



Ohio Legislative Service Commission

Bill Analysis

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BILL SUMMARY

National Precursor Log Exchange (NPLEX)

- 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.

* This analysis was prepared before the report of the Senate Health, Human Services, and Aging appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

- Regulates over-the-counter sales of ephedrine in the same manner that over-the-counter sales of pseudoephedrine products are currently 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 existing 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 bill'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 subject to an enhanced penalty as 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 standard 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 bill's resulting immediate effective date only to the bill's provisions that pertain 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)

Electronic tracking of pseudoephedrine and ephedrine product sales

The bill generally requires over-the-counter pseudoephedrine product and ephedrine product sales 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 November 26, 2012), available at <<http://www.nplexservice.com/FAQ.html>>.

Beginning June 1, 2013, the bill 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 bill 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, 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 is permitted to complete the sale even though the Exchange has generated a stop-sale alert if the retailer or terminal distributor has a reasonable fear of imminent bodily harm should the sale not be

³ R.C. 3715.052(A)(1).

⁴ R.C. 3715.053.

completed. To accommodate such 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 as required by the bill 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 bill 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 bill 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 is to be fined not more than \$1,000 per violation.⁸

A retailer or terminal distributor is also prohibited from failing to comply with the bill'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 bill 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

⁵ R.C. 3715.05(B).

⁶ R.C. 3715.052(A)(2).

⁷ R.C. 2925.56(A).

⁸ R.C. 2925.56(D) and (H).

⁹ R.C. 2925.56(C) and (G).

or a successor organization. A "stop-sale alert" is defined as a notification sent from the Exchange to a retailer or terminal distributor of dangerous drugs indicating that the completion of a sale of a pseudoephedrine product 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 bill authorizes the Attorney General to enter into a contract or memorandum of understanding with the National Association of Drug Diversion Investigators or its successor organization and, 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 to the contract or memorandum relative to such access and use.¹¹

In furtherance of the purpose of the contract or memorandum of understanding, the bill requires the contract or memorandum to include terms that do all of the following:

(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 bill 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;

¹⁰ R.C. 3715.05(A)(6) and (13).

¹¹ R.C. 109.88(B).

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

Qualified immunity from civil liability

The bill 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 bill regulates over-the-counter sales of ephedrine products in the same manner that over-the-counter sales of pseudoephedrine products are regulated under current 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. Current Ohio law restricts over-the-counter sales only with respect to pseudoephedrine products.

Specifically, the bill 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 may be purchased or received by an individual (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

¹² R.C. 109.88(C).

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.

purchase or procure ephedrine products without the direct assistance of a pharmacist or other authorized employee of the retailer or terminal distributor.

- Requires retailers and terminal distributors to maintain a log book of all over-the-counter ephedrine product purchases made.
- 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 bill 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 bill 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 bill applies the same daily limit to state law.¹⁹ Currently, Ohio law limits to nine

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).

grams the amount of pseudoephedrine product that may be purchased or received without a prescription in a period of 30 consecutive days.²⁰

The bill specifies that 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.²¹

Restrictions on retailers and terminal distributors

The bill 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. Currently, a retailer or terminal distributor is required 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.²²

The bill 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.²³

Regulation of pseudoephedrine product sales

The bill makes all products containing pseudoephedrine that are purchased or obtained without a prescription subject to the restrictions that apply under existing law. Under current law, both of the following are excluded from the definition of "pseudoephedrine product": (1) a consumer product containing pseudoephedrine that is 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 do not exceed 15 milligrams of

²⁰ R.C. 2925.55(B)(1).

²¹ R.C. 2925.55(B).

²² R.C. 3715.05(B).

²³ R.C. 3715.05(B)(2) and (4).

pseudoephedrine.²⁴ This means that these products are not subject to current law's restrictions governing over-the-counter pseudoephedrine sales. The bill removes the exclusions and applies the restrictions to all over-the counter sales of products containing pseudoephedrine.

