



Ohio Legislative Service Commission

Final Analysis

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Sub. H.B. 334

129th General Assembly
(As Passed by the General Assembly)

Reps. Johnson and Bubb, Amstutz, Barnes, Buchy, Butler, Fende, Goodwin, Gonzales, Kozlowski, O'Brien, Peterson, Rosenberger, Stebelton, Uecker, Wachtmann, Yuko, Antonio, Duffey, Garland, Hackett, R. Adams, Anielski, Beck, Blair, Blessing, Boose, Boyd, Celebrezze, Combs, Conditt, Damschroder, Derickson, DeVitis, Dovilla, Driehaus, Fedor, Foley, Gardner, Gerberry, Goyal, Grossman, C. Hagan, Hall, Hayes, Henne, Hill, Hottinger, Huffman, Landis, Luckie, Lundy, Lynch, Maag, McClain, McGregor, Milkovich, Newbold, Patmon, Pelanda, Phillips, Roegner, Ruhl, Scherer, Schuring, Sears, M. Slaby, Smith, Sprague, Stautberg, Szollosi, Terhar, Thompson, Winburn, Young, Batchelder

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Effective date: Emergency; provisions addressing controlled substances and controlled substance analogs effective December 20, 2012; provisions addressing pseudoephedrine and ephedrine products effective March 20, 2013

ACT SUMMARY

Pseudoephedrine products and ephedrine products

- Beginning June 1, 2013, generally requires that retailers and terminal distributors of dangerous drugs participate in electronically tracking over-the-counter pseudoephedrine and ephedrine product sales through the National Precursor Log Exchange.
- Exempts a retailer or terminal distributor from required participation in the Exchange if there is any charge for using the Exchange, there is any fee from the Exchange related to funding its operation or maintenance, or the equipment or software needed to use the Exchange is not technologically capable of interfacing with operational systems used by the retailer or terminal distributor.

- Authorizes the Attorney General to enter into a contract or memorandum of understanding governing access to the Exchange with the National Association of Drug Diversion Investigators and any individual administering the Exchange.
- Regulates over-the-counter sales of ephedrine in the same manner that over-the-counter sales of pseudoephedrine products have been regulated.
- Imposes daily limits consistent with federal law on the amount of pseudoephedrine products and ephedrine products that an individual may purchase or receive without a prescription.
- Grants qualified immunity from civil liability to retailers and terminal distributors regarding over-the-counter pseudoephedrine product and ephedrine product sales.
- Makes all products containing pseudoephedrine that are purchased or obtained without a prescription subject to the restrictions that apply under continuing law.

Controlled substance analogs

- Creates the criminal offenses of trafficking in and possession of controlled substance analogs and specifies penalties for the offenses.
- Specifies that it is an affirmative defense to the charge of trafficking in a controlled substance analog that the person charged with the offense sold or offered to sell, or prepared for shipment, shipped, transported, delivered, prepared for distribution, or distributed any of the following: (1) a controlled substance, (2) any substance for which there is an approved new drug application, or (3) with respect to a particular person, any substance if an exemption is in effect for investigational use for that person pursuant to federal law to the extent that conduct with respect to that substance is pursuant to that exemption.
- Specifies that it is an affirmative defense to the charge of possession of a controlled substance analog that the person charged with the offense obtained, possessed, or used an item described above.
- Specifies that controlled substance analogs must continue to be treated for purposes of any provision of Ohio law as schedule I controlled substances, except as specified in the act's provisions governing the offenses of trafficking in and possession of controlled substance analogs.
- Specifies that no "bulk amount" exists for a controlled substance analog.

- Specifies that an offender who pleads guilty to the possession of, sale of, or offer to sell any drug, compound, mixture, preparation, or substance that contains at least 50 grams of a controlled substance analog is a "major drug offender."

Ohio's controlled substances schedules

- Removes five synthetic cannabinoids (commonly referred to as "spice") from Ohio's list of schedule I hallucinogenic substances and, in place of these, adds certain groups of synthetic cannabinoids to this schedule.
- Removes six synthetic derivatives of cathinone found in bath salts from Ohio's list of schedule I hallucinogenic substances, and removes cathinone and methcathinone from Ohio's list of schedule I stimulants.
- Associated with the removal of the substances described above, adds substituted cathinones to Ohio's list of schedule I stimulants.
- Adds several compounds to Ohio's list of schedule I hallucinogenic substances that neither fall into the groups of synthetic cannabinoids (described above) nor are substituted cathinones.
- Adds methiopropamine to Ohio's list of schedule I stimulants.
- Associated with the removal of five synthetic cannabinoids from Ohio's list of schedule I hallucinogenic substances, eliminates the offenses of trafficking in and possession of spice.

Definition of "standard pharmaceutical reference manual"

- Specifies that only references approved by the State Board of Pharmacy are considered to be a "standard pharmaceutical reference manual" as that term is used in Ohio's drug offense statutes.

Emergency clause; delayed effective date

- Declares an emergency, but applies the act's resulting immediate effective date only to the provisions pertaining to controlled substance analogs, controlled substance schedules, and the definition of "standard pharmaceutical reference manual."

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CONTENT AND OPERATION

National Precursor Log Exchange (NPLEX)

The act generally requires over-the-counter sales of pseudoephedrine products and ephedrine products to be electronically tracked through a national exchange known as the National Precursor Log Exchange.¹ According to the Exchange's web site, the Exchange is "a unique public/private partnership offering a real-time electronic methamphetamine precursor tracking service, free of charge, to law enforcement and state governments." The Exchange is provided by the National Association of Drug Diversion Investigators, but is sponsored and paid for entirely by the over-the-counter medicine manufacturers who are members of the Consumer Healthcare Products Association.²

¹ R.C. 3715.052.

² National Precursor Log Exchange, *Frequently Asked Questions* (last visited January 3, 2013), available at www.nplexservice.com/FAQ.html.

