

NAMSDL



National Alliance for Model State Drug Laws

SUPPLEMENT TO CONTROLLED SUBSTANCE ANALOGUES STATUTORY COMPARISON

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The main crux of the federal Controlled Substances Act analogue language is that it requires both that the substance have a substantially similar chemical structure and that it have a substantially similar effect on the central nervous system or which an individual represents to have a substantially similar effect on the central nervous system as a scheduled substance. It is the “and” requirement that has led to so many issues with prosecuting the new synthetic substances or designer drugs on the market today. There simply isn’t enough scientific research on both the chemical structure and the effect on the body to allow prosecutors the ability to prove their cases in most situations. About one-third (1/3) of the states replaced the “and” with “or” so that they only have to prove one prong of the statute rather than both (AR, CA, DE, IL, NE, NM, OK, PA, SC, UT).

Other states do not include the “and” or “or” language, replacing those with just a semi-colon between the sections as in the current federal statute. In most jurisdictions, including federal, that has been interpreted to mean “and.”

From 2011 to 2012, five states either added or amended their controlled substance analogue statute – Alabama, Delaware, Oklahoma, Tennessee, and Utah. Alabama added an extensive controlled substance analogue statute, which is attached hereto as Exhibit 1. They tied it to the generic language for synthetic cannabinoids, and also included two provisions that specifically target cannabinoid-type drugs – a substance may be a controlled substance analogue if 1) the substance has been demonstrated to have binding activity at one or more cannabinoid receptors; or 2) is capable of exhibiting cannabinoid-like activity. It does also include the requirement that it be “chemically similar” to the chemical structure of another controlled substance listed in Schedules I or II. “Chemically similar” is probably a far lower legal threshold to meet than “substantially similar.”

Delaware has a “designer drug” statute that is similar to the controlled substance analogue statute. It previously included a list of chemical classes and was amended in 2012 to add cannabinoids, cathinones, and any synthetic analogue of a controlled substance.

Oklahoma amended their “synthetic controlled substance” definition to bring it more in line with the traditional controlled substance analogue statutes.

Another common problem experienced by prosecutors and other law enforcement officials in successfully prosecuting a synthetic substances case under the controlled substance analogue statute is the provision that substances not intended for human consumption are not classified as controlled substance analogues. As a result, manufacturers and distributors of synthetic drugs label their products as “not intended for human consumption” to avoid falling under the controlled substance analogue statute.

Tennessee probably has one of the better new controlled substance analogue statutes around. It is attached as Exhibit 2. It attempts to get around the issue with the requirement that the substance be intended for human consumption by including several different factors to be considered when trying to determine if a substance is an analogue. For instance, one of them is the difference between the price at which the substance is being sold and the price at which the substance it is purported to be or advertised as is normally sold. So, if a packet of incense normally sells for \$2.99 and the retailer is selling it for \$19.99 or, more likely, \$29.99, then it could come under the analogue definition. Their section (a)(2)(C) is also an interesting attempt to get around the human consumption requirement because it

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requires that it a) not be for human or animal consumption and b) that as packaged it presents no significant potential for abuse. However, it appears to be limited to substances that contain a controlled substance.

Illinois did not modify their controlled substance analogue statute, but added a definition of “synthetic drug product” and added crimes and penalties for synthetic drug products and misbranded products. The definition of “synthetic drug product” includes only those substances listed in their controlled substances act in subsections (d) and (e), which are their cathinone, cannabinoid, and other synthetic controlled drugs sections. Illinois’ statutes and other provisions related to misbranded products is their attempt to prosecute those individuals who attempt to circumvent the human consumption requirement by labeling their products as “not intended for human consumption.”

South Dakota passed legislation which was signed by their Governor on March 6, 2013 which added a definition for controlled substance analogue. The definition provides that a controlled substance analogue is:

A substance that differs in its chemical structure to a controlled substance listed in or added to the schedule designated in schedule I or II only by substituting one or more hydrogens with halogens or by substituting one halogen with a different halogen.

It also provides that a substance that is an alkyl homolog of a controlled substance listed in or added to schedules I or II is a controlled substance analogue. Additionally included in the definition is the familiar controlled substance analogue language from the federal controlled substances act. The South Dakota language is attached hereto as Exhibit 3.

