

Novel Psychoactive Substances - 2016 Legislative and Regulatory Update

By Jonathan Woodruff

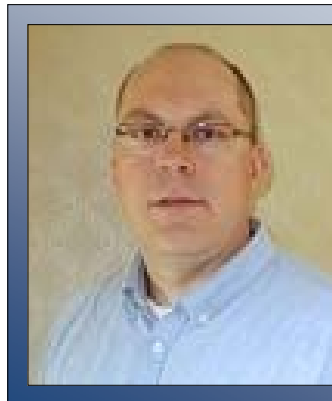
The emergence and expansion of manufactured drugs designed to mimic the effects of illegal drugs over the past 10 years is one of the most significant public health issues facing the United States and other countries today. On what certainly seems like a near-regular basis, there are reports of a flurry of overdoses or bad reactions in a particular locality caused by the ingestion of one or more of these substances.

News articles have used many different terms to refer to these drugs, or at least a subset of them, including: “synthetic drugs,” “designer drugs,” “spice,” “bath salts,” “synthetic marijuana,” “synthetic cannabinoids,” and “synthetic cathinones.” In this article, the National Alliance for Model State Drug Laws (“NAMSDL”) will use the phrase “novel psychoactive substances” or “NPS,” which is a common international moniker, to refer to all of these substances generally.

Over time, U.S. federal and state policymakers have tried to combat the emergence of NPS. Their legislative and regulatory actions fall generally into two categories: (1) placing (at least some of) the substances into schedule I of state and federal controlled substance lists, thereby making them illegal to use or possess; and (2) creating and/or enhancing criminal penalties for persons or businesses found producing or selling the banned substances. In this issue of *NAMSDL News - Subject Matter Analysis*, NAMSDL will review and analyze many of the NPS-related legislative and regulatory responses that were proposed or enacted during calendar-year 2016. First, NAMSDL will detail the federal and state NPS scheduling actions during 2016. Then, NAMSDL will analyze other types of legislation introduced to address NPS trafficking and abuse. Additional details about the legislation and regulations discussed in this article can be found in NAMSDL’s recently published document *Synthetic & Novel Psychoactive Substances: 2016 Legislative Session Bill Status Update*.¹

Scheduling NPS in federal and state controlled substance lists

According to federal sources, NPS were first reported in the United States in 2008 when a shipment containing synthetic cannabinoids laced on plant materials was seized by the U.S. Customs and Border Protection.²



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Subsequently, the U.S. Drug Enforcement Administration (“DEA”) first announced its intention to temporarily place certain NPS, initially five synthetic cannabinoids, into federal controlled substance schedule I in 2010.³ This first scheduling action took effect in 2011.⁴ In the 58 months from that first action through the end of 2015, DEA had placed, either temporarily or permanently, 38 NPS into federal schedule I.

During the first 11 months of 2016, DEA has added five new NPS into schedule I, increasing the total number of scheduled NPS to 43. Each of the new NPS was scheduled under 21 U.S.C. § 811(h), which allows the U.S. Attorney General to schedule substances on a temporary (and expedited) basis if it is “necessary to avoid an imminent hazard to the public safety.” The temporary scheduling initially lasts two years, but it can be extended once for an additional year before a final scheduling decision is made. The new federally scheduled NPS, listed in chronological order along with the type of NPS and effective date of DEA action, are:

- MAB-CHMINACA / ADB-CHMINACA (synthetic cannabinoid) (February 5, 2016);⁵
- butyryl fentanyl (synthetic opioid) (May 12, 2016);
- beta-hydroxythiofentanyl (synthetic opioid) (May 12, 2016);⁶
- U-47700 (synthetic opioid) (November 14, 2016);⁷ and
- furanyl fentanyl (synthetic opioid) (November 29, 2016).⁸

In August 2016, DEA proposed to temporarily place the opioids mitragynine and 7-hydroxymitragynine, which are the main active constituents of the plant kratom, into federal schedule I.⁹ However, DEA withdrew this notice of intent in October 2016 and instead solicited public comments on scheduling these substances on or before December 1, 2016.¹⁰

The remainder of DEA’s NPS scheduling activity in 2016 involved either permanently scheduling substances already temporarily scheduled or extending temporary scheduling by one year. During 2016, the following 11 NPS, listed in chronological order, were permanently placed into schedule I:

- UR-144 (synthetic cannabinoid) (May 11, 2016);
- 5-fluoro-UR-144 / XLR11 (synthetic cannabinoid) (May 11, 2016);
- APINACA / AKB48 (synthetic cannabinoid) (May 11, 2016);¹¹
- AH-7921 (synthetic opioid) (May 16, 2016);¹²
- PB-22 / QUPIC (synthetic cannabinoid) (September 6, 2016);
- 5-fluoro-PB-22 / 5F-PB-22 (synthetic cannabinoid) (September 6, 2016);
- AB-FUBINACA (synthetic cannabinoid) (September 6, 2016);
- ADB-PINACA (synthetic cannabinoid) (September 6, 2016);¹³
- 25I-NBOMe / 2C-I-NBOMe / 25I; Cimbi-5 (synthetic phenethylamine) (October 27, 2016);
- 25C-NBOMe / 2C-C-NBOMe / 25C; Cimbi-82 (synthetic phenethylamine) (October 27, 2016); and
- 25B-NBOMe / 2C-B-NBOMe / 25B; Cimbi-36 (synthetic phenethylamine) (October 27, 2016).¹⁴

Meanwhile, effective March 4, 2016, the temporary placement of 10 synthetic cathinone NPS in federal schedule I was extended for one year to March 2017.¹⁵ At the same time, DEA issued a notice of intent to permanently schedule

these substances in schedule I in the future:

- 4-MEC (synthetic cathinone);
- 4-MePPP (synthetic cathinone);
- α -PVP (synthetic cathinone);
- butylone (synthetic cathinone);
- pentedrone (synthetic cathinone);
- pentylone (synthetic cathinone);
- 4-FMC (synthetic cathinone);
- 3-FMC (synthetic cathinone);
- naphyrone (synthetic cathinone); and
- α -PBP (synthetic cathinone).¹⁶

There is one bill presently pending in Congress that would add about a dozen new NPS to federal schedule I.¹⁷ This bill was passed by the House of Representatives in September 2016, and is now in the Senate Committee on Judiciary.

At the state level in 2016, there have been numerous pieces of legislation enacted and regulations adopted that add one or more NPS into state controlled substance schedules. According to NAMSDL's review, 24 states plus the District of Columbia have added at least one NPS to their respective state schedules to this point in 2016, with proposed regulatory changes to schedule I pending in three other states. In addition, although the revision did not involve the state's controlled substance schedules, recently enacted legislation in California broadened the definitions of illegal "synthetic cannabinoid compounds" and "synthetic stimulant compounds" to include additional NPS.¹⁸

In 18 of these 29 jurisdictions referenced above, the changes made can be summarized basically as mirroring some or all of the NPS additions made to the federal controlled substance schedules by DEA in recent years.¹⁹ In the remaining ten states plus the District of Columbia, the scheduling changes include adding both NPS acted upon by DEA and other NPS, which are quite numerous in several instances.²⁰ In two of these 29 jurisdictions, Alabama and Florida, legislation also was proposed in 2016 to add the main active constituents of kratom to the respective state schedule I. Alabama's measure passed,²¹ while Florida's measure did not. In addition to these 29 jurisdictions, legislation to add certain NPS to state controlled substance schedules was proposed in both Maryland and New York, but was not enacted. Out of the 11 jurisdictions that made scheduling changes in 2016 beyond DEA's actions, the most expansive NPS-related scheduling activity probably occurred in four states—California, Florida, Georgia, and Vermont— and the District of Columbia.

As briefly mentioned above, California greatly expanded its definition of illegal "synthetic cannabinoid compounds" from a list of five specific substances to a list of 13 different classes plus more than 20 specific unclassified NPS.²² In Florida, the state added 12 individual NPS (nine of which have not been scheduled by DEA) and six general NPS substance classes to state schedule I.²³ These six general classes are: (1) Synthetic Cannabinoids; (2) Substituted Cathinones; (3) Substituted Phenethylamines; (4) N-Benzyl Phenethylamines Compounds; (5) Substituted Tryptamines; and (6) Substituted Phenylcyclohexylamines. In Georgia, through legislation, the state added to