Beginning June 1, 2013, the act requires retailers and terminal distributors of dangerous drugs to submit the following information to the Exchange regarding each sale of pseudoephedrine product and ephedrine product that is not made pursuant to a valid prescription:

- (1) The purchaser's name and address;
- (2) The name and quantity of the product purchased;
- (3) The date and time of the purchase;

(4) The government-issued identification card used when making the purchase, the identification number (if any) on the identification, and the agency that issued the identification.³

Exemption from required participation in NPLEX

The act exempts a retailer or terminal distributor from required participation in the Exchange if one or more of the following apply:

(1) There is any charge for using the Exchange, including a charge for obtaining access to, submitting information to, or receiving a stop-sale alert from the Exchange.

(2) There is any fee from the Exchange related to funding its operation or maintenance.

(3) The equipment or software needed to use the Exchange is not technologically capable of interfacing with existing and future operational systems used by the retailer or terminal distributor.⁴

Stop-sale alerts and equipment malfunction

Beginning June 1, 2013, the act specifies that a retailer or terminal distributor is not to complete a pseudoephedrine or ephedrine product sale if the Exchange generates a stop-sale alert. However, a retailer or terminal distributor may complete the sale despite a stop-sale alert if the retailer or terminal distributor has a reasonable fear of imminent bodily harm should the sale not be completed. To accommodate such

³ R.C. 3715.052(A)(1).

⁴ R.C. 3715.053.

circumstances, the retailer or terminal distributor must ensure that the override function of the Exchange has been enabled.⁵

A retailer or terminal distributor that is unable to submit information to the Exchange due to experiencing mechanical or electronic failure of the equipment used to submit the information, or due to the temporary inability of the retailer or terminal distributor to obtain Internet service, must (1) maintain a written or electronic record of the information and (2) complete the information submission as soon as practicable after the mechanical or electronic failure has been rectified or Internet service has been restored.⁶ Under these circumstances, if a stop-sale alert is generated after the information submission is completed, the act specifies that the daily or monthly limits on the amount of over-the-counter pseudoephedrine and ephedrine products that may be purchased or provided to an individual after the mechanical or electronic failure has been rectified or Internet service has been restored have not been violated (see "**Purchase limits on pseudoephedrine and ephedrine products**," below).⁷

Criminal prohibitions

The act prohibits a retailer or terminal distributor from failing to comply with the information submission requirements regarding the Exchange that are described above. A violation of this prohibition is the offense of "failing to submit information to the National Precursor Log Exchange," a misdemeanor for which the offender must be fined not more than \$1,000 per violation.⁸

A retailer or terminal distributor is also prohibited from failing to comply with the act's stop-sale provisions. A violation of this prohibition is the offense of "improper sale of a pseudoephedrine product or ephedrine product," a second degree misdemeanor.⁹

Definitions

The act defines the "National Precursor Log Exchange" as the electronic system for tracking sales of pseudoephedrine products and ephedrine products on a national basis that is administered by the National Association of Drug Diversion Investigators or a successor organization. A "stop-sale alert" is defined as a notification sent from the

⁵ R.C. 3715.052(B).

⁶ R.C. 3715.052(A)(2).

⁷ R.C. 2925.56(A)(2)(b)(ii).

⁸ R.C. 2925.56(D) and (H).

⁹ R.C. 2925.56(C) and (G).

Exchange to a retailer or terminal distributor indicating that completion of a sale of a pseudoephedrine or ephedrine product would result in violating the daily or monthly limits on pseudoephedrine or ephedrine products that may be sold to an individual under Ohio or federal law.¹⁰

Law enforcement access to NPLEX

The act authorizes the Attorney General to enter into a contract or memorandum of understanding with (1) the National Association of Drug Diversion Investigators or its successor organization and, (2) if the Attorney General determines it to be appropriate, a person to whom the authority to administer the National Precursor Log Exchange has been delegated. If the Attorney General enters into such a contract or memorandum, it is to govern the Attorney General's access to and use of information from the Exchange and the responsibilities of each party relative to the access and use.¹¹

The contract or memorandum must include terms that:

(1) Authorize the Attorney General to obtain real-time access to information from the Exchange;

(2) Authorize the Attorney General to receive a weekly report regarding pseudoephedrine product and ephedrine product sales transactions made in Ohio as monitored by the Exchange, the specific content of which is to be identified in the contract or memorandum;

(3) Authorize the Attorney General to disseminate any information listed above to other state and local law enforcement officers as the Attorney General determines appropriate;

(4) Specify that neither the Attorney General nor any local or state law enforcement officer is to be charged a fee for access to or use of the Exchange or information from the Exchange authorized by the act or the contract or memorandum;

(5) Require all parties to the contract or memorandum to comply with federal and state laws governing the confidentiality of patient-specific information; and

(6) Specify how the contract or memorandum may be amended or revoked.¹²

¹⁰ R.C. 3715.05(A)(6) and (13).

¹¹ R.C. 109.89(B).

¹² R.C. 109.89(C).

Qualified immunity from civil liability

The act provides that a retailer or terminal distributor of dangerous drugs is not liable in damages in a civil action for injury, death, or loss to person or property resulting from any act or omission in carrying out the retailer's or terminal distributor's duties regarding over-the-counter pseudoephedrine product and ephedrine product sales, unless the act or omission is negligent or reckless or constitutes willful or wanton misconduct.¹³

Restrictions on over-the-counter sales of ephedrine products

Consistent with federal law, the regulates over-the-counter sales of ephedrine products in the same manner that over-the-counter sales of pseudoephedrine products are regulated under continuing Ohio law.¹⁴ The federal Combat Methamphetamine Epidemic Act of 2005¹⁵ was enacted to reduce the illicit production of methamphetamine by requiring that retail sales of pseudoephedrine products and ephedrine products be regulated. Prior Ohio law restricted over-the-counter sales only with respect to pseudoephedrine products.

