



# National Association of Assistant United States Attorneys

*Safeguarding Justice for All Americans*

## Board of Directors

March 11, 2022

Steven B. Wasserman  
President (DC)

Dear Senators,

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

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 regarding the urgent need for Congress to act to combat the fentanyl crisis impacting our nation.

Mark Vincent  
Treasurer  
(UT)

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

NAAUSA appreciates Congress including in appropriations legislation an extension to the emergency, temporary order placing fentanyl analogues (commonly referred to as fentanyl-related substances (FRS))<sup>1</sup> in Schedule I of the Controlled Substance Act. While no one action will be sufficient to combat the fentanyl and fentanyl analogue epidemic, class wide scheduling is a necessary step to equip law enforcement with the tools to combat the dangers of these drugs.

Kevan Cleary  
(E.D. NY)

Karen Escobar  
(E.D. CA)

NAAUSA has engaged in discussions on this issue from both a public health and a public safety perspective and believes a more cohesive and coordinated approach is necessary to combat this crisis. Below we outline the existing landscape of the fentanyl problem, and the actions Congress must take to alleviate the problem.

Joseph Koehler  
(AZ)

Clay West  
(W.D. MI)

## I. Fentanyl & Fentanyl-Related Substances Pose an Immediate Danger to Society

In 2020 alone, the [CDC reports](#) nearly 100,000 people died of drug overdoses—up 30 percent from the previous year with fentanyl and FRS being a primary driver. The [National Center for Drug Abuse Statistics](#) finds that fentanyl is a factor in 53 percent of drug overdose deaths. Last year, [cities across the country reported](#) sharp increases in drugs laced with fentanyl, causing overdose deaths in unsuspecting victims. And just last month, a superintendent [confirmed](#) a vaping device found at an Iowa high school contained both THC and fentanyl.

Fentanyl is a substance similar to morphine, but [100 times more potent](#), making it one of the deadliest drugs in the world. As little as 2 milligrams of fentanyl may be lethal—and traffickers often deal in kilograms. Therefore, a trafficker with just one kilogram of fentanyl could distribute nearly 500,000 lethal doses.

FRSs are even more dangerous, and we know even less about their additional risks. As law enforcement efforts improve at detecting fentanyl offenders, drug traffickers make slight alterations to their drugs to evade prosecution. Today, traffickers are constantly creating new fentanyl-related substances. As of [January 2021](#), the DEA was aware of 34 new substances that meet the FRS definition and each poses an imminent hazard to public safety.

Executive Director  
Chad Hooper

Washington Reps.  
Jason Briefel  
Natalia Castro

In 2021 alone, the DEA seized more than [9.5 million counterfeit pills](#)—more than the last two years combined. Roughly 42 percent of counterfeit pills seized by law enforcement contain at least 2 milligrams of fentanyl. Drug traffickers deceptively market these pills as legitimate prescription pills and are killing unsuspecting victims at an unprecedented rate.

Counsel  
Debra Roth

<sup>1</sup> Although fentanyl-related substances are analogues, not all analogues are classified as fentanyl-related substances (FRS). Fentanyl analogues are a subset of fentanyl related substances. Therefore, this letter uses the term “FRS” when discussing the broad issue of the drug overdose epidemic and “fentanyl analogue” when discussing specific prosecutorial issues.

The fentanyl and FRS crisis is here, and Congress must act to protect our communities.

## **II. Permanent Scheduling is the Only Permanent Solution**

While temporary class wide scheduling is important in the immediate term, permanent scheduling is necessary. [Law enforcement](#), [researchers](#), and [bipartisan lawmakers](#) agree permanent scheduling is an absolutely necessary step toward combatting the proliferation of fentanyl.

In the absence of class-wide scheduling, prosecutors lack adequate capacity to prosecute cases relating to fentanyl and FRS. Prosecuting an unscheduled 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, 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 FRSs 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 substance 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 a substance to delay the scheduling process and avoid a more severe sentence. This severely hampers a prosecutor's ability to combat the distribution of FRSs in real time and encourages experimentation by drug traffickers at the expense of consumers.

**Permanent scheduling is critical and broadly acknowledged as necessary. Despite this reality, Congress continues to push the deadline on the emergency order. Congress must act on permanent scheduling and cannot continue delaying the issue.**

### **III. Statutory Mandatory Minimums Play a Critical & Necessary Role in the Fight**

While permanent scheduling has been widely acknowledged as a critical solution, debates around statutory mandatory minimum penalties have unfortunately clouded the conversation. The Biden Administration and several Democratic lawmakers have proposed exempting fentanyl and FRS offenders from mandatory minimums. NAAUSA cannot support, and vehemently opposes, this recommendation.

Excluding these offenders from mandatory minimums will deeply undermine law enforcement efforts to combat the trafficking of fentanyl-related substances that pose an extremely dangerous public health risk.

The U.S. Sentencing Commission reports that fentanyl trafficking offenses have increased 1,890 percent since FY 2016. Similarly, [fentanyl analogue trafficking offenses](#) have 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 analogues 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 relief either pursuant to the safety valve or for cooperating with law enforcement.

While not all individuals facing mandatory minimum penalties 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. Mandatory minimums help low-level, nonviolent defendants escape the life of crime, reduce their sentence, and receive the assistance they may need to combat addiction.

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.

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

#### **IV. Research Opportunities Can Combat Addiction & Increase Expert Knowledge**

While not directly related to prosecutions, NAAUSA strongly supports the recommendation from the [Biden Administration](#) and [Republican lawmakers](#) 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.

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.

Unfortunately, with the rapid proliferation of fentanyl and fentanyl-related substances, there remains much we do not know about these drugs. **Increasing our knowledge about these drugs can only assist in combatting the larger addiction crisis harming our communities.**

#### **V. Congress Must Act on Legislation to Combat this Crisis**

NAAUSA has endorsed the [HALT Fentanyl Act \(S. 3336\)](#) as an effective tool to enhance law enforcement efforts to combat the proliferation of fentanyl and FRSs with permanent class-wide scheduling and allows for necessary research to improve our knowledge about these drugs. At the same time, this legislation does not undermine law enforcement efforts by exempting offenders from mandatory minimums. At a time when Americans are dying at alarming rates from fentanyl and fentanyl analogues, this legislation is critical.

NAAUSA also supports bipartisan efforts, such as the [Temporary Extension of Fentanyl Scheduling Act of 2021 \(S. 1216\)](#), to extend the DEA temporary scheduling order. However, permanent scheduling is necessary.

Ultimately, NAAUSA urges lawmakers to realize that fentanyl is an active and devastating crisis for the American people. Permanent scheduling is necessary, now. Mandatory minimums for these offenders are not a problem, but a critical part of the solution. And additional research on these drugs can only enhance our position in the fight against addiction.

For additional information on NAAUSA's position, please do not hesitate to reach out to our Washington representative Natalia Castro ([ncastro@shawbransford.com](mailto:ncastro@shawbransford.com)).

Sincerely,

A handwritten signature in black ink, appearing to read "Steven Wasserman". The signature is fluid and cursive, with the first name "Steven" written in a larger, more prominent script than the last name "Wasserman".

Steven Wasserman  
NAAUSA National President