

**Questions for the Record**  
**U.S. Department of Justice**  
**“Defeating Fentanyl: Addressing the Deadliest Drugs Fueling the Opioid Crisis”**  
**Hearing Before the Subcommittee on Crime and Terrorism**  
**Committee on the Judiciary**  
**United States Senate**  
**April 11, 2018**

**Questions from Senator Sasse**

- 1. Beyond the additional resources proposed in our Ending the Fentanyl Crisis Act of 2018, are there additional authorities and enforcement strategies that would significantly improve our ability to interdict illegal fentanyl imports?**

**Response:**

The Department of Justice (Department) and the Drug Enforcement Administration (DEA) believe a coordinated response by public health and law enforcement and other stakeholders remains the most effective response to this problem. DEA continues to share information and engage stakeholders to decrease the demand for New Psychoactive Substances (NPS).

The Department and DEA join the Administration to support H.R. 2851, the Stop the Importation and Trafficking of Synthetic Analogues (SITSA) Act of 2017, and the Synthetic Trafficking and Overdose Prevention (STOP) Act of 2018, which was incorporated into H.R. 6, the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act and signed by the President on October 24, 2018. SITSA would make needed updates to the Controlled Substances Act (CSA), primarily by establishing “Schedule A” as a new drug schedule. Schedule A would consist of substances that are analogues of certain substances already controlled by Schedules I through V of the CSA. Allowing for analogue substances to be added to Schedule A, rather than to Schedules I through V, would create a more streamlined process that would significantly reduce the time necessary to schedule new synthetic analogue drug threats. The STOP Act improves the security of the international mail system to prevent abuses by those who would use it to smuggle dangerous opioids and other illicit substances into the United States.

The Department and DEA support ongoing Congressional efforts to more quickly bring these dangerous synthetic drugs under the CSA. We look forward to working with the subcommittee and staff on strategies that may improve the ability to interdict illegal fentanyl imports.

- 2. To what extent has the Department of Justice coordinated with the Department of State for the purpose of reducing the manufacture and export of fentanyl from China?**

**Response:**

The Department, DEA, and the Department of State coordinate on the reduction of the manufacture and export of fentanyl from China within the framework of the ministerial-level Law Enforcement and Cybersecurity Dialogue (LECD), and the sub-ministerial level Joint Liaison Group for Law Enforcement Cooperation (JLG) – specifically, the Counternarcotics Working Group (CNWG) of the JLG. The LECD is co-chaired by the Department and the Department of Homeland Security (DHS) on the U.S. side, and coordinated with the Department of State; the JLG is chaired by the Department, the Department of State's Bureau of International Narcotics and Law Enforcement Affairs, and DHS on the U.S. side. DEA and the Narcotics Control Board (NCB) participate in the CNWG, which is chaired, respectively, by the Department and DEA on the U.S. side and the Ministry of Public Security on the Chinese side.

Combatting illicit fentanyl is a top priority of this Administration. Recognizing that a significant amount of illicit fentanyl, fentanyl analogues, and their immediate precursors are manufactured in China, Attorney General Sessions requested that China take action in the LECD in October 2017 with then-State Councilor Guo Shengkun of the Chinese Ministry of Public Security. Deputy Attorney General Rosenstein met with Guo in Beijing, China on September 25, 2017 and made the same request.

The Attorney General and the Deputy Attorney General's efforts are built on long-standing, working-level engagements with the Chinese in a number of areas. For example, DEA has maintained a liaison presence in the People's Republic of China, with an office in Beijing for the last three decades. DEA is currently working to establish a second office in Guangzhou. DEA's office in Beijing has direct engagement with drug control officials from China's Ministry of Public Security, NCB. DEA's well-established relationship with Chinese drug control authorities is the primary bilateral conduit to address the threat resulting from the shipment of illicit fentanyl and analogues, their precursors, and other synthetic drugs to the United States and elsewhere.

DEA and the NCB share drug-related intelligence and trends through the Bilateral Drug Intelligence Working Group (BDIWG) led by DEA's Intelligence Division. This annual engagement was established through a Memorandum of Agreement between DEA and the NCB in 2002. As noted, at a higher policy level, the United States Government has also engaged China through other working groups. These efforts combined have resulted in positive actions by the Government of China over the last year. While these actions are a step in the right direction, more can be done.