Specifically, the act does all of the following with respect to over-the-counter sales of ephedrine products:¹⁶

- Imposes daily and monthly limits on the amount of over-the-counter ephedrine products that an individual knowingly may purchase or receive (see "**Purchase limits on pseudoephedrine and ephedrine products,**" below).
- Generally prohibits a retailer or terminal distributor of dangerous drugs from knowingly selling or otherwise providing to an individual an amount of ephedrine product that exceeds the daily or monthly limits.
- Requires retailers and terminal distributors to segregate ephedrine products from other merchandise so that no member of the public may purchase or procure ephedrine products without the direct assistance of a pharmacist or other authorized employee of the retailer or terminal distributor.

¹³ R.C. 3715.054.

¹⁴ R.C. 2925.55 and 2925.56.

¹⁵ Title VII of the "USA PATRIOT Improvement and Reauthorization Act of 2005" (Pub. L. 109-177).

¹⁶ R.C. 2925.55, 2925.56, 3715.05, and 3715.051.

- Requires retailers and terminal distributors to maintain a log book of all over-the-counter ephedrine product purchases.
- Requires each individual who purchases or receives an over-the-counter ephedrine product to sign and print their name in the log book and to present a government-issued identification card to the retailer or terminal distributor.
- Generally prohibits an individual under age 18 from knowingly purchasing or receiving an ephedrine product unless dispensed by a pharmacist pursuant to a valid prescription.
- Generally prohibits a retailer or terminal distributor from selling or otherwise providing an ephedrine product to an individual under age 18 unless dispensed by a pharmacist pursuant to a valid prescription.

Definitions

The act defines "ephedrine" as any material, compound, mixture, or preparation that contains any quantity of ephedrine, any of its salts, optical isomers, or salts of optical isomers. "Ephedrine product" is defined as any consumer product that contains ephedrine.¹⁷

Purchase limits on pseudoephedrine and ephedrine products

Consistent with the federal Combat Methamphetamine Epidemic Act of 2005, the act imposes daily limits on the amount of pseudoephedrine products and ephedrine products that an individual may purchase or receive without a prescription. The federal law limits the amount of pseudoephedrine products or ephedrine products an individual may purchase in a single transaction to not more than 3.6 grams per day.¹⁸ The act applies the same daily limit to state law by prohibiting any individual from knowingly purchasing, receiving, or otherwise acquiring more than 3.6 grams within a single day without a valid prescription.¹⁹

Ohio law retained by the act limits to 9.0 grams the amount of pseudoephedrine product that an individual knowingly may purchase or receive without a prescription

¹⁷ R.C. 2925.55(A)(7) and (8).

¹⁸ 21 United States Code (U.S.C.) § 830(d)(1).

¹⁹ R.C. 2925.55(B)(1)(a).

in a period of 30 consecutive days. The act applies this same 9.0-gram monthly limit to over-the-counter purchases or receipt of ephedrine products.²⁰

As under pre-existing law for violations of the monthly limits on purchases of over-the-counter pseudoephedrine products, a violation of any of the new limits, daily or monthly, on the over-the-counter purchases or receipt of pseudoephedrine products or ephedrine products is a first degree misdemeanor.²¹

The daily and monthly limits on the purchase or receipt of over-the-counter pseudoephedrine products or ephedrine products apply to the total amount of base pseudoephedrine or base ephedrine in the product, and not the product's overall weight.²²

Restrictions on retailers and terminal distributors

The act imposes additional requirements on retailers and terminal distributors of dangerous drugs regarding the sale or provision of over-the-counter pseudoephedrine products and ephedrine products. Law retained by the act requires a retailer or terminal distributor to do all of the following: (1) segregate pseudoephedrine products from other merchandise, (2) determine that an individual seeking to purchase or receive a pseudoephedrine product is at least age 18, (3) make a reasonable attempt to ensure that the individual does not purchase or receive more than the monthly limit, and (4) maintain a log book of all over-the-counter pseudoephedrine product purchases.²³

The act adds that retailers and terminal distributors must do the following: (1) make a reasonable attempt to ensure that an individual does not purchase or receive more than the daily and monthly product limits *by using any information available, including information from the National Precursor Log Exchange if the information is accessible*, and (2) if required to participate in the Exchange, submit information from the log book to the Exchange.²⁴

Regulation of pseudoephedrine product sales

The act makes all products containing pseudoephedrine that are purchased or obtained without a prescription subject to the restrictions that apply under continuing

²⁰ R.C. 2925.55(B)(1).

²¹ R.C. 2925.55(F).

²² R.C. 2925.55(B).

²³ R.C. 3715.05(B).

²⁴ R.C. 3715.05(B)(2) and (4).

law. Under prior law, both of the following were excluded from the definition of "pseudoephedrine product": (1) a consumer product containing pseudoephedrine that was in a liquid, liquid capsule, or gel capsule form and (2) a consumer product primarily intended for administration to children under age 12, in solid dosage form, including chewable tablets, when individual dosage units did not exceed 15 milligrams of pseudoephedrine.²⁵ This means that these products were not subject to continuing law's restrictions governing over-the-counter pseudoephedrine sales. The act removes the exclusions and applies the restrictions to all over-the counter sales of products containing pseudoephedrine.

Transaction scans

Law unchanged by the act authorizes a seller or agent to perform a transaction scan by using a transaction scan device to check the validity of an individual's driver's license or government-issued identification card as a condition of selling, giving away, or distributing a pseudoephedrine product. A seller or agent is generally prohibited from electronically or mechanically recording or maintaining any information derived from a transaction scan. Under continuing law, the prohibition does not apply to the individual's name and date of birth listed on the driver's license or identification card and to the expiration date and identification number of the license or card.

The act adds all of the following to the items excluded from the prohibition against recording information derived from a transaction scan performed in relation to over-the-counter pseudoephedrine sales and, under the act, ephedrine product sales: (1) the information required by the act to be submitted to the National Precursor Log Exchange for each over-the-counter sale of a pseudoephedrine or ephedrine product, (2) an individual's address, and (3) the issuing agency of the individual's driver's license or identification card.²⁶

Sales permitted by prescription

Under the act, the restrictions that apply to over-the-counter sales of pseudoephedrine products and ephedrine products generally do not apply if the product is dispensed by a pharmacist pursuant to a valid prescription issued by the following licensed health professionals authorized to prescribe drugs: (1) physicians, (2) dentists, (3) advanced practice nurses holding certificates to prescribe, (4) physician assistants holding certificates to prescribe, and (5) veterinarians.²⁷

²⁵ R.C. 2925.55(A)(4).