Several other states have proposed bills to include definitions related to analogs or synthetic drugs. Arizona has a bill that would add a definition of “drug analogue” to their controlled substances act which mimics the federal definition of controlled substance analogue. The bill passed the Arizona Senate, but has been completely overhauled by the House. If passed in its present form, the bill would not provide a controlled substance analogue definition.

Maine has proposed to add a definition of “synthetic cannabinoid” which applies only to cannabinoids. It requires that it have been demonstrated to have binding activity at one or more cannabinoid receptors or is a chemical analogue or isomer of a substance that has been demonstrated to have binding activity at one or more cannabinoid receptors. Maryland also has a proposed bill that was just amended to add a definition of “cannabimimetic agents” and includes the synthetic cannabinoid generic language. It previously proposed to add a definition of “synthetic cannabinoids.”

Minnesota has a bill proposing to add a definition for “synthetic drug look-alike substance” that combines the substantially similar effect language with their language on synthetic drugs. “Synthetic drug look-alike substance” is any substance that a) a reasonable person would believe is a synthetic drug; b) a reasonable person would believe is being purchased or sold as a synthetic drug; or c) a person knows or should have known was intended to be consumed by inhalation, injection, ingestion, etc., and consumption was intended to cause or simulate a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than a controlled substance in schedule I.

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Montana just sent a bill to their Governor for signature that would add a definition of “dangerous drug analogue.” It is a bit similar to the controlled substances act analog definition. It defines a “dangerous drug analogue” as a substance that is structurally related to or chemically derived from a drug in Schedules I – V or that is expressly or impliedly represented to produce or does produce a physiological effect similar to or greater than the effect of a drug in Schedules I – V. There’s no mention of human consumption, and it adds in the “chemically derived from” language which is similar to Tennessee’s requirement that a substance be a derivative of or substantially similar to a controlled substance.

Finally, Tennessee also has a bill that would change their newly added controlled substance analogue statute which was sent to their Governor on April 5, 2013 for signature. The new language sets out what is required to prove that a substance is substantially similar in chemical structure saying that to be an analogue, the structure of the item tested differs in no more than two atoms, one functional group, or one double bond from the structure of a controlled substance. This is probably being pushed through so that both prosecutors and defense attorneys know what must be proven in order to demonstrate that a substance is substantially similar to a controlled substance. This issue comes up a lot in appeals, so having it set out in statute is probably an attempt to forestall a lot of those cases. At this time, Tennessee and South Dakota are the only two states that include, or would include, definite parameters for what qualifies structurally as an analogue.

EXHIBIT 1

Code of Alabama (2013)
Title 20. Food, Drugs, and Cosmetics.
Chapter 2. Controlled Substances.
Article 2. . Standards and Schedules.

§ 20-2-23. Schedule I -- Listing of controlled substances.

(a) The Legislature finds the following:

(1) New synthetic substances are being created which are not controlled under the provisions of existing state law but which have a potential for abuse similar to or greater than that for substances controlled under existing state law. These new synthetic substances are called "controlled substance analogs," and can be designed to produce a de-sired pharmacological effect and to evade the controlling statutory provisions. Controlled substance analogs are being manufactured, distributed, possessed, and used as substitutes for controlled substances.

(2) The hazards attributable to the traffic in and use of controlled substance analogs are increased because their unregulated manufacture produces variations in purity and concentration.

(3) Many new synthetic substances are untested, and it cannot be immediately determined whether they have useful medical or chemical purposes.

(4) The uncontrolled importation, manufacture, distribution, possession, or use of controlled substance analogs has a substantial and detrimental impact on the health and safety of the people of this state.

(5) Controlled substance analogs can be created more rapidly than they can be identified and controlled by action of the Legislature. There is a need for a speedy determination of their proper classification under existing law. It is therefore necessary to identify and classify new substances that have a potential for abuse, so that they can be controlled in the same manner as other substances controlled under existing state law.

(b) The controlled substances listed in this section are included in Schedule I:

...

(5)a. A controlled substance analog, being a material, mixture, or preparation that contains any chemical structure of which is chemically similar to the chemical structure of any other controlled substance in Schedule I or Schedule II and that satisfies any one of the following:

1. Has a stimulant, depressant, or hallucinogenic effect on the central nervous system that mimics or is similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a con-trolled substance in Schedule I or Schedule II.