Since 2014, the Department, DEA, and Chinese officials have met regularly to discuss bilateral efforts to counter the threat to the United States from fentanyl class substances. For the past four years, representatives from China's National Narcotics Laboratory have met with DEA experts to exchange information on emerging substances, trafficking trends, and drug sampling standards. This dialogue fosters discussion about new substances of abuse in the United States to be considered for control in China. A larger and more formal bilateral exchange between legal and scientific experts took place in Beijing in May 2017. DEA and its scientific counterparts met again in June 2018.

A key moment in enhanced cooperation on synthetic drugs came in October 2015, when, following similar discussions, China implemented domestic control on 116 NPS, including a number of fentanyl analogues and streamlined its procedures to control additional substances.

On March 1, 2017, China's National Narcotics Control Commission announced scheduling controls against four fentanyl-class substances: carfentanil; furanyl fentanyl; valeryl fentanyl; and acryl fentanyl. This announcement was the culmination of ongoing collaboration between the Department and the Government of China, and reaffirms an expanding collaborative commitment to countering illicit fentanyl. On July 1, 2017, China controlled U-47700. While not a fentanyl class substance, U-47700 is a powerful synthetic opioid that has been trafficked and abused in the United States.

After requests by Administration officials, including the Attorney General and Deputy Attorney General, and in accordance with its obligations under the 1988 UN Convention, on December 28, 2017, China's Ministry of Public Security announced scheduling controls on two fentanyl precursor chemicals, NPP and 4ANPP. The scheduling controls took effect on February 1, 2018. Chinese control of these substances is encouraging and affirms the need for the continued collaboration between DEA and the NCB. On August 29, 2018, the Government of China announced the control of an additional 32 NPS, bringing the total number of NPS and precursor chemicals China has controlled to 175 since 2015.

DEA will continue to engage the Chinese on the control of emerging fentanyl analogues and other NPS. We are further encouraged that the Chinese are willing to engage in discussions and technical exchanges with DEA regarding scheduling fentanyl as a class. Officials from the NCB indicated that their scheduling process is long and complicated, that China has always scheduled one drug at a time, pursuant to its law, and that any change in that process would be groundbreaking for China. In spite of the complexity of this process, and the fact that domestic abuse of fentanyl and related substances has not been a problem in China, the Government of China has continued to show an understanding of the problem and a willingness to listen and consider class scheduling.

As the opioid threat continues, the Department and DEA are committed to working with Chinese officials through its well-established bilateral efforts, including: liaison presence, the JLG/CNWG, the BDIWG, and enhancing collaboration with DEA's interagency partners stationed abroad and in the United States.

- 3. What do law enforcement officials in jurisdictions that experienced the opioid epidemic earlier and with greater intensity have to teach their colleagues in jurisdictions that have had less experience in handling the epidemic's consequences? What mechanisms does the Department have in place to facilitate information sharing of this nature?**

**Response:**

As the opioid crisis has spread from specific regions to virtually every area of the country, the Department has relied upon its more experienced law enforcement officials and prosecutors to develop proven and promising national and District-specific strategies. The

skills, lessons, and best practices gleaned by hundreds of seasoned agents and prosecutors through years of experience on investigations and in courtrooms are shared extensively and comprehensively through a number of vehicles and channels. The Department works closely with its state and local law enforcement counterparts to communicate best practices and share lessons learned from our federal partners.

The Department reviews and monitors ongoing efforts in every District to combat the epidemic. To better evaluate promising policies and initiatives, the Attorney General's Advisory Committee (AGAC) has formed a Heroin and Opioid Working Group comprised of 12 U.S. Attorneys from Districts heavily impacted by the opioid crisis. On a recurring basis, the Working Group will report its findings, analyses, and recommendations through the AGAC to the Attorney General for further development and dissemination through the Department's many components.

To further strengthen the Department's efforts to build and share effective responses, the Deputy Attorney General has created a new position, the Director of Opioid Enforcement and Prevention Efforts. The Director's mission is to reduce opioid deaths throughout the nation by developing national investigative and prosecution initiatives and by organizing Departmental litigative support to U.S. Attorneys' Offices. The Director coordinates her work with law enforcement agencies, the Department's Criminal and Civil Division components, and all 94 U.S. Attorneys' Offices. An extensive and robust network has been established for communications concerning opioid prosecutions and related issues through Heroin and Opioid Coordinators who are now designated within every U.S. Attorney's Office.