²⁶ R.C. 2925.57(D).

²⁷ R.C. 2925.55 and 2925.56.

Prior law authorizing pseudoephedrine sales pursuant to prescriptions did not include references to the prescriptive authority of physician assistants, which was implemented after the pseudoephedrine law was enacted.²⁸

Controlled substance analogs

Background; definition

H.B. 64 of the 129th General Assembly, which became effective October 17, 2011, defined the term, "controlled substance analog," for purposes of Ohio's controlled substances law.²⁹ It also specified that a controlled substance analog must, to the extent intended for human consumption, be treated as a schedule I controlled substance. (Schedule I controlled substances are those substances that have a high potential for abuse, have no currently accepted medical use in treatment in the United States, and for which there are a lack of safe uses under medical supervision.³⁰)

The definition of "controlled substance analog" enacted by H.B. 64 is similar to the federal definition for this term enacted by the Federal Analog Act,³¹ is generally a substance to which both of the following apply:³²

(1) The chemical structure is substantially similar to the structure of a controlled substance in schedule I or II.

(2) One of the following applies regarding the substance:

-- The substance 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.

-- With respect to a particular person, that person represents or intends the substance to have a stimulant, depressant, or hallucinogenic effect on the central

²⁸ Am. Sub. S.B. 53 and Sub. S.B. 154 of the 126th General Assembly, both effective May 17, 2006.

²⁹ R.C. Chapter 3719.

³⁰ U.S. Department of Justice, Drug Enforcement Administration, Office of Diversion Control, *Controlled Substance Schedules* (last visited January 3, 2013), available at www.deadiversion.usdoj.gov/schedules/index.html#define.

³¹ See 21 U.S.C. § 802(32). The "Federal Analog Act" is officially known as the "Controlled Substance Analogue Enforcement Act of 1986," Pub. L. No. 99-570, § 1203, 100 Stat. 3207, 3213-14.

³² R.C. 3719.01(HH)(1).

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.

This act defines "controlled substance analog" for purposes of Ohio's drug offense statutes (R.C. Chapter 29.25.) consistent with the definition of this term in the controlled substances law (R.C. Chapter 3719.).³³ The act also contains a provision specifying that controlled substance analogs must continue to be treated for purposes of any provision of Ohio law as a schedule I controlled substance, except as specified in the act's provisions governing the offenses of trafficking in and possession of controlled substance analogs.³⁴ This provision is similar to one enacted by the Federal Analog Act specifying that a controlled substance analog must, to the extent intended for human consumption, be treated for the purposes of any federal law as a schedule I controlled substance.³⁵

New offenses - trafficking in and possession of controlled substance analogs

The act creates the criminal offenses of trafficking in and possession of controlled substance analogs.³⁶ Under prior law, a person who sold or offered to sell, or prepared for shipment, shipped, transported, delivered, prepared for distribution, or distributed a substance that is defined by the act as a controlled substance analog (*i.e.*, trafficked in the substance), was prosecuted under the statute that applied to a person who trafficked any schedule I controlled substance—aggravated trafficking in drugs.³⁷ Similarly, a person who possessed a substance that is defined by the act as a controlled substance analog was prosecuted under the statute that applied to a person who possessed any schedule I controlled substance—aggravated possession of drugs.³⁸ The penalties that applied to the offenses of aggravated trafficking in drugs and aggravated possession of drugs varied depending on the type of controlled substance, the amount of the controlled substance, and whether the offense occurred near a school or juveniles.

The penalties that apply to the offenses created by the act similarly vary depending on the amount of the substance and whether the offense occurred near a

³³ R.C. 2925.01(A).

³⁴ R.C. 3719.013.

³⁵ 21 U.S.C. § 813.

³⁶ R.C. 2925.03(A)(1) and (2) and (C)(8) (trafficking in controlled substance analogs) and 2925.11(A) and (C)(8) (possession of a controlled substance analog).

³⁷ R.C. 2925.03(C)(1).

³⁸ R.C. 2925.11(C)(1).

school or juveniles. A comparison of the penalties that apply under prior law and the act are shown below.

Trafficking Offenses – Penalties and Sentencing

("F" refers to "felony" and the numeral refers to the degree of the felony.
 "CS" refers to "controlled substance")

Prior law (treats controlled substance analog as any other schedule 1 controlled substance)		The act (new offenses)	
Crime	Penalty	Crime	Penalty
Aggravated trafficking in drugs (involving CS 1) – in general	F4	Trafficking in a controlled substance analog – in general	F5; R.C. 2929.13(C) applies in determining whether to impose a prison term.
Aggravated trafficking in drugs (involving CS 1) – offense committed in vicinity of school or juvenile	F3; R.C. 2929.13(C) applies in determining whether to impose a prison term.	Trafficking in a controlled substance analog – offense committed in vicinity of school or juvenile	F4; R.C. 2929.13(C) applies in determining whether to impose a prison term.
Aggravated trafficking in drugs (involving CS 1) – amount equals or exceeds bulk amount but is less than five times the bulk amount	F3 with presumption for a prison term. If offender previously convicted of or pleaded guilty to a felony drug abuse offense on at least two prior occasions, mandatory prison term prescribed for F3. If amount of drug involved is within the range and if offense committed in vicinity of a school or juvenile, F2 with mandatory prison term prescribed for F2.	Trafficking in a controlled substance analog – amount equals or exceeds ten grams but is less than 20 grams	F4; R.C. 2929.13(B) applies in determining whether to impose a prison term. If amount of drug involved is within the range and if offense committed in vicinity of a school or juvenile, F3 with presumption for a prison term.
Aggravated trafficking in drugs (involving CS 1) –	F2 with a mandatory prison term prescribed for F2. If amount of drug	Trafficking in a controlled substance	F3 with presumption for a prison term. If amount of drug involved is within the

