

# **Criminal Division Title III Risk Mitigation Protocols for Investigations Involving Substances Containing Fentanyl**

**These protocols are intended for the guidance of law enforcement officers and prosecutors (the “investigative team”) utilizing Title III authority in investigations that have encountered or are reasonably likely to encounter substances containing fentanyl, fentanyl analogues, or fentanyl-related substances under 21 C.F.R. § 1308.11(h)(30)(i) (“fentanyl”). These protocols are not intended to limit the use of Title III authority in investigations involving fentanyl. Rather they are an acknowledgment that the presence of fentanyl, even in small doses, can be fatal. This increased risk of harm to public safety requires additional consideration and prompt action by those in a position to intervene. Therefore, investigative teams must continually assess the potential public safety risks posed by foregoing immediate reasonable enforcement action to prevent the trafficking of fentanyl against the broader public safety benefits that would ultimately be achieved through a successful investigation and prosecution.<sup>1</sup> Prior to seeking Criminal Division authorization to apply for Title III authority in investigations involving or reasonably likely to involve fentanyl, members of the investigative team must review and discuss these protocols to ensure that all agree to adhere to and apply them in their investigation.**

**These protocols are for internal use only and do not create or confer any privileges, benefits, or substantive or procedural rights enforceable by any party or witness in any administrative, civil, or criminal matter.**

1. The investigative team should regularly confer regarding evidence developed during the investigation that affects potential risks to public safety associated with the trafficking of fentanyl in their investigation and area of operation.
2. In connection with any Title III application submitted to the Office of Enforcement Operations (OEO), the investigative team must notify OEO of known, credible evidence of fentanyl trafficking, and the actions contemplated or taken by the team in accordance with the protocols.
3. For investigations involving or reasonably likely to involve fentanyl, a supervisory attorney<sup>2</sup> must review and approve the investigative team’s procedure to evaluate and address the

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<sup>1</sup> See Memorandum of Deputy Attorney General James M. Cole, Baseline Risk Assessment and Mitigation Policies for Law Enforcement Operations in Criminal Matters, December 7, 2013, available for U.S. Attorney’s Offices [here](#), and for DOJ components [here](#) (setting “forth baseline principles that reflect the Department’s approach to risk assessment in criminal investigations and operations,” and highlighting that investigative teams “should be mindful whether the benefits of any operation continue to outweigh the potential public safety risks as the investigation moves forward. Ongoing risk assessment is the product of good judgment and common sense by agents and prosecutors who are attentive to the presence of public safety risks associated with an investigation and actively take steps to address those risks as they occur”).

<sup>2</sup> A supervisory attorney includes a supervisory Assistant U.S. Attorney, as designated by the U.S. Attorney’s Office, and, in a matter staffed by a DOJ component attorney, a supervisory component attorney designated by the relevant Division or Section leadership.

public safety risks encountered or likely to be encountered. This review and approval should occur prior to OEO submission.

4. Additionally, if an investigation involves or is reasonably likely to involve aggravating factors that significantly increase the threat to public safety, the U.S. Attorney and, in a matter staffed by a DOJ component attorney, the Head of the Component must be fully briefed on and approve the investigation. The investigative team must also brief the appropriate supervisors at the law enforcement agency(ies) leading the investigation. Aggravating factors include but are not limited to: (1) specific and credible evidence of overdoses from fentanyl connected to the organization under investigation or any subject of the investigation; (2) the possession by or distribution of fentanyl to unsuspecting or vulnerable individuals (*e.g.*, minors); or (3) the storage or distribution of significant quantities of fentanyl, the attempted seizure of which would present an opportunity to significantly impact downstream distribution.
5. The investigative team may exercise discretion in determining whether to take action to prevent the trafficking of fentanyl, understanding that protecting public safety is paramount and the benefits to be achieved through preserving the investigation must be assessed against the potential public safety risks posed by foregoing immediate reasonable enforcement action. In circumstances involving aggravating factors, the investigative team, including leadership at the U.S. Attorney's Office/DOJ component and law enforcement agency(ies), must assess the operational plan and the need to act promptly to prevent or mitigate the threat to public safety considering this heightened risk.
6. If the investigative team develops probable cause to believe that fentanyl is being or will be trafficked, including distribution from a specified identifiable location or storage at a specified identifiable location for later distribution, the investigative team should promptly consider taking reasonable law enforcement actions to disrupt the trafficking of and/or seize the fentanyl. Such actions may include but are not limited to: (1) arresting or notifying suspects; (2) conducting walled-off stops; (3) conducting a controlled purchase; (4) increasing a visible presence of law enforcement at a particular time and location relevant to the distribution; (5) disclosing information to state and local law enforcement officers for appropriate action; and (6) applying for and executing search warrants. The reasonableness of these actions should be evaluated in the context of the overall investigation, as well as the nature, specificity, and immediacy of the threat, understanding that public safety is paramount. If the investigative team determines that broader public safety benefits would ultimately be achieved by not taking such an enforcement action, they must notify, consult with, and obtain the concurrence of the supervisory attorney referenced above, or a comparable supervisory attorney, and the law enforcement agency(ies) leading the investigation. This consultation and concurrence should take place prior to the investigative team deciding not to take that action.