



# Emergency Scheduling of Novel Psychoactive Substances and Controlled Substance Analogues – Model Language

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# Emergency Scheduling of Novel Psychoactive Substances and Controlled Substance Analogues – Model Language

## Policy Statement

The United States is experiencing a growing problem with novel psychoactive substances (i.e., synthetic drugs) and controlled substance analogues. Federal and state drug statutes control substances by listing them in their controlled substances act as a Schedule I, II, III, IV, or V substance. Each substance is listed according to its precise chemical structure. However, in today's world of the internet, no sooner is a substance made illegal than another appears to take its place. Novel psychoactive substances are cheap, easy to make, and return a high profit for manufacturers, distributors, and retailers. Novel psychoactive substances, particularly synthetic cannabinoids, substituted cathinones, and other synthetic substances, are sold as "legal" highs in convenience stores, gas stations, "head" shops, discount beer and tobacco shops, and on the internet. Typically, these substances are sold as "herbal incense," "bath salts," "plant food," "jewelry cleaner," and are labeled "not for human consumption."

In 2010, the American Association of Poison Control Centers ("AAPCC") received 2,906 calls relating to exposures to synthetic marijuana and 304 calls relating to exposures to bath salts (substituted cathinones). In 2011, the AAPCC received 6,959 calls relating to exposures to synthetic marijuana and 6,138 calls relating to exposures to bath salts. Those numbers dropped significantly in 2012 with the AAPCC receiving 5,202 calls relating to exposures to synthetic marijuana and 2,655 calls relating to exposures to bath salts. As of October 31, 2013, the AAPCC has received 2,222 calls relating to exposures to synthetic marijuana and 833 calls relating to exposures to bath salts.

Scheduling each of these substances as they appear can be a long process during which time more people may be injured through the use of a substance they believe to be harmless because they purchased it at their local gas station. The Model Law attempts to make it easier to address the problem of controlled substance analogues and novel psychoactive substances by providing emergency scheduling provisions of those substances.

# Highlights of the Emergency Scheduling of Novel Psychoactive Substances and Controlled Substance Analogues Model Law

- Allows a state agency to schedule novel psychoactive substances and controlled substance analogues on an emergency basis
- Provides that a substance will be temporarily scheduled for a period not to exceed eighteen (18) months to allow the state agency and/or legislature an opportunity to review additional information or research related to the substance
- Provides that when notice is received by the state agency under the state equivalent of Section Two of NAMSDDL's Model Controlled Substance Analogue Statute that the controlled substance analogue will be scheduled on an emergency basis for a period not to exceed eighteen (18) months unless permanently scheduled within that time period
- Provides a six (6) month extension of the temporary scheduling order for both emergency scheduling of substances without Section Two notice and with Section Two notice for state legislatures that meet every two years

## ***Section One. Emergency Scheduling Model Language.***

*Option 1. For states that schedule controlled substances via the legislature.*

(a) The [Board, Department, or other state agency charged with oversight of controlled substances], by rule and without regard to the scheduling requirements of [code section], may schedule a controlled substance analogue in Schedule I 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 in Schedule I or II if the [Board, Department, or other state agency charged with oversight of controlled substances] finds that scheduling of the substance on an emergency basis is necessary to avoid an imminent hazard to the public safety and 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.

(b) The [Board, Department, or other state agency charged with oversight of controlled substances], by rule and without regard to the scheduling requirements of [code section], may schedule a novel psychoactive substance in Schedule I, II, III, IV, or V of the [state equivalent of the federal Controlled Substances Act schedules of controlled substances] if the [Board, Department, or other state agency charged with oversight of controlled substances] finds that scheduling of the substance on an emergency basis is necessary to avoid an imminent hazard to the public safety and 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.

(c) In making the determination of whether to emergency schedule a substance, the [Board, Department, or other state agency charged with oversight of controlled substances] shall assess the degree of danger or probable danger of the substance by considering the following:

(1) The actual or potential abuse of the substance, including:

(A) Its history and current pattern of abuse;

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

(C) A judgment of the degree of actual or possible detriment that may result from the abuse of the substance; and

(2) The risk to public health.

The [Board, Department, or other state agency charged with oversight of controlled substances] shall also consider whether the substance has been scheduled on a temporary basis under federal law and may also consider clandestine importation, manufacture, or distribution of said substance.