schedule I three individual NPS not scheduled by DEA and the following six substance classes: (1) Indole carboxamides; (2) Indole carboxylates; (3) Indazole carboxylates; (4) Indole tetramethylcyclopropanecarbonyls; (5) Naphthoylbenzimidazoles; and (6) Naphthoylindazoles.²⁴ In addition, through regulation, Georgia added 20 synthetic cannabinoids to state schedule I.²⁵ In Vermont, the state's list of "regulated drugs" was amended to add 14 NPS to the stimulant section, acetyl fentanyl to the narcotic section, and 54 NPS to the sections containing hallucinogenic drugs, synthetic cannabinoids, tryptamines, cannabinimimetics, mescaline analogs, and dissociatives.²⁶ Finally, in the District of Columbia, the regulation containing schedule I substances was amended in emergency fashion, with approximately 200 NPS added to the list of hallucinogenic substances and additional changes and additions made to sections listing depressants, stimulants, synthetic cannabinoids, unclassified synthetic cannabinoids, substituted tryptamines, and unclassified NPS.²⁷

Other, non-schedule related NPS legislation

Separate from the scheduling of NPS as controlled substances, Congress and a number of states have proposed legislation in 2016 designed to combat the emergence of NPS in other ways. Most of this legislation is focused on creating or increasing penalties for the possession, use, or sale of NPS. However, there is some legislation that is aimed at information gathering and/or public health issues.

In Congress, there are roughly a dozen NPS-related bills presently pending, although none of them (except for the scheduling-related bill discussed in the prior section) have progressed beyond their initial post-introduction assignment to a subcommittee. Key elements of several of these pending, but not enacted, bills are discussed below. Of the ten bills mentioned, three broaden the definition of a controlled substance "analogue" under the Controlled Substances Act, three are aimed at promoting studies of and research into abuse of NPS, and four focus on criminal penalties associated with trafficking fentanyl:

- "Synthetic Abuse and Labeling of Toxic Substances Act of 2015" - amends the Controlled Substances Act to authorize six factors to be considered in determining whether a controlled substance analogue is "intended for human consumption," and provides that the labeling of a substance as "not for human consumption" is not sufficient by itself to overcome the other factors.²⁸
- "Protecting Our Youth from Dangerous Synthetic Drugs Act of 2015" - amends the Controlled Substances Act to include in the definition of a controlled substance analogue a substance designated as such by the Controlled Substance Analogue Committee ("Committee") established in the Act. The bill further requires the Committee to designate, establish, and maintain a list of controlled substance analogues determined to be similar to a schedule I or II controlled substance in either chemical structure or predictive effect on the body in such a manner as to make it likely that the substance will, or can be reasonably expected to, have a potential for abuse.²⁹
- "Illegal Synthetic Drug Safety Act of 2016"- amends the Controlled Substances Act to treat all controlled substance analogues, other than chemical substances subject to the Toxic Substances Control Act, as controlled substances in schedule I regardless of whether they are intended for human consumption.³⁰
- "Combat Heroin Epidemic and Backlog Act of 2015" - amends the Omnibus Crime Control and Safe Streets Act of 1968 to authorize the Department of Justice to award grants to state and tribal governments to address the distribution, sale, and use of heroin, fentanyl, and associated synthetic drugs.³¹

- “Synthetic Drug Awareness Act of 2016” - requires the U.S. Surgeon General to report to Congress on the public health effects of the increased use by teenagers of drugs designed to avoid control under the Controlled Substances Act.³²
- “Synthetic Drug Overdose Prevention and Education Act” - provides that the Director of the Centers for Disease Control and Prevention must complete a study on strategies for preventing and treating the use of synthetic recreational drugs and submit a report to Congress. Also provides that the Secretary of Health, in coordination with the Administrator of the DEA, must establish and maintain a database of synthetic recreational drugs, which must include analogues of controlled substances.³³
- “Help Ensure Lives are Protected Act of 2016” - provides enhanced penalties for certain offenses relating to a mixture or substance in an amount of 100 grams or more, if: (1) the mixture or substance contains both a detectable amount of heroin and a detectable amount of fentanyl or fentanyl analogue; or (2) if the mixture or substance contains a detectable amount of fentanyl or fentanyl analogue and it was represented or sold as heroin.³⁴
- “Blocking Deadly Fentanyl Imports Act” - a bill to gather information about the production of illicit fentanyl in foreign countries and to withhold bilateral assistance from countries that do not have emergency scheduling procedures for new illicit drugs, cannot prosecute criminals for the manufacture or distribution of controlled substance analogues, or do not require the registration of tableting machines and encapsulating machines.³⁵
- “Stop Trafficking in Fentanyl Act of 2015” - amends the Controlled Substances Act to modify the drug quantity thresholds that trigger a mandatory minimum prison term for a defendant who manufactures, distributes, or possesses with intent to distribute fentanyl.³⁶
- “Synthetics Trafficking and Overdose Prevention Act of 2016” - the bill would require shipments from foreign countries through the U.S. postal system to provide electronic advance data about the sender, the addressee, and the contents, prior to the package reaching the U.S. border.³⁷

