Model Expedited Scheduling of Controlled Substances Act

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Model Expedited Scheduling of Controlled Substances Act

Policy Statement and Background

The emergence and proliferation over the past 10 years of manufactured drugs designed to mimic the effects of controlled substances is a significant public health threat facing the United States and other countries today. With unfortunate regularity, communities are experiencing outbreaks of localized overdoses or bad reactions due to the ingestion of one or more of these substances.[1] Colloquially referred to as "synthetic drugs" or "designer drugs," the United Nations Office on Drugs and Crime ("UNODC") uses the terms "new psychoactive substances" or "novel psychoactive substances" ("NPS") to describe them. UNODC's definition of NPS is "substances of abuse, either in a pure form or a preparation, that are not controlled by the 1961 Single Convention on Narcotic Drugs or the 1971 Convention on Psychotropic Substances, but which may pose a public health threat."[2]

NPS fall into several structural categories that include synthetic cannabinoids (also known as "synthetic marijuana," "spice," or "K2"), substituted cathinones (also known as "bath salts"), phenethylamines, opioids, tryptamines, benzodiazepines, and several others. According to UNODC's World Drug Report 2018, in the nine years between 2009 and 2017, over 100 different countries report encountering more than 800 different NPS. The 800+ substances reported to UNODC during those years include more than 250 different synthetic cannabinoids, and approximately 150 different substances in each of the cathinone, phenethylamine, and "other" (which include fentanyl analogues and benzodiazepines) categories.[3]

The concerns about NPS stem from several factors. First, ingesting NPS can cause a number of serious health problems, including increased heart rate blood pressure, agitation, anxiety, nausea, vomiting, tachycardia, tremors, seizures, hallucinations, paranoid behavior, non-responsiveness, and death. Second, products containing NPS are readily available to buyers, including at convenience stores, gas stations, and via online sellers, sometimes in packaging that appears

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[1] As one in a sea of examples, within the span of two days in July 2018, reports in Philadelphia and Washington, D.C. described recent overdose spikes caused in whole or in part by synthetic drugs. Marisa Penaloza, *D.C. Has Had More Than 300 Synthetic Marijuana Overdoses in 2 Weeks*, NPS (July 28, 2018), https://www.npr.org/2018/07/27/632261920/d-c-has-had-more-than-300-suspected-k2-overdoses-in-2-weeks; Joel Wolfram, Synthetic marijuana detected in drug sample from Philly overdose spike, WHYY (July 27, 2018), https://whyy.org/articles/synthetic-marijuana-detected-in-drug-sample-from-philly-overdose-spike/.

[2] *UNODC Early Warning Advisory on New Psychoactive Substances*, UNODC.org, https://www.unodc.org/LSS/Page/NPS (last visited Aug. 3, 2018)

[3] UNODC, *World Drug Report 2018* 60 (June 2008), http://www.unodc.org/wdr2018/prelaunch/WDR18_Booklet_3_DRUG_MARKETS.pdf.

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designed to attract teenagers and young adults. Third, the clandestine chemists developing NPS often reconfigure the chemical structures of their products to create new versions of drugs in an effort to circumvent controlled substance laws. Indeed, in some countries, people refer to certain NPS as "legal highs," because of the belief (whether accurate or mistaken) that local drug prohibitions do not apply.

Ideally, any comprehensive approach to reducing NPS misuse should address at least: (1) education about the dangers of use (prevention); (2) ensuring adequate resources devoted to intervention, treatment and recovery supports, and (3) supply reduction (primarily law enforcement). Supply reductions include decreasing the amount of NPS as well as strengthening deterrence by increasing the likelihood that an NPS manufacturer/distributor/seller faces consequences for his or her conduct, via criminal penalties, economic losses, or both.

One available avenue for reducing NPS supply is classifying each new substance that presents a threat to public health as a controlled substance. By doing so, state and federal restrictions on the manufacture and sale of controlled substances can be applied to NPS. The ever-changing chemical structure of emerging substances makes this task difficult. By the time that policymakers can move from the initial discovery of a new substance to permanent scheduling as controlled (which can take over a year), a different substance replaces the old one and the process must restart. Accordingly, the National Alliance for Model State Drug Laws ("NAMSDL") recommends a multi-faceted approach to controlled substance scheduling containing each of these aspects: (1) a robust set of regularly updated controlled substance schedules covering as many NPS as possible; (2) a method to schedule emerging NPS on an expedited (yet temporary) basis, while authorities decide whether, and work through the more timing consuming process, to schedule on a permanent basis; and (3) a means by which a yet-to-be-scheduled analogue can be treated as a controlled substance even before the temporary scheduling period begins.

NAMSDL's Model Expedited Scheduling of Controlled Substances Act addresses approach (2). As of 2017, the laws/regulations of only 18 states plus the District of Columbia explicitly provide a process for the expedited scheduling of controlled substances. The effective period for all but one of these temporary scheduling provisions is less than 18 months, making it hard for permanent scheduling activity to take place during the temporary period. Moreover, while many states authorize controlled substance scheduling via regulatory rulemaking—and thus allow quick scheduling actions through emergency rules—these rules typically are in effect only for 120-180 days, which allows even less time to cover the entire process of permanent scheduling.