Because the opioid threat and available resources differ from District to District, each U.S. Attorney's Office has also developed its own, individualized District-Based Opioid Strategy. These Strategies include programs and initiatives in the areas of enforcement, prevention, and treatment. Promising and productive strategies are broadly shared, described in various venues such as training seminars for Assistant U.S. Attorneys (AUSAs), the U.S. Attorneys' Conference, and the U.S. Attorneys' Bulletins. *For example see*, U.S. Attorneys' Bulletin, Volume 66, No. 4, *Fentanyl and Related Threats*, <https://www.justice.gov/usao/resources/united-states-attorneys-bulletins>.

Best practices for prosecutors and investigators are disseminated extensively through seminars and other training events. Regular courses for AUSAs cover productive investigative techniques, effective charging practices, and every aspect of litigating complex cases involving fentanyl and other opioids. In March 2015, DEA released a nationwide alert on fentanyl and fentanyl analogues as a threat to health and public safety. In June 2016, DEA released a Roll Call video to all law enforcement nationwide about improperly handling fentanyl and fentanyl analogues. In June 2017, DEA released an updated video message to law enforcement nationwide about the dangers of fentanyl and fentanyl analogues. In addition, DEA participated in the White House's Interagency Working Group on Fentanyl to develop *Fentanyl Safe Handling Recommendations for First Responders* which was released in the *President's Commission on Combating Drug Addiction and Opioid Abuse's* final report on November 1, 2017. A Roll Call video based on these science-based recommendations will be released by the end of 2018.

Further, through the National Institute of Justice's (NIJ's) Drugs and Crime Research portfolio, and in collaboration with other federal agencies, the Department is investing in developing the evidence base to inform law enforcement best practice with regard to combating the opioid epidemic. This year NIJ plans to fund research projects examining criminal investigations and prosecutions, and drug intelligence and community surveillance relating to drug trafficking markets and use of heroin and other opioids, including fentanyl. *See* <https://www.nij.gov/topics/drugs/Pages/nij-role-in-the-strategy-to-combat-heroin-and-other-opioids.aspx>.

In addition to the general ongoing surveillance described above, the Organized Crime Drug Enforcement Task Forces (OCDETF) has partnered with the Centers for Disease Control and Prevention (CDC) and Customs and Border Protection (CBP) to implement advanced analytical testing of substances at select international ports of entry. NPS, including first-instance fentanyl analogues, are positively and accurately identified within approximately thirty days. Upon identification, publication is made to international, national, regional, and local public health and safety communities, allowing medical examiners, toxicology experts, emergency department personnel, and law enforcement to tailor and expedite responses. The project has spurred both immediate reporting and regularized information sharing on NPS in impacted areas, thereby allowing targeted testing, responses, and outreach on emerging fentanyl analogues and other NPS.

These extensive efforts to train and share best practices throughout the Department and with state and local counterparts will continue.

## Questions from Senator Coons

4. **Wilmington's *News Journal*, reported that between Friday, April 6, 2018, and Monday, April 9, 2018, 36 Delawareans overdosed statewide. In 2016 alone, 154 Delawareans died from opioid-related overdoses, which is a rate of 16.9 deaths per 100,000 persons and higher than the national rate. Delaware is not alone in facing this epidemic. Based on your experience with the opioid epidemic, what are some best practices Delaware should consider implementing?**

### Response:

Delaware, like other states and Districts, must continue to broaden the partnerships that will ultimately reduce the demand for opioids and eliminate the illegal sources. Critical to every effort is collaboration – collaboration between law enforcement agencies, with prosecutors' offices, and across disciplines. No single Department, agency, institution, or initiative can resolve the enormous and complex problems that contribute to this crisis.