2. With respect to a particular person, if the person represents or intends that the substance have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or Schedule II.

3. Has been demonstrated to have binding activity at one or more cannabinoid receptors.

4. Is capable of exhibiting cannabinoid-like activity.

5. Any compound structurally derived from 3-(1-naphthoyl)indole or 1H-indol-3-yl-(1-naphthyl)methane by substitution at the nitrogen atom of the indole ring by alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl or 2-(4-morpholinyl)ethyl whether or not further substituted in the indole ring to any extent, whether or not substituted in the naphthyl ring to any extent.

6. Any compound structurally derived from 3-(1-naphthoyl)pyrrole by substitution at the nitrogen atom of the pyrrole ring by alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl or 2-(4-morpholinyl)ethyl, whether or not further substituted in the pyrrole ring to any extent, whether or not substituted in the naphthyl ring to any extent.

7. Any compound structurally derived from 1-(1-naphthylmethyl)indene by substitution at the 3-position of the indene ring by alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl or 2-(4-morpholinyl)ethyl whether or not further substituted in the indene ring to any extent, whether or not substituted in the naphthyl ring to any extent.

8. Any compound structurally derived from 3-phenylacetylindole by substitution at the nitrogen atom of the indole ring with alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl or 2-(4-morpholinyl)ethyl, whether or not further substituted in the indole ring to any extent, whether or not substituted in the phenyl ring to any extent.

9. Any compound structurally derived from 2-(3-hydroxycyclohexyl)phenol by substitution at the 5-position of the phenolic ring by alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl or 2-(4-morpholinyl)ethyl, whether or not substituted in the cyclohexyl ring to any extent.

b. A controlled substance analog does not include any of the following:

1. Any substance for which there is an approved new drug application under the Federal Food, Drug, and Cosmetic Act.

2. With respect to a particular person, any substance, if an exemption is in effect for investigational use, for that person, as provided by 21 U.S.C. § 355, and the person is registered as a controlled substance researcher as required under section 152.12, subdivision 3, to the extent conduct with respect to the substance is pursuant to the exemption and registration.

c. A controlled substance analog, to the extent intended for human consumption, is treated as a controlled substance in Schedule I.

d. After the Alabama Department of Forensic Sciences has determined a substance to be a controlled substance analog under this section, the department shall notify the Alabama Department of Public Health with information relevant to scheduling as provided by Section 20-2-20.

EXHIBIT 2

West's Tennessee Code Annotated (2013)
Title 39. Criminal Offenses
Chapter 17. Offenses Against Public Health, Safety and Welfare
Part 4. Drugs

§ 39-17-454. Controlled substance analogue; violations; penalties

(a)(1) As used in this section, “controlled substance analogue” means a capsule, pill, powder, product or other substance, however constituted:

(A) That has the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance; and

(B) The chemical structure of which is a derivative of, or substantially similar to, the chemical structure of a controlled substance; or

(C) That is prohibited by § 39-17-452.

(2) “Controlled substance analogue” does not include:

(A) A controlled substance;

(B) Any substance for which there is an approved use or new drug application by the federal food and drug administration;

(C) Any compound, mixture, or preparation that contains any controlled substance that is not for administration to a human being or animal, and that is packaged in such form or concentration, or with adulterants or denaturants, so that as packaged it does not present any significant potential for abuse; or

(D) Any substance to which an investigational exemption applies under Section 505 of the Food, Drug and Cosmetic Act, 21 U.S.C. § 355, but only to the extent that conduct with respect to the substance is pursuant to such exemption.

(b)(1) In determining whether a substance is a controlled substance analogue, the following factors shall be considered, along with any other relevant factors:

(A) The difference between the price at which the substance is sold and the price at which the substance it is purported to be or advertised as is normally sold;

(B) Its diversion from legitimate channels, and its clandestine importation, manufacture, or distribution;

(C) The defendants prior convictions, if any, for a violation of any state or federal statute prohibiting controlled substances or controlled substance analogues; and

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(D) Comparisons with accepted methods of marketing a legitimate nonprescription drug for medicinal purposes rather than for the purpose of drug abuse or any similar nonmedical use, including:

(1) The packaging of the substance and its appearance in overall finished dosage form;

(2) Oral or written statements or representations concerning the substance;

(3) The methods by which the substance is distributed; and

(4) The manner in which the substance is sold to the public.