Prior law (treats controlled substance analog as any other schedule 1 controlled substance)		The act (new offenses)	
Crime	Penalty	Crime	Penalty
amount equals or exceeds five times the bulk amount but is less than 50 times the bulk amount	involved is within that range and if offense committed in vicinity of a school or juvenile, F1 with mandatory prison term prescribed for F1.	analog – amount equals or exceeds 20 grams but is less than 30 grams	range and if offense committed in vicinity of a school or juvenile, F2 with presumption for a prison term.
Aggravated trafficking in drugs (involving a CS 1) – amount equals or exceeds 50 times the bulk amount but is less than 100 times the bulk amount	F1 (regardless of whether offense committed in vicinity of a school or juvenile) with mandatory prison term for F1.	Trafficking in a controlled substance analog – amount equals or exceeds 30 grams but is less than 40 grams	F2 with mandatory prison term prescribed for F2. If amount of drug involved is within the range and if offense committed in vicinity of a school or juvenile, F1 with mandatory prison term prescribed for F1.
Aggravated trafficking in drugs (involving a CS 1) – amount equals or exceeds 100 times the bulk amount	F1 (regardless of whether offense committed in vicinity of a school or juvenile), the offender is a "major drug offender," and the court must impose as a mandatory prison term the maximum prison term prescribed for F1 classification as specified in R.C. 2929.14(B)(3).	Trafficking in a controlled substance analog – amount equals or exceeds 40 grams but is less than 50 grams	F1 (regardless of whether offense committed in vicinity of a school or juvenile) with mandatory prison term prescribed for F1.
		Trafficking in a controlled substance analog – amount equals or exceeds 50 grams	F1 (regardless of whether offense committed in vicinity of a school or juvenile), the offender is a "major drug offender," and the court must impose as a mandatory prison term the maximum prison term prescribed for F1.

Possession Offenses – Penalties and Sentencing

("F" refers to "felony" and the numeral refers to the degree of the felony.)

Prior law (treats controlled substance analog as any other schedule I controlled substance)		The act (new offense)	
Crime	Penalty	Crime	Penalty
Aggravated possession of drugs (involving a schedule I controlled substance) – in general	F5; R.C. 2929.13(B) applies in determining whether to impose prison term.	Possession of a controlled substance analog – in general	F5; R.C. 2929.13(B) applies in determining whether to impose prison term.
Aggravated possession of drugs (involving a schedule I controlled substance) – amount equals or exceeds bulk amount but is less than five times the bulk amount	F3 with presumption for a prison term.	Possession of a controlled substance analog – amount equals or exceeds ten grams but is less than 20 grams	F4 with presumption for a prison term.
Aggravated possession of drugs (involving a schedule I controlled substance) – amount equals or exceeds five times the bulk amount but is less than 50 times the bulk amount	F2 with mandatory prison term prescribed for F2.	Possession of a controlled substance analog – amount equals or exceeds ten grams but is less than 20 grams	F4 with presumption for a prison term.
Aggravated possession of drugs (involving a schedule I controlled substance) – amount equals or exceeds 50 times the bulk amount but is less than 100	F1 with mandatory prison term prescribed for F1.	Possession of a controlled substance analog – amount equals or exceeds 20 grams but is less than 30 grams	F3 with presumption for a prison term.

Prior law (treats controlled substance analog as any other schedule I controlled substance)		The act (new offense)	
Crime	Penalty	Crime	Penalty
times the bulk amount			
Aggravated possession of drugs (involving a schedule I controlled substance) – amount equals or exceeds 100 times the bulk amount	F1, the offender is a "major drug offender," and the court must impose as a mandatory prison term the maximum prison term prescribed for F1.	Possession of a controlled substance analog – amount equals or exceeds 30 grams but is less than 40 grams	F2 with mandatory prison term prescribed for F2.
		Possession of a controlled substance analog – amount equals or exceeds 40 grams but is less than 50 grams	F1 with mandatory prison term prescribed for F1.
		Possession of a controlled substance analog – amount equals or exceeds 50 grams	F1, the offender is a "major drug offender," and the court must impose as a mandatory prison term the maximum prison term prescribed for F1.

Affirmative defenses

The act specifies that it is an affirmative defense to the charge of trafficking in a controlled substance analog that the person charged with the offense sold or offered to sell, or prepared for shipment, shipped, transported, delivered, prepared for distribution, or distributed any of the following:³⁹

- A controlled substance;

³⁹ R.C. 2925.03(J).

- Any substance for which there is an approved new drug application;
- With respect to a particular person, any substance if an exemption is in effect for investigational use for that person pursuant to federal law to the extent that conduct with respect to that substance is pursuant to that exemption.

The act specifies that it is an affirmative defense to the charge of possession of a controlled substance analog that the person charged with the offense obtained, possessed, or used an item described in (1), (2), or (3), above.⁴⁰

Bulk amount

The act specifies that no bulk amount exists for a controlled substance analog.⁴¹ Under continuing law, five other controlled substances (marihuana, cocaine, L.S.D., heroin, and hashish) also do not have bulk amounts.⁴² Bulk amounts exist for all other controlled substances in schedules I, II, and III. Bulk amounts are specified as certain weights (*e.g.*, grams) or unit doses of substances.⁴³

The possession and trafficking offenses associated with controlled substances for which no bulk amount exists have unique penalties.⁴⁴ The unique penalties the act specifies for the offenses of trafficking in and possession of controlled substance analogs⁴⁵ are shown in the tables above.

"Major drug offender" status

The act specifies that an offender who pleads guilty to the possession of, sale of, or offer to sell any drug, compound, mixture, preparation, or substance that contains at least 50 grams of a controlled substance analog is a "major drug offender."⁴⁶ The

⁴⁰ R.C. 2925.11(H).

⁴¹ R.C. 2925.01(D)(1).

⁴² R.C. 2925.01(D)(1).

⁴³ R.C. 2925.01(D).