In responding to the opioid epidemic, the Department has encouraged U.S. Attorneys' Offices and federal law enforcement to develop initiatives and programs best suited to specific circumstances in their district and to cooperate with their local law enforcement partners. Some districts face significant problems with diversion of prescription opioids, while others are plagued more heavily with illicit opioids. In Delaware, overdoses have been caused by a multitude of sources. For example, a couple in a small town in lower Delaware acquired the fentanyl analogue, furanyl fentanyl, over the dark web from China. The highly potent analogue led to a number of overdoses. In another instance, a multitude of overdoses were traced to a drug dealer from Dover, Delaware who was selling fentanyl-laced heroin.

The resources available to combat the opioid threat also vary from district to district. Some have a robust federal law enforcement presence in the hardest-hit areas while some do not. Some have High Intensity Drug Trafficking Area program (HIDTA) counties with productive task forces, and others have built task forces or collaborative initiatives with federal, state, and local law enforcement agencies and prosecutors' offices.

Because a one-size-fits-all strategy or program cannot satisfy the unique needs of every district, the Department has directed all U.S. Attorneys' Offices to develop individualized district-based opioid strategies. The U.S. Attorney's Office in Delaware (USAO-DE) has developed a comprehensive strategy addressing enforcement, prevention, and treatment. The USAO-DE works closely with DEA and other law enforcement agencies to share intelligence and target suppliers and distributors of heroin, fentanyl, and illegally diverted prescription opioids. These efforts have generated investigations and cases against medical professionals unlawfully diverting opioids and against suppliers of opioids that cause overdose deaths. The USAO-DE is also actively engaged in prevention efforts with an extensive educational program targeting community groups with age-appropriate information focused on opioid abuse deterrence.

The Department continues to develop promising strategies and programs to counter the epidemic. As effective models are identified, they are widely shared with all states and

districts – through conferences, training programs, inter-agency channels, and internal communications. As new strategies become best practices, these will be shared and adopted widely.

5. **According to a report on alcohol, drugs, and health by the Surgeon General, “[i]mplementation of evidence-based interventions . . . can have a benefit of more than \$58 for every dollar spent; and studies show that every dollar spent on substance use disorder treatment saves \$4 in health care costs and \$7 in criminal justice costs.” How would you recommend allocating funding to best combat the scourge of opioids and fentanyl?**

**Response:**

The Department is in full agreement with the Surgeon General’s report on the cost benefits of implementing evidence-based prevention and treatment. In addition, the Department recommends that Delaware ensure that its treatment resources support evidence-based treatment as described in the Surgeon General’s report.

The Department’s Office of Justice Programs (OJP) continues to work to help combat the opioid epidemic facing the nation. In Fiscal Year (FY) 2018, OJP provided \$369 million nationwide to support efforts to address this issue. These funds were allocated as follows:

<b>OJP Programs</b>	<b>FY 2018 Enacted (dollars in millions)</b>
<b>Comprehensive Addiction and Recovery Act (CARA) Programs, Total</b>	<b>\$330.0</b>
• Comprehensive Opioid Assistance Program	[145.0]
• Drug Courts Program	[75.0]
• Justice and Mental Health Collaborations	[30.0]
• Prescription Drug Monitoring Program	[30.0]
• Residential Substance Abuse Treatment	[30.0]
• Veterans Treatment Courts	[20.0]
<b>Paul Coverdell Forensic Science Grants: Forensic Support for Opioid and Synthetic Drug Investigations</b>	<b>17.0</b>
<b>Delinquency Prevention Program: Opioid-Affected Youth Initiative</b>	<b>8.0</b>
<b>Youth Mentoring: Mentoring for Youth Affected by the Opioid Crisis</b>	<b>14.0</b>
<b><i>TOTAL, OJP OPIOID-RELATED PROGRAMS</i></b>	<b><i>\$369.0</i></b>

Additionally, the Department has allocated up to \$2.5M to support the “*NIJ Research and Evaluation on Drugs and Crime FY2018*” solicitation. Additional information regarding these programs may be found at <https://ojp.gov/>. In FY 2019, OJP will continue to invest in activities nationwide to combat the opioid crisis.

Finally, demand reduction and prevention efforts must be complimented by sustained enforcement efforts that disrupt and dismantle drug trafficking organizations (DTOs). Sustained efforts to counter these traffickers is necessary to maintain rule of law.