(d) The [Board, Department, or other state agency charged with oversight of controlled substances] shall post a public notice thirty (30) days prior to the effective date of the emergency scheduling action, at the state capitol, in the office of the governor, and on the [Board, Department, or other state agency charged with oversight of controlled substances]'s website for public inspection.

(e) If a substance is added or rescheduled under this subsection, the control shall be for a period not to exceed [eighteen (18) months] unless the legislature does not meet during that time period, in which case the temporary control may be extended by a period not to exceed [six (6) months]. If, at the next regular session of the state legislature, the temporary designation of the added or rescheduled substance is not made permanent by the legislature, such addition or rescheduling shall expire.

(f) Upon receipt of a notice under [state equivalent of Section Five of NAMSDL's Model Controlled Substance Analogue Statute- see attached Appendix] and amendments thereto, the [Board, Department, or other state agency charged with oversight of controlled substances] shall initiate scheduling of the controlled substance analogue on an emergency basis pursuant to this subsection. The scheduling of a substance under this subsection shall be for a period of [eighteen (18) months] after the adoption of the scheduling rule unless the legislature does not meet during that time period, in which case the temporary scheduling may be extended by a period not to exceed [six (6) months]. If the substance is scheduled on a permanent basis by the legislature at the next regular session or it is determined prior to the expiration of [eighteen (18) months] plus any extension that the substance should not be scheduled, the temporary scheduling shall expire.

(g) Authority to control under this section does not extend to distilled spirits, wine, malt beverages, or tobacco as those terms are defined or used in [code section].

COMMENT.

THIS SECTION IS TAKEN IN PART FROM HAW. REV. STAT. § 329-11, KAN. STAT. ANN. § 65-4102, AND WASH. REV. CODE § 69.50.201. SUBSECTIONS (A) – (E) ARE INTENDED TO ALLOW A STATE AGENCY TO SCHEDULE NOVEL PSYCHOACTIVE SUBSTANCES AND/OR CONTROLLED SUBSTANCE ANALOGUES ON AN EMERGENCY BASIS WHILE THE LEGISLATURE IS IN OR OUT OF SESSION AS THE NEED ARISES FOR THE PROTECTION OF THE PUBLIC HEALTH. THESE SUBSECTIONS ARE INTENDED TO PROVIDE A FAST MECHANISM TO SCHEDULE THESE SUBSTANCES ON A TEMPORARY BASIS. THE EIGHTEEN MONTH TIME PERIOD IS PROVIDED TO GIVE THE STATE AGENCY AND/OR THE LEGISLATURE AMPLE OPPORTUNITY TO GATHER INFORMATION REGARDING THE SUBSTANCE AND MAKE AN EDUCATED DETERMINATION AS TO WHETHER THE SUBSTANCE IS A THREAT TO THE PUBLIC HEALTH AND SAFETY AND SHOULD BE SCHEDULED ON A PERMANENT BASIS OR THAT THERE IS NO THREAT TO THE PUBLIC HEALTH AND SAFETY AND THE TEMPORARY BAN SHOULD BE REVOKED. THE SIX MONTH EXTENSION IS INCLUDED FOR THOSE STATE LEGISLATURES THAT MEET ON AN INFREQUENT BASIS. SUBSECTION (F) PROVIDES FOR THE EMERGENCY SCHEDULING OF A CONTROLLED SUBSTANCE ANALOGUE WHEN NOTICE IS RECEIVED BY THE RELEVANT AGENCY UNDER THE STATE STATUTORY EQUIVALENT OF SECTION TWO OF NAMSDL'S MODEL CONTROLLED SUBSTANCE ANALOGUE STATUTE THAT PROSECUTION HAS BEEN INITIATED AGAINST

A PERSON ACCUSED OF A CRIME RELATED TO A CONTROLLED SUBSTANCE ANALOGUE. AS WITH SUBSECTIONS (A) – (E), TEMPORARY SCHEDULING UNDER SUBSECTION (F) IS FOR A PERIOD NOT TO EXCEED EIGHTEEN MONTHS, WITH ONE SIX MONTH EXTENSION, TO PROVIDE AN OPPORTUNITY FOR THE LEGISLATURE OR STATE AGENCY TO GATHER INFORMATION ON THE SUBSTANCE AND MAKE AN EDUCATED DETERMINATION THAT THE SUBSTANCE SHOULD OR SHOULD NOT BE PERMANENTLY SCHEDULED. SUBSECTION (G) IS INTENDED TO PROVIDE THAT THE EMERGENCY SCHEDULING POWERS UNDER THIS SECTION DO NOT INCLUDE THE SCHEDULING OF CERTAIN SUBSTANCES.