⁴⁴ See R.C. 2925.03(C)(3) to (7) (trafficking) and 2925.11(C)(3) to (7) (possession).

⁴⁵ See R.C. 2925.03(C)(8) and 2925.11(C)(8).

⁴⁶ R.C. 2929.01(W).

significance of being a major drug offender is that such a person is subject to an enhanced penalty.⁴⁷

Ohio's controlled substances schedules

Synthetic cannabinoids ("K2" or "spice")

Background

Under the Comprehensive Crime Control Act of 1984,⁴⁸ the U.S. Attorney General is authorized to temporarily place a controlled substance in schedule I of the federal Controlled Substances Act for one year if the Attorney General finds that such action is necessary to avoid imminent hazard to the public safety.⁴⁹ Continuing Ohio law specifies that when the U.S. Attorney General (1) adds a compound, mixture, preparation, or substance to a schedule of the Controlled Substances Act, (2) transfers any of the same between one schedule to another, or (3) removes a compound, mixture, preparation, or substance from the schedules, the addition, transfer, or removal is automatically effected in the corresponding schedule or schedules in Ohio law.⁵⁰

On March 1, 2011, the Administrator of the U.S. Drug Enforcement Agency (DEA), pursuant to authority delegated to her by the U.S. Attorney General, issued a final order temporarily placing five synthetic cannabinoids into the federal Controlled Substances Act as schedule I controlled substances: 1-pentyl-3-(1-naphthoyl)indole (JWH-018), 1-butyl-3-(1-naphthoyl)indole (JWH-073), 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200), 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497), and 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol; CP-47,497 C8 homologue). The Administrator essentially gave three reasons for her order: (1) there had been a rapid and significant increase in abuse of the substances in the U.S., (2) law enforcement had seized synthetic cannabinoids in conjunction with controlled substances and, based on reports to law enforcement by individuals and health care professionals, synthetic cannabinoids were being abused for their psychoactive properties, and (3) numerous state and local public health

⁴⁷ R.C. 2929.14(B)(3) (not in the act).

⁴⁸ Pub. L. No. 98-473.

⁴⁹ 21 U.S.C. § 811.

⁵⁰ R.C. 3719.43 (not in the act).

departments and poison control centers had issued health warnings describing the adverse health effects associated with synthetic cannabinoids.⁵¹

Thereafter, the General Assembly's enactment of H.B. 64 made it clear that the five synthetic cannabinoids, commonly referred to as "spice" or "K2," were to be permanently added to Ohio's list of schedule I hallucinogenic substances.⁵² The addition of the synthetic cannabinoids to the schedule I hallucinogenic substances list meant that all Revised Code provisions pertaining to schedule I controlled substances, including the drug offenses, generally applied to synthetic cannabinoids.

Scheduling by chemical group

The act removes the five synthetic cannabinoids identified above from Ohio's list of schedule I hallucinogenic substances. Instead, the act specifies that unless specifically exempted or included in another schedule, any quantity of a synthetic cannabinoid found to be in any of the following chemical groups are on that list:⁵³

(1) Naphthoylindoles: any compound containing a 3-(1-naphthoyl)indole structure with or without substitution at the nitrogen atom of the indole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, (N-methylpiperidin-2-yl)methyl, cyanoalkyl, (N-methylpyrrolidin-2-yl)methyl, (tetrahydropyran-4-yl)methyl, ((N-methyl)-3-morpholinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted on the indole ring to any extent or whether or not substituted on the naphthyl group to any extent. Naphthoylindoles include, but are not limited to, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200); 1-(5-fluoropentyl)-3-(1-naphthoyl)indole (AM2201), 1-pentyl-3-(1-naphthoyl)indole (JWH-018), and 1-butyl-3-(1-naphthoyl)indole (JWH-073).

(2) Naphthylmethylinindoles: any compound containing a 1H-indol-3-yl-(1-naphthyl)methane structure with or without substitution at the nitrogen atom of the indole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, (N-methylpiperidin-2-yl)methyl, cyanoalkyl, (N-methylpyrrolidin-2-yl)methyl, (tetrahydropyran-4-yl)methyl, ((N-methyl)-3-morpholinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted on the indole ring to any extent or whether or not substituted on the naphthyl group to any extent.

⁵¹ Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. 11075.

⁵² R.C. 3719.41, former divisions (C)(35), (36), (37), (38), and (39).

⁵³ R.C. 3719.41(C)(67).

Naphthylmethylindoles include, but are not limited to, (1-pentylindol-3-yl)(1-naphthyl)methane (JWH-175).

(3) Naphthoylpyrroles: any compound containing a 3-(1-naphthoyl)pyrrole structure with or without substitution at the nitrogen atom of the pyrrole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, (N-methylpiperidin-2-yl)methyl, cyanoalkyl, (N-methylpyrrolidin-2-yl)methyl, (tetrahydropyran-4-yl)methyl, ((N-methyl)-3-morpholinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted on the pyrrole ring to any extent or whether or not substituted on the naphthyl group to any extent. Naphthoylpyrroles include, but are not limited to, 1-hexyl-2-phenyl-4-(1-naphthoyl)pyrrole (JWH-147).

(4) Naphthylmethylindenes: any compound containing a naphthylmethylindeneindene structure with or without substitution at the 3-position of the indene ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, (N-methylpiperidin-2-yl)methyl, cyanoalkyl, (N-methylpyrrolidin-2-yl)methyl, (tetrahydropyran-4-yl)methyl, ((N-methyl)-3-morpholinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted on the indene group to any extent or whether or not substituted on the naphthyl group to any extent. Naphthylmethylindenes include, but are not limited to, (1-[(3-pentyl)-1H-inden-1-ylidene)methyl]naphthalene (JWH-176).