**6. In 1997, Delaware Superior Court introduced the first statewide drug court in the United States. Before that, the Drug Court Program started in New Castle County. Defendants began to enter the program in April 1994. Now, in part because of successes in states like Delaware, there are over 3,000 drug courts nationwide.**

**a. In your experience, how do drug courts help to address the opioid crisis?**

**Response:**

For individuals in the criminal justice system, drug courts provide an important pathway to get engaged in treatment. For communities hard hit by the opioid epidemic, drug courts are an important component of a response to the opioid crisis.

The District of Vermont has had a post-conviction, pre-sentence drug court in Rutland since 2015. Defendants are allowed to participate only with the consent of the U.S. Attorney's Office. This program provides an alternative to incarceration for pre-trial defendants whose low-level criminal offenses were motivated by their addictions. Under the supervision of a Vermont U.S. District Court Judge, the drug court provides addicts with wrap-around treatment services and intensive community supervision. An AUSA, a defense attorney, a drug treatment specialist, and a U.S. Probation Officer are also involved in oversight of each defendant's progress and each makes recommendations to the judge prior to monthly drug court hearings. During the hearings, the judge speaks directly with the participants. Sanctions and awards are allocated based on performance. Mandatory and random drug testing occurs regularly. If a drug court participant successfully completes the program, the charges against them may be reduced or dismissed altogether. A second federal drug court is being stood up in northern Vermont.

The District of Vermont also has had a re-entry court program in Burlington called Treatment Response and Alternatives to Increase Long-term Success (TRAILS) since 2009. The program involves similar stakeholders, with the Magistrate Judge presiding. The purpose of this court is to oversee the transition of offenders with a history of substance abuse from incarceration back into the community. A drug and alcohol treatment specialist supervises the participants in the program, and the Magistrate Judge holds biweekly court hearings to discuss participants' progress. The program consists of three phases, lasting 12-15 months. Participants who complete the program are rewarded with a one-year reduction in their term of supervision.

The role of prosecutor is a solemn one. In pursuing justice, prosecutors make weighty decisions, including the decision to seek to curtail liberty. It is important to approach the job judiciously and to treat each offender based on their unique circumstances.

**b. What are some best practices for drug courts that you would recommend replicating?**

**Response:**

The National Association of Drug Court Professionals has adopted Best Practice Standards. These standards are based on the expansive body of research spanning nearly 20



years that represents best practices in substance abuse, pharmacology, behavioral health treatment, and criminal justice that, if integrated into practice, will optimize drug court operations. The Standards were released in two volumes and can be found at the following links:

- Volume I - <https://www.nadcp.org/sites/default/files/nadcp/AdultDrugCourtBestPracticeStandards.pdf>;
- Volume II - <http://www.ndci.org/wp-content/uploads/2013/08/Best-Practice-Standards-Vol.-II..pdf>.

The U.S. Attorneys' Office in Vermont believes it is important that the authority of the executive branch to prosecute violations of federal law is not ceded to another branch or to non-governmental actors who may participate on specialty court teams. For this reason, the U.S. Attorneys' Office in Vermont retains authority to decide whether to pursue a conventional prosecution or to consent to participation in drug court. After participation in drug court, the U.S. Attorney's Office also retains the authority to approve any proposed drug court resolution. These decisions are made in consultation with our law enforcement partners, the U.S. Probation Office, and other stakeholders. Another critical element of a successful drug court is accountability. Participants who relapse or otherwise fail to comply with conditions must be held accountable by the Judge, otherwise the program is less effective.

**c. What unique challenges does fentanyl present for a drug court?**

**Response:**

Illicit fentanyl is a particularly lethal synthetic opioid substance that is being mixed with other illicit substances, such as heroin, cocaine, and methamphetamine. Vermont is seeing a spike in positive drug tests for fentanyl in defendants who believed they were only ingesting cocaine. Drug court participants who relapse are at a higher risk of a fatal overdose because of the presence of fentanyl in the drug supply. Fentanyl introduces the need for expanded drug testing capability and the need to train probation officers and law enforcement officers supervising drug court participants on safety precautions to ensure they are not accidentally exposed to fentanyl while conducting searches. Appropriate safety precautions are needed to keep law enforcement and probation officers safe from incidental exposure to fentanyl. Moreover, given that the consequences for relapse can be fatal – including for those who wrongly believe they are using substances less potent than fentanyl or its analogues – accountability must be strictly enforced to preserve the lives of those participants who may be tempted to relapse.