Transaction scans

Current law 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. The prohibition does not currently 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 bill 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 bill, ephedrine product sales: (1) the information required by the bill 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.²⁵

Sales permitted by prescription

Under the bill, 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.²⁶

Current law authorizing pseudoephedrine sales pursuant to prescriptions does not include references to the prescriptive authority of physician assistants, which was implemented after the pseudoephedrine law was enacted.²⁷

²⁴ R.C. 2925.55(A)(4).

²⁵ R.C. 2925.57(D).

²⁶ R.C. 2925.55 and 2925.56.

²⁷ Am. Sub. S.B. 53 and Sub. S.B. 154 of the 126th General Assembly, both effective May 17, 2006.

Controlled substance analogs

Background; definition

Sub. 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.²⁸ 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.²⁹)

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.³⁰ H.B. 64, a controlled substance analog is generally a substance to which both of the following apply:³¹

(1) The chemical structure of the substance 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 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.

²⁸ R.C. Chapter 3719.

²⁹ U.S. Department of Justice, Drug Enforcement Administration, Office of Diversion Control, *Controlled Substance Schedules* (last visited Nov. 28, 2012), available at <<http://www.deadiversion.usdoj.gov/schedules/index.html#define>>.

³⁰ 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.

³¹ R.C. 3719.01(HH)(1).

H.B. 64 specified that all of the following are *not* controlled substance analogs:³²

(1) A controlled substance;

(2) Any substance for which there is an approved new drug application;

(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;

(4) Any substance to the extent it is not intended for human consumption before the exemption described in (2), above, takes effect with respect to that substance.

The bill defines "controlled substance analog" for purposes of Ohio's drug offense statutes³³ consistent with the definition of this term in the controlled substances law (R.C. Chapter 3719.).³⁴ The bill 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 bill's provisions governing the offenses of trafficking in and possession of controlled substance analogs.³⁵ 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.³⁶

New offenses - trafficking in and possession of controlled substance analogs

The bill creates the criminal offenses of trafficking in and possession of controlled substance analogs.³⁷ Under current law, a person who sells or offers to sell, or prepares for shipment, ships, transports, delivers, prepares for distribution, or distributes a substance that is defined by the bill as a controlled substance analog (*i.e.*, traffics the substance), is prosecuted under the statute that applies to a person who traffics any schedule I controlled substance—aggravated trafficking in drugs.³⁸ Similarly, a person

³² R.C. 3719.01(HH)(2).

³³ See R.C. Chapter 2925.

³⁴ R.C. 2925.01(A).

³⁵ R.C. 3719.013.

³⁶ See 21 U.S.C. § 813.

³⁷ 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).

³⁸ R.C. 2925.03(C)(1).

who possesses a substance that is defined by the bill as a controlled substance analog is prosecuted under the statute that applies to a person who possesses any schedule I controlled substance—aggravated possession of drugs.³⁹ The penalties that apply to the offenses of aggravated trafficking in drugs and aggravated possession of drugs vary 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 bill similarly vary depending on the amount of the substance and whether the offense occurred near a school or juveniles. A comparison of the penalties that apply under current law and the bill 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")

Current law		The bill (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 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	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,

³⁹ R.C. 2925.11(C)(1).

Current law		The bill (new offenses)	
Crime	Penalty	Crime	Penalty
	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.		F3 with presumption for a prison term.
Aggravated trafficking in drugs (involving CS 1) – amount equals or exceeds five times the bulk amount but is less than 50 times the bulk amount	F2 with a mandatory prison term prescribed for F2. If amount of drug involved is within that range and if offense committed in vicinity of a school or juvenile, F1 with mandatory prison term prescribed for F1.	Trafficking in a controlled substance analog – amount equals or exceeds 20 grams but is less than 30 grams	F3 with presumption for a prison term. If amount of drug involved is within the 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) with mandatory prison term prescribed for F1 and may impose additional prison term for "major drug offender"	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.

Current law		The bill (new offenses)	
Crime	Penalty	Crime	Penalty
	classification as specified in R.C. 2929.14(B)(3).		
		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) with mandatory prison term prescribed for F1 and may impose additional prison term for "major drug offender" classification as specified in R.C. 2929.14(B)(3).