(5) Phenylacetylindoles: any compound containing a 3-phenylacetylindeole structure with or without substitution at the nitrogen atom of the indole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, (N-methylpiperidin-2-yl)methyl, cyanoalkyl, (N-methylpyrrolidin-2-yl)methyl, (tetrahydropyran-4-yl)methyl, ((N-methyl)-3-morpholinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted on the indole ring to any extent or whether or not substituted on the phenyl group to any extent. Phenylacetylindoles include, but are not limited to, 1-pentyl-3-(2-methoxyphenylacetyl)indole (JWH-250), and 1-(2-cyclohexylethyl)-3-(2-methoxyphenylacetyl)indole (RCS-8); 1-pentyl-3-(2-chlorophenylacetyl)indole (JWH-203).

(6) Cyclohexylphenols: any compound containing a 2-(3-hydroxycyclohexyl)phenol structure with or without substitution at the 5-position of the phenolic ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, (N-methylpiperidin-2-yl)methyl, cyanoalkyl, (N-methylpyrrolidin-2-yl)methyl, (tetrahydropyran-4-yl)methyl, ((N-methyl)-3-morpholinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted on the cyclohexyl group to any extent. Cyclohexylphenols include, but are not limited to, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (some trade or other names: CP-47,497) and 5-

(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (some trade or other names: cannabicyclohexanol; CP-47,497 C8 homologue).

(7) Benzoylindoles: any compound containing a 3-(1-naphthoyl)indole structure with or without substitution at the nitrogen atom of the indole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, (N-methylpiperidin-2-yl)methyl, cyanoalkyl, (N-methylpyrrolidin-2-yl)methyl, (tetrahydropyran-4-yl)methyl, ((N-methyl)-3-morpholinyl)methyl or 2-(4-morpholinyl)ethyl group, whether or not further substituted on the indole ring to any extent or whether or not substituted on the phenyl group to any extent. Benzoylindoles include, but are not limited to, 1-pentyl-3-(4-methoxybenzoyl)indole (RCS-4), 1-[2-(4-morpholinyl)ethyl]-2-methyl-3-(4-methoxybenzoyl)indole (Pravadoline or WIN 48, 098).

In addition, the act specifies that any of the groups that contain synthetic cannabinoid salts, isomers, or salts of isomers, whenever the existence of such salts, isomers, or salts of isomers is possible within the specific chemical groups, are also in schedule I.⁵⁴

Synthetic derivatives of cathinone

Background

"Bath salts" are the most common code name given to a specific type of synthetic drug made in underground labs and marketed as a household item; they are nothing like the epsom salts often added to bathwater. The drugs have been camouflaged as plant food, stain remover, toilet bowl cleaner, and hookah cleaner. They have been sold online and in "head shops," which are businesses that sell drug paraphernalia. The boxes usually contain a foil wrap or plastic bag of powder, although sometimes they take the form of pills or capsules. The color of the powder ranges from white to yellow to brown, while the price ranges from \$30 to \$50 per box. Nearly every box has a label that says "not for human consumption."⁵⁵

H.B. 64 added six synthetic derivatives of cathinone found in bath salts to Ohio's list of schedule I hallucinogenic substances: methylone (3,4 methylenedioxy methcathinone), MDPV (3,4 methylenedioxy pyrovalerone), mephedrone (4 methylmethcathinone), 4 methoxymethcathinone, 4 fluoromethcathinone, and 3 fluoromethcathinone. The addition of these synthetic derivatives of cathinone to Ohio's list of schedule I hallucinogenic substances meant

⁵⁴ R.C. 3719.41(C)(67).

⁵⁵ National Public Radio, PBS Newshour, *Bath Salts – The Drug That Never Lets Go* (last visited January 3, 2013), available at www.pbs.org/newshour/multimedia/bath-salts.

that all Revised Code provisions pertaining to schedule I controlled substances, including the drug offenses, generally applied to these substances.⁵⁶

The act

The act removes the six synthetic derivatives of cathinone, described above, from Ohio's list of schedule I hallucinogenic substances. In addition, the act removes cathinone and methcathinone from Ohio's list of schedule I stimulants. In place of these, the act adds substituted cathinones to Ohio's list of schedule I stimulants. The act specifies that substituted cathinones are any compound except bupropion or compounds listed under a different schedule, structurally derived from 2-aminopropan-1-one by substitution at the 1-position with either phenyl, naphthyl, or thiophene ring systems, whether or not the compound is further modified in any of the following ways:⁵⁷

(1) By substitution in the ring system to any extent with alkyl, alkylendioxy, alkoxy, haloalkyl, hydroxyl, or halide substituents, whether or not further substituted in the ring system by one or more other univalent substituents;

(2) By substitution at the 3-position with an acyclic alkyl substituent;

(3) By substitution at the 2-amino nitrogen atom with alkyl, dialkyl, benzyl, or methoxybenzyl groups;

(4) By inclusion of the 2-amino nitrogen atom in a cyclic structure.

The act specifies that examples of substituted cathinones include, but are not limited to, methylone (3,4-methylenedioxy-methcathinone), MDPV, (3,4-methylenedioxy-pyrovalerone), mephedrone (4-methylmethcathinone), 4-methoxymethcathinone, 4-fluoromethcathinone, 3-fluoromethcathinone, Pentadron (2-(methylamino)-1-phenyl-1-pentanone), pentylone(1-(1,3-benzodioxol-5-yl)-2-(methylamino)-1-pentanone), 2-(1-pyrrolidinyl)-1-(4-methylphenyl)-1-propanone, alpha-PVP (1-phenyl-2-(1-pyrrolidinyl)-1-pentanone), cathinone (2-amino-1-phenyl-1-propanone), and methcathinone (2-(methylamino)-propionophenone).

Other compounds – hallucinogenic substances

The act adds several compounds to Ohio's list of schedule I hallucinogenic substances that neither fall into the groups of synthetic cannabinoids (described above)

⁵⁶ R.C. 3719.41, former divisions (C)(40) to (45).