- 7. In the 1980s, in response to the crack epidemic, Congress enacted legislation that created harsher penalties for crack cocaine use, including mandatory minimum sentences. These new penalties for drug use disproportionately affected the African-American community. In addition, according to a 2014 report for the National Academy of Sciences, “[t]he best empirical evidence suggests that the successive iterations of the war on drugs – through a substantial public policy effort – are unlikely to have markedly or clearly reduced drug crime over the past three decades.”**

- a. Please distinguish why increasing the use of mandatory minimum sentences would be the same as or different from the response to the crack cocaine epidemic.
- b. Please explain whether you believe increasing the use of mandatory minimum sentences would effectively stop the spread of fentanyl use, as opposed to the impact achieved for crack cocaine.

**Response:**

The mandatory minimum penalties for crack enacted in the 1980's are not the same as the scheme that exists today. The amounts required to trigger mandatory minimum penalties for crack were significantly raised in the Fair Sentencing Act of 2010. Prior to the Fair Sentencing Act of 2010, five grams of cocaine base (crack), or of a mixture or substance which contains cocaine base, triggered a five-year mandatory minimum; currently, a five-year mandatory minimum is triggered by 28 grams or more. *See* 21 U.S.C. § 841. By contrast, mandatory minimum penalties for fentanyl are triggered at 40 grams. Mandatory minimum penalties need to be calibrated to respond to the potency of the substance and the harm the drug causes and fentanyl is significantly more lethal than crack.

According to the CDC, there were 10,619 overdose deaths due to cocaine in 2016. *See* CDC, PROVISIONAL COUNTS OF DRUG OVERDOSE DEATHS AS OF 8/6/2017; *see also* National Institute on Drug Abuse, OVERDOSE DEATH RATES (Revised September, 2017). Although people with addiction may tolerate a higher quantity, as little as 1.2 grams of pure cocaine (or cocaine base/crack) is an oral lethal dose for most people (crack is also injected, and the lethal dose is lower for intravenous administration). An amount of 28 grams thus contains up to 23 lethal doses, and 228 grams contains up to 190 lethal doses. Fentanyl is an extremely deadly substance, with the European Monitoring Centre for Drugs and Drug Addiction reporting a lethal dose is only two milligrams, which means there are potentially 500 lethal doses in one gram and 500,000 lethal doses in one kilogram of pure fentanyl.

Mandatory minimum penalties no longer apply in all cases. In 1994, Congress enacted the drug safety valve, which provides that drug defendants for which a mandatory minimum penalty is applicable may be sentenced as though no mandatory minimum penalty applied, if certain conditions are met. *See* 18 U.S.C. § 3553(f), Limitation on Applicability of Mandatory Minimum Penalties in Certain Cases (Violent Crime Control and Law Enforcement Act of 1994, § 80001, Pub. L. No. 103-322, 108 Stat. 1796). Current law also provides that courts have authority to impose a sentence below the level set by a mandatory minimum if the government files a motion to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. *See* 18 U.S.C. § 3553(e) (Limited Authority To Impose a Sentence Below a Statutory Minimum).

The practical effect of these and other changes to the sentencing regime is that fewer than one in three federal crack defendants are subject to a mandatory minimum at sentencing. Of the 1562 defendants convicted of a crack cocaine offense during FY 2016, 728 of these (46.6 percent) were convicted of an offense carrying a mandatory minimum penalty, 220 of these defendants were relieved of the mandatory minimum penalty under § 3553(e) or (f), resulting in 508 defendants (32 percent) subject to a mandatory minimum penalty at sentencing. *See* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES FOR DRUG

OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, OCT. 2017, App. E, tab. E1. For the remaining 1,062 defendants (728 convicted of an offense not carrying a mandatory minimum, and the 220 defendants relieved from the mandatory minimum at sentencing), courts must apply the U.S. Sentencing Guidelines. Under the current guidelines, 28 grams to 112 grams of crack results in a guideline range of 51-63 months for a defendant with up to one criminal history point. In practice, after pleading guilty, the range would likely drop to 37-46 months.