Possession Offenses – Penalties and Sentencing

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

Current law (treats controlled substance analog as any other schedule I controlled substance)		The bill (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) –	F3 with presumption for a prison term.	Possession of a controlled substance analog – amount equals or exceeds ten grams but is less than 20	F4 with presumption for a prison term.

Current law (treats controlled substance analog as any other schedule I controlled substance)		The bill (new offense)	
Crime	Penalty	Crime	Penalty
amount equals or exceeds bulk amount but is less than five times the bulk amount		grams	
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 times the bulk amount	F1 with mandatory prison term prescribed for an 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.
Aggravated possession of drugs (involving a schedule I controlled substance) – amount equals or exceeds 100 times the bulk amount	F1 with mandatory prison term prescribed for F1 and may impose additional prison term for "major drug offender" classification in R.C. 2929.14(B)(3)	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	F1 with mandatory prison term prescribed for F1.

Current law (treats controlled substance analog as any other schedule I controlled substance)		The bill (new offense)	
Crime	Penalty	Crime	Penalty
		but is less than 50 grams	
		Possession of a controlled substance analog – amount equals or exceeds 50 grams	F1 with mandatory prison term prescribed for F1 and may impose additional prison term for "major drug offender" classification in R.C. 2929.14(B)(3)

Affirmative defenses

The bill specifies that it is an affirmative defense to the charge of trafficking in a controlled substance analog that the person charged with violating the offense sold or offered to sell, or prepared for shipment, shipped, transported, delivered, prepared for distribution, or distributed any of the following:⁴⁰

- A controlled substance;
- 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 bill specifies that it is an affirmative defense to the charge of possession of a controlled substance analog that the person charged with violating the offense obtained, possessed, or used an item described in (1), (2), or (3), above.⁴¹

⁴⁰ R.C. 2925.03(J).

⁴¹ R.C. 2925.11(H).

Bulk amount

The bill specifies that no bulk amount exists for a controlled substance analog.⁴² Under current law, five other controlled substances (marihuana, cocaine, L.S.D., heroin, and hashish) also do not have bulk amounts.⁴³ 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.⁴⁴

The possession and trafficking offenses associated with controlled substances for which no bulk amount exists have unique penalties.⁴⁵ The unique penalties the bill specifies for the offenses of trafficking in and possession of controlled substance analogs⁴⁶ are shown in the tables above.

"Major drug offender" status

The bill 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."⁴⁷ The significance of being a major drug offender is that such a person is subject to an enhanced penalty.⁴⁸

Ohio's controlled substances schedules

Synthetic cannabinoids ("K2" or "spice")

Background

Under the Comprehensive Crime Control Act of 1984,⁴⁹ 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

⁴² R.C. 2925.01(D)(1).

⁴³ R.C. 2925.01(D)(1).

⁴⁴ R.C. 2925.01(D).

⁴⁵ See R.C. 2925.03(C)(3) to (7) (trafficking) and 2925.11(C)(3) to (7) (possession).

⁴⁶ See R.C. 2925.03(C)(8) and 2925.11(C)(8).

⁴⁷ R.C. 2929.01(W).

⁴⁸ R.C. 2929.14(B)(3) (not in the bill).

⁴⁹ Pub. L. No. 98-473.

action is necessary to avoid imminent hazard to the public safety.⁵⁰ 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.⁵¹

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 departments and poison control centers had issued health warnings describing the adverse health effects associated with synthetic cannabinoids.⁵² 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.⁵³

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 apply to synthetic cannabinoids.

Scheduling by chemical group

The bill removes the five synthetic cannabinoids identified above from Ohio's list of schedule I hallucinogenic substances. Instead, the bill specifies that unless

⁵⁰ 21 U.S.C. § 811.

⁵¹ R.C. 3719.43.

⁵² Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. 11075.

⁵³ R.C. 3719.41(C)(35), (36), (37), (38), and (39).