This Model Expedited Scheduling Act provides a better way to counter the problem caused by ever-changing NPS structure by instituting a streamlined method in which the state's controlled substance scheduling authority (as defined) can quickly schedule a controlled substance for a

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temporary period of at least 18 months.[4] During the period of temporary scheduling, state agencies can undertake additional research to determine the necessity for permanent scheduling. The express terms of the Act, however, do not limit the initiation of the expedited scheduling process to only NPS or analogues. The purpose of this is to avoid creating a definition for one or both terms that unintentionally prevents application of the process to a particular harmful substance. Additionally, the Act provides for automatic commencement of the expedited scheduling process when the scheduling authority receives: (1) notice of a prosecution involving an analogue; or (2) a request from the state Office of Drug Policy [or equivalent executive-level agency] or the state's Board of Forensic Science [or equivalent agency].

[4] The temporary period can be extended an additional six (6) months in certain cases where permanent scheduling must be approved by the state legislature.

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Model Expedited Scheduling of Controlled Substances Act

Highlights

- Allows the state controlled substance scheduling authority, as defined, to schedule controlled substances on an expedited basis.

- Provides a process under which the scheduling authority can place a substance under control temporarily in order to allow time for additional research related to the substance.

- Sets the temporary scheduling period at eighteen (18) months, with a six (6) month extension available in circumstances where permanent scheduling must occur through a state legislature that did not meet during the eighteen (18) month period.

- Provides for the automatic commencement of the expedited scheduling process when the scheduling authority: (1) receives notification, pursuant to the [state equivalent of Section Five of NAMSDL's Model Controlled Substance Analogue Statute], of the initiation of a prosecution involving a controlled substance analogue; or (2) the state Office of Drug Policy [or equivalent executive-level agency] or the state's Board of Forensic Science [or equivalent agency] requests the scheduling authority to begin the expedited scheduling process for any substance that would meet the criteria for scheduling under state law.

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SECTION I. SHORT TITLE.

This Act is known and may be cited as the "Model Expedited Scheduling of Controlled Substances Act" (the "Act").

SECTION II. PURPOSE

The purpose of this Act is to provide a streamlined process whereby a state may temporarily schedule a substance as controlled for a period of 18 months. During that period, the state can perform additional research on the substance before deciding whether to schedule it permanently.[5] The components of this law reflect the need for states to not only develop mechanisms to temporarily schedule emerging substances but also to focus on shortening the time from initial substance discovery to completed scheduling action.

SECTION III. CONTROLLED SUBSTANCE SCHEDULING AUTHORITY.[6]

For purposes of this Act, the phrase "controlled substance scheduling authority" or "scheduling authority" refers to the individual or entity within [state] having the authority to permanently schedule controlled substances. If such authority within the state rests with the state legislature, the phrase "controlled substance scheduling authority" or "scheduling authority" refers to the individual or entity within [state] that has oversight of controlled substances.

[5] The express terms of this Act do not limit the initiation of the expedited scheduling process to only "new/novel psychoactive substances" or "controlled substance analogues." This avoids creating a definition for one or both of those terms that unintentionally restricts application of the process to a particular substance. Accordingly, under this Act, the state's controlled substance scheduling authority may institute expedited scheduling for any substance that meets the requirements of Section IV. However, the process likely will be used most commonly to temporary schedule recently emerging new/novel psychoactive substances while additional research and permanent scheduling is completed.

[6] The Act grants expedited scheduling authority to the state's "controlled substance scheduling authority," as that term is defined in Section III. In many states, the scheduling authority is the same state agency that has the power to schedule a substance permanently (such as a state Board of Pharmacy). In other states, however, such authority rests with the state legislature. In those cases, this Act grants expedited scheduling authority to the state agency charged with oversight of controlled substances, which should be able to act more nimbly than the legislature.

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SECTION IV. AUTHORIZATION FOR EXPEDITED SCHEDULING.[7]

1) By rule and without regard to the scheduling requirements of [state code provision providing the authority to schedule substances], the controlled substance scheduling authority may schedule a substance in Schedule I or II of the [state equivalent of the federal Controlled Substances Act schedules of controlled substances] regardless of whether the substance is substantially similar to a controlled substance if:
   a) The scheduling authority finds that scheduling the substance on an expedited basis is necessary to avoid an imminent hazard to the public safety; and
   b) The substance is not included in any other schedule or no exemption or approval is in effect for the substance under Section 505 of the federal Food, Drug, and Cosmetic Act, 21 U.S.C. Sec. 355.

2) In making the determination of whether to schedule a substance on an expedited basis, the scheduling authority shall assess the degree of danger or probable danger of the substance by considering the following:
   a) The actual or potential abuse of the substance, including:
      (1) Its history and current pattern of abuse;
      (2) The scope, duration, and significance of abuse; and
      (3) A judgment of the degree of actual or possible detriment that may result from the abuse of the substance;
   b) The risk to public health; and
   c) Whether or not the substance is scheduled on a temporary basis under federal law.