When considering if increasing the use of mandatory minimum sentences would effectively stop the spread of fentanyl use, the Department urges Congress to consider mandatory minimums for drug trafficking as part of the overall strategy to reduce overdose deaths. Because fentanyl is so potent, it is so much more likely to cause overdose deaths than any other substance, and the substance is so cheap compared with heroin and other opioids, a successful strategy to reduce overdose deaths should – and indeed must – impose significant costs on those who traffic in fentanyl. Drug trafficking is an economic activity. Expanding the application of mandatory minimum penalties for fentanyl trafficking will increase both the certainty and the severity of punishment and will drive up costs. The Department also urges Congress to consider new penalties, aimed specifically at traffickers who mix or substitute fentanyl with or for other substances, because we know that this practice leads to deaths.

8. **A 2011 congressional report by the United States Sentencing Commission found that mandatory minimum sentences were often applied too broadly, were set too high, and were unevenly applied. If Congress enacts legislation that reduces the threshold required to impose mandatory minimum sentences on people trafficking or distributing fentanyl, how would you recommend that we ensure that the problems identified by the United States Sentencing Commission do not persist?**

**Response:**

While the Department understands the concerns about uneven application of sentencing laws, we note that the Attorney General has taken steps to address this issue by directing prosecutors to charge, except in unusual cases, the most serious, readily provable offense in all cases, including cases where a mandatory minimum is applicable. *See Memorandum from Attorney General Jeff Sessions to All Federal Prosecutors* (May 10, 2017). This memorandum explains that the purpose of this charging policy is to ensure that the law is enforced consistently and fairly. The Deputy Attorney General has been directed to oversee the implementation of this policy and to issue any clarification and guidance he deems appropriate for its just and consistent application. *Id.*

Turning to the mandatory minimums for fentanyl specifically, the current penalties seriously underestimate the potency and toxicity of the substance. A 5-year mandatory minimum sentence applies for a drug trafficking conviction involving 40 grams of fentanyl (or of a mixture or substance containing a detectable amount fentanyl), and a 10-year mandatory minimum sentence applies to a conviction involving 400 grams or more (or mixture). 21 U.S.C. § 841. As little as two *milligrams* (0.002 grams) of pure fentanyl is a lethal dose for most people (although it may be higher in some users). The current 5-year penalty is thus triggered by an amount of fentanyl containing up to 20,000 lethal doses, and the 10-year penalty is triggered by an amount containing up to 200,000 potentially lethal doses. In the Department's view, 5- and 10-year sentences should be applied to amounts containing far

fewer lethal doses. As discussed above, in striking contrast with fentanyl, the 5-year mandatory minimum penalty for crack (28 grams) is triggered by an amount containing about 23 lethal doses, and the 10-year (228 grams) is triggered by an amount containing up to 190 lethal doses.

Heroin provides another instructive comparison. Whereas the average lethal dose for fentanyl is about 2 milligrams (or 0.002 gram), the average lethal dose for heroin is about 200 milligrams (0.2 gram). A 10-year mandatory minimum is triggered by 400 grams of fentanyl and 1 kilogram of heroin. It does not make sense that the same 10-year mandatory minimum penalty applies to both 400 grams of fentanyl, which is sufficient for 200,000 lethal doses or four million therapeutic doses, and one kilogram of heroin, which is sufficient for 5,000 lethal doses.

In fact, fentanyl is so potent at such low doses that DEA has issued guidance to law enforcement personnel regarding the safe handling of fentanyl at crime scenes which puts it on par with a weapon of mass destruction. *See* U.S. DEPARTMENT OF JUSTICE, FENTANYL: A BRIEFING GUIDE FOR FIRST RESPONDERS (June 2017) (“s]ince fentanyl can be ingested orally, inhaled through the nose or mouth, or absorbed through the skin or eyes, any substance suspected to contain fentanyl should be treated with extreme caution as exposure to a small amount can lead to significant health-related complications, respiratory depression, or death”); *see also* U.S. DEPARTMENT OF JUSTICE, DEA Warns Local Law Enforcement And First Responders About The Dangers Of Fentanyl Exposure (June 6, 2017).