*Option 2. For states that schedule controlled substances via a state agency.*

(a) The [Board, Department, or other state agency charged with oversight of controlled substances], by rule and without regard to the scheduling requirements of [code section], may schedule a controlled substance analogue in Schedule I 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 in Schedule I or II if the [Board, Department, or other state agency charged with oversight of controlled substances] finds that scheduling of the substance on an emergency basis is necessary to avoid an imminent hazard to the public safety and 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.

(b) The [Board, Department, or other state agency charged with oversight of controlled substances], by rule and without regard to the scheduling requirements of [code section], may schedule a novel psychoactive substance in Schedule I, II, III, IV, or V of the [state equivalent of the federal Controlled Substances Act schedules of controlled substances] if the [Board, Department, or other state agency charged with oversight of controlled substances] finds that scheduling of the substance on an emergency basis is necessary to avoid an imminent hazard to the public safety and 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.

(c) In making the determination of whether to emergency schedule a substance, the [Board, Department, or other state agency charged with oversight of controlled substances] shall assess the degree of danger or probable danger of the substance by considering the following:

(1) The actual or potential abuse of the substance, including:

(A) Its history and current pattern of abuse;

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

(C) A judgment of the degree of actual or possible detriment that may result from the abuse of the substance; and

(2) The risk to public health.

The [Board, Department, or other state agency charged with oversight of controlled substances] shall also consider whether the substance has been scheduled on a temporary basis under federal law and may also consider clandestine importation, manufacture, or distribution of said substance.

(d) The [Board, Department, or other state agency charged with oversight of controlled substances] shall post a public notice thirty (30) days prior to the effective date of the emergency scheduling action, at the state capitol, in the office of the governor, and on the [Board, Department, or other state agency charged with oversight of controlled substances]'s website for public inspection.

(e) If a substance is added or rescheduled under this subsection, the control shall be for a period not to exceed [eighteen (18) months] and, if the temporary designation is not made permanent by the [Board, Department, or other state agency charged with oversight of controlled substances] with such time period, such addition or rescheduling shall expire.

(f) Upon receipt of a notice under [state equivalent of Section Five of NAMSDL's Model Controlled Substance Analogue Statute – see attached Appendix] and amendments thereto, the [Board, Department, or other state agency charged with oversight of controlled substances] shall initiate scheduling of the controlled substance analogue on an emergency basis pursuant to this subsection. The scheduling of a substance under this subsection shall expire [eighteen (18) months] after the adoption of the scheduling rule unless the substance is scheduled on a permanent basis or it is determined prior to the expiration of [eighteen (18) months] that the substance should not be scheduled.

(g) Authority to control under this section does not extend to distilled spirits, wine, malt beverages, or tobacco as those terms are defined or used in [code section].

COMMENT.

THIS SECTION IS TAKEN IN PART FROM HAW. REV. STAT. § 329-11, KAN. STAT. ANN. § 65-4102, AND WASH. REV. CODE § 69.50.201. THIS SECTION IS IDENTICAL TO OPTION 1 EXCEPT THAT IT REMOVES ANY REFERENCE TO THE STATE LEGISLATURE AND REMOVES THE SIX (6) MONTH EXTENSION AS UNNECESSARY FOR STATE AGENCIES.



## APPENDIX A

### *Model Controlled Substances Analogue Statute*

#### *Section Five. Controlled Substance Analogue Treated as Schedule I Substance.*

A controlled substance analogue, must be treated, for the purposes of this [Act], as a substance included in Schedule I. Within [ ] days after the initiation of prosecution with respect to a controlled substance analogue by indictment or information, the [prosecuting attorney] shall notify the [appropriate person or agency] of information relevant to emergency scheduling. After final determination that the controlled substance analogue should not be scheduled, no prosecution relating to that substance as a controlled substance analogue may be commenced or continued.

#### COMMENT

THIS SECTION IS TAKEN FROM § 214 OF THE UNIFORM CONTROLLED SUBSTANCES ACT (1990). THIS SECTION PROVIDES THAT A CONTROLLED SUBSTANCE ANALOGUE BE TREATED AS A SCHEDULE I SUBSTANCE AND FURTHER PROVIDES FOR THE EMERGENCY SCHEDULING OF SUCH SUBSTANCE.