In terms of state legislative activity, at least eight states enacted laws in 2016 to create or increase criminal penalties associated with NPS. Most of these laws appear aimed at drug traffickers and sellers, although California’s law applies to persons who also use NPS. The provisions of the new laws can be summarized as follows:

- In California, the penalty for a second or third offense of possessing or using a “synthetic cannabinoid compound” or “synthetic stimulant compound” is increased beyond a simple infraction.³⁸ In addition, in separate legislation, the state’s definition of a controlled substance analog will be expanded effective January 1, 2017, to include not only substances with substantially similar chemical structure as schedule I and II substances, but also substances with substantially similar chemical structure as “synthetic cannabinoid compounds.”³⁹
- Delaware added a Class B felony for “drug dealing – resulting in death.”⁴⁰
- The District of Columbia enacted a series of temporary measures that: (1) allow the D.C. Mayor to suspend or revoke the business license of any business engaged in the buying or selling of a synthetic drug; and (2) enable the D.C. Chief of Police to close the business premise for up to 96 hours.⁴¹
- On January 1, 2017, Illinois’ “Bath Salts Prohibition Act” will take effect, which provides that: (1) a person may not sell or offer for sale any “bath salts” in an Illinois retail mercantile establishment; (2) a violation is a

Class 3 felony subject to a fine of up to \$150,000; and (3) the local government that issued an offending retailer's license may revoke that license upon a conviction.⁴²

- Kentucky increased its penalty provisions for trafficking in or possession of “synthetic drugs,” which are defined in the law as “any synthetic cannabinoids or piperazines or any synthetic cathinones.”⁴³
- Mississippi has raised penalties for growing, possessing, selling, or trafficking synthetic cannabinoids, providing that a violation for less than 10 grams could earn a fine up to \$3,000 and up to three years in prison, while selling or trafficking 40 or more grams could earn a fine up to \$20,000 and a prison sentence between five to 20 years.⁴⁴
- Nebraska now prohibits a person from offering, displaying, marketing, advertising for sale, or selling a “look-alike substance,” which is a product or substance, not specifically designated as a controlled substance, that is either portrayed in such a manner to lead another to reasonably believe that it produces effects on the human body that replicate, mimic, or are intended to simulate the effects produced by a controlled substance or that it possesses certain characteristics involving packaging. The penalty for selling or marketing a “lookalike substance” is a Class 4 felony.⁴⁵
- New Hampshire has added the possession and use of “fentanyl-class drugs” for the purposes of the penalties under the controlled drug act. “Fentanyl-class drugs” are defined as fentanyl, 3-methylfentanyl, 3-methylthiofentanyl, acetylfentanyl, acetyl-alpha-methylfentanyl, alpha-methylfentanyl, alpha-methylthiofentanyl, beta-hydroxyl-3-methylfentanyl, beta-hydroxyfentanyl, para-fluorofentanyl, thiofentanyl, alfentanil, carfentanil, remifentanil, sufentanil, and all optical isomers of these substance.⁴⁶
- Legislation that would increase the criminal penalties associated with the possession or trafficking of fentanyl remains pending in two states at this time, Ohio and New Jersey.

A number of similar-type NPS bills were active in Maryland and New York during 2016 legislative sessions, but none of those were enacted before the sessions ended. Similar to these statewide efforts, several localities in California have proposed and adopted ordinances to punish individuals and businesses who sell NPS. The cities of Oceanside, Riverside, and San Diego, as well as San Luis Obispo County, each passed ordinances that make it unlawful to manufacture, sell, distribute, or possess NPS.⁴⁷ Each of these ordinances also declares that the locality can designate as a public nuisance a person or business that violates the ordinance. In August 2016, the Los Angeles City Council approved a motion asking the city attorney's office to draft an ordinance banning the sale, distribution, manufacture, and possession of NPS.

