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April 14, 2021

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U.S. Senate
Washington, D.C. 20510

Ranking Member Brett Guthrie
Subcommittee on Health
Committee on Energy & Commerce
U.S. Senate
Washington, D.C. 20510

RE: NAAUSA Statement for the Record for the April 14, 2021 Subcommittee Hearing, "An Epidemic within a Pandemic: Understanding Substance Use and Misuse in America"

Dear Chairwoman Eshoo, Ranking Member Guthrie, and Members of the Subcommittee:

On behalf of the National Association of Assistant United States Attorneys (NAAUSA), representing the interests of the 6,300 Assistant U.S. Attorneys (AUSAs) working in the 93 U.S. Attorney Offices, we write to provide feedback on the importance of maintaining the emergency scheduling order issued by the Drug Enforcement Administration to place fentanyl-related substances in Schedule I of the Controlled Substances Act. Doing so 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. In the absence of a class-wide scheduling order, prosecuting fentanyl and fentanyl analogue cases becomes extremely difficult. This poses a public health threat as it stifles the prosecution of drug traffickers and encourages chemical experimentation.

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.

In the absence of class-wide scheduling, prosecutors lack the adequate capacity to prosecute cases relating to fentanyl and fentanyl analogues. 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 also 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 prosecution of such crimes will become much more complicated and, in some instances, impossible.

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.

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 under the Controlled Substances Act 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.

NAAUSA appreciates the Subcommittee for considering NAAUSA's perspective. If we can be of further assistance, please do not hesitate to contact our Washington Representative Natalia Castro at ncastro@shawbransford.com.

Respectfully,



Lawrence. J. Leiser
President

CC: Chairman Frank Pallone
Ranking Member Cathy McMorris Rogers