



# National Association of Assistant United States Attorneys

*Safeguarding Justice for All Americans*

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November 30, 2021

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Committee on Energy & Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

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## **RE: NAAUSA Statement for the Record for the December 2, 2021, Subcommittee Hearing, "The Overdose Crisis: Interagency Proposal To Combat Illicit Fentanyl-Related Substances"**

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 over 6,000 Assistant U.S. Attorneys (AUSAs) working in the 94 U.S. Attorney Offices, we write to provide feedback on the Biden – Harris Administration's recommendation to Congress on Reducing Illicit Fentanyl-Related Substances.

As NAAUSA articulated to the Subcommittee in April, fentanyl and fentanyl related substances (often referred to as fentanyl analogues) are extremely lethal and pose significant dangers to communities across the nation.

In 2020 alone, the [CDC reports](#) nearly 100,000 people died of fentanyl and fentanyl related drug overdoses – up 30 percent from the previous year. Additionally, the [National Center for Drug Abuse Statistics](#) finds that fentanyl is a factor in 53 percent of drug overdose deaths. Ingesting less than 0.07 ounces of fentanyl causes certain death, making it one of the deadliest drugs in the world. This year, [cities across the country have reported](#) sharp increases in drugs laced with fentanyl, causing overdose deaths in unsuspecting victims. For example, just last month [Vermont police reported](#) an overdose death caused by fentanyl-laced marijuana. The dangers of fentanyl and fentanyl related substances cannot be overstated.

For these reasons, NAAUSA is extremely pleased the Administration has supported permanently placing fentanyl analogues in Schedule I of the Controlled Substances Act. 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. Permanently scheduling fentanyl analogues ensures law enforcement has the tools to bring these cases to court and take serious drug traffickers off the street.

NAAUSA also supports the administration's recommendation to establish a simplified process that would align research registration for all Schedule I substances, including FRS, more closely with the research registration process for Schedule II substances. Although not related to federal prosecutions directly, NAAUSA understands the importance of ensuring productive research can occur to combat drug addiction and understand the effects of drugs on human health. Allowing this research to occur may prevent and combat addiction to ensure individuals get the help they need and never end up in the criminal justice system.

However, NAAUSA cannot support and vehemently opposes the administration's recommendation to exempt fentanyl and fentanyl analogue offenders from mandatory minimums.

**Executive Director**  
Robert O. Patterson

**Washington Reps.**  
Jason Briefel  
Natalia Castro

**Counsel**  
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Excluding these offenders from mandatory minimums will deeply undermine law enforcement efforts to combat drug trafficking.

The U.S. Sentencing Commission reports that [fentanyl trafficking offenses](#) increasing 1,890 percent since FY 2016. Similarly, [fentanyl analogue trafficking offenses](#) increased 159.6 percent since FY 2018. Over 90 percent of offenders for both fentanyl and fentanyl analogues are convicted and sentenced to prison time. More than half of both fentanyl and fentanyl analogue offenses were subject to mandatory minimum sentences in FY 2020. Fentanyl analogies are more lethal than fentanyl. In fact, Fentanyl analogue offenses resulted in 29.2 percent of deaths as compared to 14.1 percent for fentanyl offenses.

Still, nearly 60 percent of fentanyl offenders and roughly 40 percent of fentanyl analogue offenders are relieved of this mandatory minimum sentence. For fentanyl and fentanyl analogue offenders this is often because they qualify for either relief pursuant to the safety valve or for cooperating with law enforcement.

While not all individuals eligible for mandatory minimums receive such a sentence, the existence of mandatory minimums serves as a valuable tool for discouraging drug alterations and gaining critical cooperation that enables law enforcement to prosecute more culpable participants in drug trafficking networks.

Make no mistake, drug traffickers will realize that they can avoid mandatory minimum sentences by making slight alterations to fentanyl. This will not only hamper the ability of law enforcement to target the most culpable and dangerous drug traffickers, but also encourages risky experimentation with an already lethal drug – and the test subjects will be victims struggling with addiction in communities across the country.

As noted above, mandatory minimums are a critical tool for law enforcement to incentivize cooperation. Federal prosecutors do not target addicts for possession offenses, but rather, focus our efforts on dismantling drug trafficking networks. Statutory safety valve and substantial assistance provisions allow prosecutors and judges to exempt [low-level, nonviolent, and cooperative defendants](#) from mandatory minimum sentences. In FY 2020, the U.S. Sentencing Commission reports 38.1 percent of fentanyl offenders and 17.2 percent of fentanyl analogue offenders received relief from mandatory minimums due to safety valve provisions. Using mandatory minimums as a tool for gaining information on high level, violent drug traffickers helps low-level, nonviolent defendants escape the life of crime, reduce their sentence, and receive the assistance they may need to combat addiction. Without mandatory minimums, there would be little incentive for those in the best position to provide information against more culpable co-conspirators to cooperate. Further, exempting FRS from mandatory minimum sentences would leave prosecutors and judges without the means to adequately punish and deter those at the top of the drug trafficking network and allow these dangerous offenders to continue to victimize the public.

While the administration's recommendations would not exempt fentanyl analogue offenders from existing mandatory minimums for cases where death or serious bodily injury can be directly linked to the fentanyl analogue that was trafficked, this recommendation has no teeth. It is extremely difficult to prove the direct link between a death and the individual who sold the lethal dose of fentanyl to the user. In fact, very few of these cases are brought because the prosecution is required to prove beyond of a reasonable doubt both that death was caused by the FRS and that a particular individual or individuals supplied the lethal dose to the victim. Very often in these cases there are issues of polysubstance abuse by the victim and/or underlying medical conditions that make it

very difficult to meet this burden. Further, because the victim is deceased, it is often impossible to positively identify the supplier of the lethal dose.

Ultimately, 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. We commend the administration for recognizing the important need to make permanent class wide scheduling. However, given the lethality and danger of fentanyl analogues, this is not enough. The existing mandatory minimums play a critical role in reducing the proliferation of fentanyl analogues, supporting law enforcement's effort to bring these dangerous offenders to justice, and protecting the public.

Removing mandatory minimums for a drug that claimed the life of nearly 100,000 individuals last year alone is illogical and dangerous.

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](mailto:ncastro@shawbransford.com).

Respectfully,



Steven B. Wasserman  
President

CC: Chairman Frank Pallone  
Ranking Member Cathy McMorris Rogers