⁵⁷ R.C. 3719.41(E)(7).

nor are substituted cathinones.⁵⁸ These compounds, according to a forensic scientist at the Ohio Bureau of Criminal Investigation, have no known legitimate use.⁵⁹

- (1) (1-pentylindol-3-yl)-(2,2,3,3-tetramethylcyclopropyl)methanone (UR-144);
- (2) 1-pentyl-3-(1-adamantoyl)indole (AB-001);
- (3) N-adamantyl-1-pentylindole-3-carboxamide;
- (4) N-adamantyl-1-pentylindazole-3-carboxamide (AKB48);
- (5) 2-ethylamino-2-(3-methoxyphenyl)cyclohexanone (methoxetamine);
- (6) N,N-diallyl-5-methoxytryptamine (5MeO-DALT);
- (7) [1-(5-fluoropentylindol-3-yl)]-(2,2,3,3-tetramethylcyclopropyl)methanone (5-fluoropentyl-UR-144; XLR11);
- (8) [1-(5-chloropentylindol-3-yl)]-(2,2,3,3-tetramethylcyclopropyl)methanone (5-chloropentyl-UR-144);
- (9) [1-(5-bromopentylindol-3-yl)]-(2,2,3,3-tetramethylcyclopropyl)methanone (5-bromopentyl-UR-144);
- (10) {1-[2-(4-morpholinyl)ethyl]indol-3-yl}-(2,2,3,3-tetramethylcyclopropyl)methanone (A-796,260);
- (11) 1-[(N-methylpiperidin-2-yl)methyl]-3-(1-adamantoyl)indole (AM1248);
- (12) N-adamantyl-1-(5-fluoropentylindole)-3-carboxamide;
- (13) 5-(2-aminopropyl)benzofuran (5-APB);
- (14) 6-(2-aminopropyl)benzofuran (6-APB);
- (15) 5-(2-aminopropyl)-2,3-dihydrobenzofuran (5-APDB);
- (16) 6-(2-aminopropyl)-2,3-dihydrobenzofuran (6-APDB);
- (17) Benzothiophenylcyclohexylpiperidine (BTCP);

⁵⁸ R.C. 3719.41(C)(35) to (66).

⁵⁹ Bureau of Criminal Investigation, Office of Ohio Attorney General Mike DeWine (interview July 24, 2012).

- (18) 2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C-E);
- (19) 2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C-D);
- (20) 2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C-C);
- (21) 2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C-I);
- (22) 2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-2);
- (23) 2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-4);
- (24) 2-(2,5-Dimethoxyphenyl)ethanamine (2C-H);
- (25) 2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C-N);
- (26) 2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine (2C-P);
- (27) 4-methoxymethamphetamine (PMMA);
- (28) 5,6 - Methylenedioxy-2-aminoindane (MDAI);
- (29) 5-iodo-2-aminoindane (5-IAI);
- (30) 2-(4-iodo-2,5-dimethoxyphenyl)-N-[(2-methoxyphenyl)methyl]ethanamine(25I-NBOMe);
- (31) Diphenylprolinol (diphenyl(pyrrolidin-2-yl)methanol, D2PM);
- (32) Desoxypipradrol (2-benzhydrylpiperidine).

The compounds listed in (18) to (26), above, were recently added to the federal list of schedule I controlled substances through Congress's enactment of the Synthetic Drug Abuse Prevention Act of 2012.⁶⁰ But because these compounds were placed in the controlled substance schedules by an act of Congress and not the U.S. Attorney General, it is not likely that, pursuant to R.C. 3719.43, these compounds would automatically be added to Ohio's list of controlled substances.⁶¹ The act's inclusion of these compounds in Ohio's list of schedule I hallucinogenic substances, however, makes clear the General Assembly's intent to schedule these compounds for purposes of state law.

⁶⁰ Section 1152 of the "Food and Drug Administration Safety and Innovation Act," Pub. L. No. 112-144.

⁶¹ Bureau of Criminal Investigation, Office of Ohio Attorney General Mike DeWine (interview October 30, 2012).

Other compound - stimulants

The act adds methiopropamine to Ohio's list of schedule I stimulants.⁶²

Removal of trafficking in and possession of spice as offenses

Associated with the act's removal of the five synthetic cannabinoids from Ohio's list of schedule I hallucinogenic substances, the act eliminates the offenses of trafficking in and possession of spice.⁶³

Definition of "standard pharmaceutical reference manual"

The act specifies that only the current edition, with cumulative changes, if any, of references approved by the State Board of Pharmacy are considered to be a "standard pharmaceutical reference manual" as that term is used in Ohio's drug offense statutes.⁶⁴ Under prior law, a standard pharmaceutical reference manual could be the current edition, with cumulative changes, of *any* of the following:⁶⁵

(1) "The National Formulary";

(2) "The United States Pharmacopeia," prepared by authority of the United States Pharmacopeial Convention, Inc.;

(3) Other standard references that are approved by the Board.

According to a representative of the Ohio Attorney General, the references described in (1) and (2) no longer exist.⁶⁶

Emergency clause and delayed effective dates

The act declares that it is an emergency measure necessary for the immediate preservation of the public peace, health, and safety.⁶⁷ Therefore, it is not subject to the referendum under article II, section 1d of the Ohio Constitution.

⁶² R.C. 3719.41(E)(6).

⁶³ R.C. 2925.03(C)(8) (trafficking) and 2925.11(C)(8) (possession).

⁶⁴ See R.C. Chapter 2925.

⁶⁵ R.C. 2925.01(M).

⁶⁶ Bureau of Criminal Investigation, Office of Ohio Attorney General Mike DeWine (interview September 20, 2012).

⁶⁷ Section 5.

The act specifies that its provisions pertaining to the National Precursor Log Exchange take effect 90 days after the act's effective date.⁶⁸ As a result of the emergency clause, the provisions pertaining to controlled substance analogs, controlled substance schedules, and the definition of "standard pharmaceutical reference manual" take immediate effect.

HISTORY

ACTION	DATE
Introduced	09-27-11
Reported, H. Health & Aging	03-28-12
Passed House (98-0)	05-09-12
Reported, S. Health, Human Services & Aging	12-04-12
Passed Senate (33-0)	12-04-12
House concurred in Senate amendments (94-0)	12-05-12

12HB334-129/ejs

⁶⁸ Section 3.