Because of the potency of fentanyl, traffickers are shipping and dealing in four gram and two gram packages, in purities above 90 percent, far below amounts required by current federal law for even the 5-year mandatory minimum penalty. When the 5-year statutory mandatory minimum does not apply to these low quantities, courts must rely on the sentencing guidelines, and for small amounts of fentanyl, the guidelines are inadequate. For example, a defendant with up to one previous conviction, the guideline range for trafficking in any amount of fentanyl less than four grams is 10-16 months (and if the defendant pleads guilty, this range would drop further to 6-12 months, with eligibility for probation). Such an outcome is wholly inadequate for a defendant who could sell enough fentanyl to kill almost 2,000 people.

**9. Please explain the role of prosecutorial discretion in a situation that may trigger a mandatory minimum sentence.**

**Response:**

As noted above, the Attorney General has directed federal prosecutors to charge the most serious, readily provable offense in all cases, including cases where a mandatory minimum is applicable. *See Memorandum from Attorney General Jeff Sessions to All Federal Prosecutors* (May 10, 2017). The memorandum explains that the purpose of this charging policy is to ensure that the law is enforced consistently and fairly. The Deputy Attorney General has been directed to oversee the implementation of this policy and to issue any clarification and guidance he deems appropriate for its just and consistent application. *Id.* The memo also notes that there will be circumstances in which good judgment would lead a prosecutor to conclude that a strict application of this charging policy is not warranted, and directs that in such cases, prosecutors should carefully consider whether an exception may be

justified. *Id.* For example, where prosecutors conclude that based on the circumstances of the case and the defendant's favorable characteristics or minor role in the offense, a mandatory minimum sentence would not be appropriate, they have the discretion not to pursue a charge triggering that mandatory minimum. Moreover, the Attorney General has also directed prosecutors to disclose to the sentencing court all facts that impact mandatory minimum sentences, and to seek, in all cases, a reasonable sentence under 18 U.S.C. § 3553. Section 3553 provides that when imposing a sentence, courts must consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; the need for the sentence to afford adequate deterrence to criminal conduct; and the need for the sentence to protect the public from further crimes of the defendant.

**10. Senator Hoeven and I introduced the Illegal Synthetic Drug Safety Act (S.658) to stop synthetic drugs from being sold in the United States. The legislation amends the Controlled Substances Act in order to close a loophole that enables companies to circumvent the law. Currently, some producers alter the molecular structure of fentanyl and other controlled drugs to create analogues, which are technically different but have the same dangerous risks as the original drug. Under the current law, analogues of controlled substances that are "intended for human consumption" are to be considered Schedule I substances. However, companies that produce analogue substances label their products as "not for human consumption," even though the drugs are purchased for that exact purpose, and as such, exploit a loophole in current law. Our bill would close this loophole by removing the "intended for human consumption" language from the Controlled Substance Act. If enacted, do you believe that this law would help combat the opioid epidemic?**

**Response:**

In 1986, Congress provided a valuable law enforcement tool via the Controlled Substance Analogue Enforcement Act with the authority to investigate and prosecute manufacturers and distributors of dangerous substances who were exploiting a loophole in the CSA. The Act did not control drugs per se, but rather, allowed certain substances to be treated under the CSA to the extent they were intended for human consumption. The Act requires the demonstration that a substance was intended for human consumption and similar in structure and effect as a named controlled substance. The labeling of drug products with "not for human consumption" was a deliberate attempt to evade prosecution for substances with no approved medical use and unpredictable outcomes. The manufacture and distribution of highly potent and lethal synthetic opioids is an example of the harm and reckless nature of these activities.

Despite attempts to evade the CSA, most prosecutors find that the need to prove the element "intended for human consumption," strengthens their presentation of the evidence and shows a complete picture of the criminal conduct – including the veneer of efforts to pass off a product that is clearly marketed and sold for its psychoactive effects on the human central nervous system as "cleaning fluid" or "body powder" or some other innocuous substance. While elimination of an additional element might seem like a simplification for prosecutors, a

useful body of case law has developed over the years and it could be a hindrance to successful prosecutions.

The Department and DEA support ongoing Congressional efforts to assist investigators and prosecutors to protect the public from those distributing these deadly substances at all levels of the supply chain. We look forward to working with your staff on strategies that may improve the ability to help combat the opioid epidemic.