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:⁵⁴

(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) Naphthylmethylindoles: 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. 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 naphthylmethylideneindene 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

⁵⁴ R.C. 3719.41(C)(50).

extent or whether or not substituted on the naphthyl group to any extent. Naphthylmethylenes include, but are not limited to, (1-[(3-pentyl)-1H-inden-1-ylidene)methyl]naphthalene (JWH-176).

(5) Phenylacetylindoles: any compound containing a 3-phenylacetylindole 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, 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.⁵⁵

⁵⁵ R.C. 3719.41(C)(50).

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. And nearly every box has a label that says "not for human consumption."⁵⁶

H.B. 64 added six synthetic derivatives of cathinone found in bath salts to Ohio's list of schedule I hallucinogenic substances: methydone (3,4 methylenedioxyamphetaminone), MDPV (3,4 methylenedioxypropylamphetaminone), 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 that all Revised Code provisions pertaining to schedule I controlled substances, including the drug offenses, generally apply to these substances.

The bill

The bill removes the six synthetic derivatives of cathinone, described above, from Ohio's list of schedule I hallucinogenic substances. In addition, the bill removes cathinone and methcathinone from Ohio's list of schedule I stimulants. In place of these, the bill adds substituted cathinones to Ohio's list of schedule I stimulants. The bill 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;

⁵⁶ National Public Radio, PBS Newshour, *Bath Salts – The Drug That Never Lets Go* (last visited October 5, 2012), available at <<http://www.pbs.org/newshour/multimedia/bath-salts/>>.

⁵⁷ R.C. 3719.41(E)(7).

- (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 bill specifies that examples of substituted cathinones include, but are not limited to, methylone (3,4-methylenedioxyamphetaminone), MDPV, (3,4-methylenedioxyphenylamphetaminone), mephedrone (4-methylmethcathinone), 4-methoxymethcathinone, 4-fluoromethcathinone, 3-fluoromethcathinone, Pentadrone (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 bill 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. These compounds, according to a forensic scientist at the Ohio Bureau of Criminal Investigation, have no known legitimate use.⁵⁸

- (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);

⁵⁸ Bureau of Criminal Investigation, Office of Ohio Attorney General Mike DeWine (interview July 24, 2012).

(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);

(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 2012.⁵⁹ 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.⁶⁰ The bill'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.

Other compound - stimulants

The bill adds methiopropamine to Ohio's list of schedule I stimulants.⁶¹

Removal of trafficking in and possession of spice as offenses

Associated with the bill's removal of the five synthetic cannabinoids from Ohio's list of schedule I hallucinogenic substances, the bill eliminates the offenses of trafficking in and possession of spice.⁶²

Definition of "standard pharmaceutical reference manual"

The bill specifies that only one or more standard 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.⁶³ Currently, a standard pharmaceutical reference manual may be the current edition, with cumulative changes, of *any* of the following:⁶⁴

(1) "The National Formulary";

⁵⁹ Section 1152 of the "Food and Drug Safety and Administration Act," Pub. L. No. 112-144.

⁶⁰ Bureau of Criminal Investigation, Office of Ohio Attorney General Mike DeWine (interview October 30, 2012).

⁶¹ R.C. 3719.41(E)(6) and (7).

⁶² R.C. 2925.03(C)(8) (trafficking) and 2925.11(C)(8) (possession).

⁶³ See R.C. Chapter 2925.

⁶⁴ R.C. 2925.01.

(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.⁶⁵

Emergency clause and delayed effective dates

The bill declares that it is an emergency measure necessary for the immediate preservation of the public peace, health, and safety.⁶⁶ Therefore, it is not subject to the referendum under article II, section 1d of the Ohio Constitution.

The bill specifies that its provisions pertaining to the National Precursor Log Exchange take effect 90 days after the bill's effective date.⁶⁷ As a result of the bill's 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	---

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⁶⁵ Bureau of Criminal Investigation, Office of Ohio Attorney General Mike DeWine (interview September 20, 2012).

⁶⁶ Section 5.

⁶⁷ Section 4.