In the area of NPS-related public health regulation, perhaps the most interesting activity in 2016 was in the District of Columbia. In March, the District adopted temporary regulations entitled “Testing for Synthetic Cannabinoid Surveillance.”⁴⁸ Under these regulations, hospitals are required: (1) to collect urine samples (and recommended to collect blood samples) from patients who present and have symptoms consistent with having taken a synthetic cannabinoid; and (2) to turn over the urine and blood samples for testing by the Office of the Chief Medical Examiner.

Conclusion

As the importation, distribution, and use of NPS within the U.S. continues, NAMSDL expects federal and state policymakers to remain active in dealing with these substances and trying to head off public health concerns.

¹This document is available at: <http://www.namsdl.org/synthetic-substances.cfm>.

²<https://www.whitehouse.gov/ondcp-fact-sheets/synthetic-drugs-k2-spice-bath-salts>.

³75 FR 71635-01 (issued 11/24/2010).

⁴76 FR 11075-01 (effective 3/1/2011). These five NPS, plus 21 others, were permanently listed in federal schedule I when the Synthetic Drug Abuse Prevention Act of 2012 took effect on 7/9/2012.

⁵81 FR 6171-01.

⁶81 FR 29492-01.

⁷81 FR 79389-01.

⁸81 FR 85873-02.

⁹81 FR 59929-01.

¹⁰81 FR 70652-01.

¹¹81 FR 29142-01.

¹²81 FR 22023-01.

¹³81 FR 61130-01.

¹⁴81 FR 66181-01.

¹⁵81 FR 11429-01.

¹⁶81 FR 11479-01.

¹⁷2015 HR 3537.

¹⁸2016 California Laws Chapter 624 (effective 9/25/2016).

¹⁹The 16 states with enacted legislation or regulation in 2016 are: Alabama, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Mississippi, Oregon, South Carolina, South Dakota, Tennessee, Texas, and Wisconsin. The two states with current pending regulations are: Missouri and Nevada.

²⁰The ten jurisdictions with enacted legislation or regulation in 2016 are: California, District of Columbia, Florida, Georgia, Minnesota, New Mexico, Pennsylvania, Vermont, Virginia, and Wyoming. The state with a current pending regulation is Arkansas.

²¹2016 Alabama Laws Act 2016-279 (effective 5/10/2016).

²²2016 California Laws Chapter 624 (effective 9/25/2016).

²³2016 Florida Laws Chapter 2016-105 (effective 7/1/2016).

²⁴2016 Georgia Laws Act 603 (effective 5/3/2016).

²⁵Ga Comp. R. & Regs. 480-34-.04 & 480-34.07 (adopted 2/9/2016).

²⁶Vt. Admin. Code 12-5-23:7.0 (adopted 1/27/2016).

²⁷22-B DCMR § 1201.

²⁸2015 HR 1186 (similar bill 2015 S 1327).

²⁹2015 S 36 (identical bill 2015 HR 4229).

³⁰2015 S 3262

³¹2015 S 2241.

³²2015 HR 5020.

³³2015 HR 6065.

³⁴2015 HR 6158.

³⁵2015 S 3255.

³⁶2015 S 2027 (related bills 2015 HR 4183, 2015 HR 6243).

³⁷2015 HR 6045 (identical bill 2015 S 3292).

³⁸2016 California Laws Chapter 624 (effective 9/25/2016).

³⁹2016 California Laws Chapter 627 (effective 1/1/2017).

⁴⁰2016 Delaware Laws Chapter 330 (effective 7/21/2016).

⁴¹D.C. Act A21-0400 (effective 5/19/2016 to 8/17/2016); D.C. Act L21-0149 (effective 8/20/2016 to 4/2/2017).

⁴²Illinois Public Act 99-585 (effective 1/1/2017).

⁴³2016 Kentucky Laws Chapter 135 (effective 4/27/2016).

⁴⁴2016 Mississippi Laws Chapter 482 (effective 7/1/2016).

⁴⁵2015 Nebraska Legislative Bill 1009 (effective 3/30/2016).

⁴⁶2016 New Hampshire Laws Chapter 2 (effective 1/21/2016).

⁴⁷City of Oceanside Ordinance No. 16-0116-1; Riverside County Ordinance No. 932; San Diego Ordinances No. O-20660 (emergency) and O-20657; San Luis Obispo County Ordinance No. 3315.

⁴⁸22-B DCMR § 2039.

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