues are created, this two-factor *mens rea* requirement is extremely difficult to meet. The Sentencing Commission found just under a third of fentanyl offenders and over forty percent of fentanyl analogue offenders sold or advertised these substances as other drugs. As substances are distributed across their drug trafficking networks, it becomes increasingly unlikely the distributors are aware of the chemical structure and pharmacological effects of the substance being sold.

Further, prosecutions for these offenses under the Controlled Substances Act are unlikely to succeed in front of a jury. These cases require complex scientific testimony from chemists and pharmacologists that often gets lost on lay jurors, allowing drug traffickers to evade conviction and accountability for their criminal conduct. In addition to being extremely resource intensive, analogue prosecutions often devolve into a battle between experts about the positioning of molecules in chemical structures and the results of *in vitro* and *in vivo* studies involving the substance's effects on various receptors in the brain. Such debates seem remarkably misplaced when the core of the crime is a defendant trafficking in a fentanyl substance that either killed someone or easily could have. Abandoning class scheduling will result in fewer prosecutions for trafficking new and increasingly more deadly forms of fentanyl, not because fewer such crimes will have been committed, but because the prosecutions of such crimes will become much more complicated and, in some instances, impossible.

Charge: The emergency scheduling order criminalizes addiction and prevents rehabilitation.

Response: As discussed above, federal prosecutors rarely prosecute the simple possession of fentanyl and fentanyl analogues. Federal criminal prosecutions remain focused on criminal networks involving the trafficking of fentanyl and fentanyl analogues. To the extent drug traffickers also battle addiction, these individuals may be eligible for Better Choices Court or the Bureau of Prisons' Residential Drug Abuse Program. These programs maintain criminal penalties while providing an incentive for inmates to receive addiction treatment – often offering reduced sentences for such participation.

Opposition to extending the emergency scheduling order on fentanyl and fentanyl analogues rooted in criticisms of the War on Drugs and the efficiency of mandatory minimums is misplaced in the current conversation. Fentanyl remains one of the most dangerous substances in the world. Fentanyl analogues are being rapidly created to fund criminal drug networks preying on victims of the opioid epidemic. Class scheduling of fentanyl-related substances makes it more likely that fentanyl dealers will be held accountable for exploiting the addictions of their customers, for causing their deaths, and for ripping families and communities apart. A decision to abandon class scheduling would leave an analogue prosecution as the only possible alternative to hold dealers of new and increasingly more deadly forms of fentanyl accountable. Many of those who are opposed to preserving class scheduling fail to understand, or perhaps refuse to acknowledge, that analogue

prosecutions are not a viable alternative to proving a controlled substance violation. The extreme difficulty in proving that a defendant knew of the similarities in the chemical structures and pharmacological effects of a fentanyl-related substance presents an enormous hurdle to a successful federal prosecution.