3) In making the determination of whether to schedule a substance on an expedited basis, the scheduling authority may assess the extent to which there is clandestine importation,

[7] Section IV is based upon the expedited scheduling actions contained in Uniform Controlled Substances Act ("UCSA") § 201(g), Haw. Rev. Stat. § 329-11, Kan. Stat. Ann. § 65-4102, and Wash. Rev. Code § 69.50.201. Briefly stated, the Act specifies a scheduling approach similar to the authority granted to the U.S. Attorney General to temporarily place a substance into federal Schedule I under 21 U.S.C. § 811(h). In states where permanent scheduling actions must be approved by the state legislature, the standard eighteen (18) month temporary scheduling period may be extended an additional six (6) months if the state legislature did not meet during the 18-month period.

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manufacture, or distribution of said substance.

4) For any substance added on an expedited basis under this Section, the scheduling action shall be in effect for a temporary period not to exceed eighteen (18) months, except where the following two conditions are both met, in which case the temporary control may be extended by an additional period not to exceed six (6) months:
   a) Permanent scheduling actions must be approved by the state legislature; and
   b) The legislature did not meet during the initial eighteen (18) month period.

5) If the temporary scheduling action is not formally adopted by the [scheduling authority or state legislature, as appropriate] during the temporary period, the expedited scheduling action shall expire.

SECTION V. EXPEDITED SCHEDULING PROCESS.[8]

1) Upon making the initial determination to schedule a substance temporarily on an expedited basis, the controlled substance scheduling authority shall post a public notice of that decision for public inspection. The notice shall be posted at the state capitol, in the office of the governor, on the scheduling authority's website, and on any other state website designated for posting all meetings and notices. Notice of the proposed action shall also be sent to the state's Office of Drug Policy [if established] and the state's Board of Forensic Science [or equivalent agency].

2) The public notice shall set a date, time, and location for a hearing on the proposed expedited scheduling action at least thirty (30) days after the date the public notice is posted.

3) The public notice shall recommend that any person who wishes to object to the proposed expedited scheduling action should appear in person at the hearing to explain the basis for

[8] This Section contains a specified timeline for expedited scheduling modeled after an administrative hearing process, based off the scheduling process used in Virginia. The scheduling authority must hold a hearing concerning the proposed scheduling change at least thirty (30) days after providing notice, and then vote on the change within 24 hours of the conclusion of the hearing. The purpose of this Section is to encourage states to develop specific procedures to ensure proposed temporary scheduling actions do not stall.

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the objection.

4) Once the hearing concludes, the scheduling authority shall issue a ruling within twenty-four (24) hours that either upholds the proposed expedited scheduling action or withdraws it.

SECTION VI. INITIATION OF EXPEDITED SCHEDULING THROUGH NOTICE.[9]

1) Upon receipt of a notice under [state equivalent of Section IV(2) of NAMSDL's Model Controlled Substance Analogue Act] of the initiation of a prosecution involving a controlled substance analogue, the controlled substance scheduling authority shall initiate the expedited scheduling process for the analogue pursuant to this Act within thirty (30) days.

2) The state's Office of Drug Policy [if established, or an equivalent executive-level agency] or the state's Board of Forensic Science [or equivalent agency] may request that the scheduling authority schedule on an expedited basis any substance that would meet the criteria for scheduling under state law. The scheduling authority shall initiate scheduling of the requested substance on an expedited basis pursuant to this Act within thirty (30) days.

SECTION VII. LIMITATION OF AUTHORIZATION.[10]

The authorization to control provided to the controlled substance scheduling authority under this Act does not extend to distilled spirits, wine, malt beverages, or tobacco as those terms

[9] This Section allows two types of notice to trigger the initiation of the expedited scheduling process. One type of notice is when the scheduling authority receives information pursuant to the state statutory equivalent of Section IV(2) of NAMSDL's Model Controlled Substance Analogue Act (similar to UCSA § 214) that a prosecution was or will be initiated against a person accused of a crime related to an analogue. The other type of notice allows certain state agencies with considerable expertise in emerging drug trends, such as the state Office of Drug Policy and the state Board of Forensic Science, to request specifically that the scheduling authority schedule a substance on an expedited basis. This notice is based upon that provided in Ken. Rev. Stat. § 218A.020(5).

[10] This Section provides that the emergency scheduling powers under this Act do not include the scheduling of certain substances not typically considered controlled drugs.

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are defined or used in [code section].

SECTION VIII. RULES AND REGULATIONS.

State agencies and officials shall promulgate rules and regulations necessary to implement their responsibilities under this Act.

SECTION IX. SEVERABILITY.

If any provision of this Act or application thereof to any individual or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provisions or applications, and to this end, the provisions of this Act are severable.

SECTION X. EFFECTIVE DATE.

This Act shall be effective on [specific date or reference to normal state method of determination of the effect.]

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