(2) In determining whether a substance is a controlled substance analogue, the following scientific or pharmacological factors may be considered, along with any other relevant factors:

(A) Its actual or relative potential for abuse;

(B) Scientific evidence of its pharmacological effect, if known;

(C) The state of current scientific knowledge regarding the substance;

(D) The history of the substance and its current pattern of abuse;

(E) The scope, duration and significance of abuse;

(F) What, if any, risk there is to the public health;

(G) Its psychic or physiological dependence liability; and

(H) Whether the substance is an immediate precursor of a substance already controlled under this chapter;

(c) It is an offense to knowingly manufacture, deliver, dispense or sell a controlled substance analogue or to possess a controlled substance analogue with the intent to manufacture, deliver, dispense or sell such substance.

(d) It is an offense to knowingly possess or casually exchange a small amount of a controlled substance analogue not in excess of one (1) gram.

(e) It may be inferred from the amount of controlled substance analogue possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance analogue was possessed with the purpose of selling or otherwise dispensing in violation of subsection (c). It may be inferred from circumstances indicating a casual exchange among individuals of a controlled substance analogue that the controlled substance analogue so exchanged was possessed not with the purpose of selling or otherwise dispensing in violation of subsection (c). The inferences shall be transmitted to the jury by the trial judge's charge, and the jury will consider the inferences along with the nature of the substance possessed when affixing the penalty.

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(f)(1) It is an offense for a person to represent, orally or in writing, advertise, infer or intend that a controlled substance analogue:

(A) Is a derivative of, or substantially similar to, the chemical structure of a controlled substance;

(B) Has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a control substance;

(C) Is a substance listed in § 39-17-452.

(2) It is not a defense to prosecution under this subsection (f) that the controlled substance analogue:

(A) is not a derivative of a controlled substance;

(B) Does not have a chemical structure that is substantially similar to that of a controlled substance;

(C) Does not have a stimulant, depressant, hallucinogenic effect on the central nervous system substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a control substance; or

(D) Is not listed in § 39-17-452.

(g)(1) A first violation of subsection (c) is a Class D felony.

(2) A second or subsequent violation of subsection (c) is a Class C felony.

(3) If the violation of subsection (c) involved the delivery, dispensing or sale of a controlled substance analogue to a minor, the person shall be punished one classification higher than the punishment provided by this subsection for delivering, dispensing or selling to an adult.

(4) A violation of subsection (d) or (f) is a Class A misdemeanor.

(h)(1) Nothing in this section shall preclude a violation of § 39-17-453, involving an imitation controlled substance, or § 39-17-452 from being prosecuted and punished as a violation of this section if the substance in question meets the definition of an analogue controlled substance under subsection (a) of this section.

(2) Nothing in this section shall preclude a violation of this section involving a controlled substance analogue from being prosecuted and punished under § 39-17-453 or § 39-17-452 if the controlled substance analogue in question also meets the definitions found in such sections.

(i) Any disability, disqualification, forfeiture, suspension, revocation, prohibition, tax or other adverse consequence provided by law that may result from a conviction for an offense involving a controlled substance shall also apply if the conviction involves a controlled substance analogue in violation of subsection (c).

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(j) The building and premises of any business in or upon which a violation of subsection (c) or (f) is committed by an employee, agent or owner of such business is declared to be a public nuisance and shall be subject to abatement as provided in title 29, chapter 3, part 1.

EXHIBIT 3

South Dakota Codified Laws
Title 34. Public Health and Safety
Chapter 34-20B. Drugs and Substances Control

§ 34-20B-1. Definitions

(22) "Controlled substance analogue," any of the following:

- (a) A substance that differs in its chemical structure to a controlled substance listed in or added to the schedule designated in schedule I or II only by substituting one or more hydrogens with halogens or by substituting one halogen with a different halogen; or
- (b) A substance that is an alkyl homolog of a controlled substance listed in or added to schedule I or II; or
- (c) A substance intended for human consumption; and
 - (i) The chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
 - (ii) Which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
 - (iii) With respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II;

However, the term, controlled substance analogue, does not include a controlled substance or any substance for which there is an approved new drug application.