

## Current State Laws Addressing Novel Psychoactive Substances and Controlled Substance Analogues

*By Jonathan Woodruff*

Last December, the National Alliance for Model State Drug Laws (“NAMSDL”) published a *NAMSDL News - Subject Matter Analysis* discussing 2016 federal and state legislative changes addressing manufactured drugs designed to mimic the effects of illegal drugs.<sup>1</sup> Since then, NAMSDL has undertaken a comprehensive review of current U.S. state<sup>2</sup> laws addressing these substances. The product of this review is a

comprehensive state-by-state summary that NAMSDL will publish on its website soon. In the meantime, this article provides an overview of the information from the upcoming summary, identifying many of the regulatory methods used across the country while highlighting some of the similarities and differences.

Before beginning the overview, a discussion of terminology is in order. Many different terms are used in news articles and laws/regulations to refer to all of, or a subset of, the substances at issue. Some of these terms include “synthetic drugs,” “designer drugs,” “spice,” “bath salts,” “synthetic marijuana,” “synthetic cannabinoids,” and “synthetic cathinones.” For purposes of this analysis, NAMSDL uses the phrase “novel psychoactive substances” or “NPS,” which is a common international moniker for the substances. Closely related to NPS is the term “controlled substance analogue” or “analogue” (sometimes spelled “analog”). “Analogue” generally refers to a manufactured substance that is not a controlled substance in a particular state, but is sufficiently similar in chemical structure or human effect to a controlled substance that the law either: (1) treats it as a controlled substance; or (2) makes possession/distribution illegal. Thus, NPS is a broader term than analogue, in that it includes both analogues and other substances. Although an analogue is not a scheduled controlled substance (in most states), an NPS may be scheduled or may not be.

This overview and the more detailed state-by-state summary of NPS/analogue laws original from four model documents published by NAMSDL in 2014. The model documents were the product of an October 2013 working group convened in Washington, D.C. Based upon the discussions at that meeting, NAMSDL drafted and published the following four models:

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



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Language;

- Model Controlled Substance Analogue Statute;
- Scheduling Novel Psychoactive Substances - Model Language; and
- Model Novel Psychoactive Substances - Economic Sanctions Package.<sup>3</sup>

Using these models as a guide, here NAMSDL analyzes the current state of NPS/analogue laws and regulations in the following five general areas:

- Emergency scheduling of NPS and analogues;
- Definition and treatment of analogues;
- Methods used to schedule NPS;
- Treatment of fentanyl and fentanyl analogues; and
- Criminal penalties and economic sanctions specifically addressing NPS/analogues.

### **Emergency Scheduling of NPS/Analogues**

The Emergency Scheduling of Novel Psychoactive Substances and Controlled Substance Analogues – Model Language (“Emergency Scheduling Model”) recommends that a state’s law contain a provision specifically allowing for the temporary emergency scheduling of NPS/analogues by either: (1) the state agency with controlled substance scheduling authority; or (2) the state agency charged with overseeing controlled substances in states where scheduling authority rests with the legislature.<sup>4</sup> Under this language, temporary scheduling would be allowed (with 30 days’ notice) where necessary to avoid an imminent hazard to public safety. Furthermore, the scheduling would last for 18 months, with a six-month extension available in states where scheduling authority rests with the legislature. In addition, the Emergency Scheduling Model provides that the state agency must initiate scheduling after receiving notice from a state prosecutor of a criminal action involving an alleged controlled substance analogue. The model’s scheduling provision is similar to § 201(g) of the Uniform Controlled Substances Act (“UCSA”; last amended in 1994) which authorizes the emergency placement of a substance into a state’s schedule I for up to one year.<sup>5</sup> The proposed requirement that the emergency scheduling process begin upon notice from a prosecuting attorney is the same as UCSA § 214.

In practice, a large percentage of states allow for some scheduling of controlled substances via regulatory rulemaking. In the regulatory rulemaking context, it is common to allow the adoption of temporary emergency rules that are effective for approximately four to six months. Accordingly, many states implicitly allow for the emergency scheduling of controlled substances (of any kind) in this manner. In addition, many state laws also contain a statutory provision similar to UCSA § 201(f), authorizing the state scheduling authority to immediately schedule any substance “designated, rescheduled, or deleted as a controlled substance under federal law.”

A smaller, but not nominal, number of states (18 states plus D.C., by our count) have explicit statutes or regulations providing a process for the emergency scheduling of controlled substances. Many of these laws apply to both NPS/ analogues and other controlled substances, with several state laws incorporating the exact terms of UCSA § 201(g). The effective period for all but one of these temporary scheduling laws is less than the 18 months proposed in the Emergency Scheduling Model. The table below identifies these 19 jurisdictions, and provides both the substances to which the emergency provisions apply and the effective date of the temporary scheduling (if specified

in that law). It is worth noting that Kentucky’s law differs somewhat as compared to the other state provisions identified below. In Kentucky, the law does not directly authorize the scheduling authority to schedule; rather, it allows the Kentucky Office of Drug Control Policy to request the state’s scheduling authority to schedule a controlled substance within 60 days.

<u>State (effective period, if specified)</u>	<u>Substances to Which Emergency Provisions Apply</u>
Indiana (until June 30 of following year) <sup>6</sup>	“synthetic drugs”
Kansas (one year) <sup>7</sup>	“controlled substance analog”
Florida (until June 30 of following year); Louisiana (appears to be effective permanently, subject to review and challenge by state officers or other individuals); Minnesota; Nevada (one year); Washington (one year); Wisconsin (one year) <sup>8</sup>	Schedule I substance
Virginia (18 months) <sup>9</sup>	Schedule I or II substance
Arkansas (180 days); District of Columbia (approx. four months); Hawaii (end of next legislative session); Kentucky (request for scheduling within 60 days); Michigan; New Jersey (270 days); Pennsylvania (one year); Texas (September 1 of next odd-numbered year); Vermont (120 days); West Virginia <sup>10</sup>	Any controlled substance

Five of these 19 jurisdictions—Arkansas, Kansas, Nevada, Washington, and Wisconsin—have laws containing the recommended language (or something similar to it) from the model and UCSA § 214 that prosecuting attorneys must provide scheduling authorities with notice of prosecutions involving controlled substance analogues so that an emergency scheduling process can begin.<sup>11</sup> State laws in Alabama and Kentucky also contain notice provisions concerning NPS/analogues of sorts, with Alabama’s law directing the state’s Department of Forensic Sciences to provide notice,<sup>12</sup> while the aforementioned Kentucky statute implicitly involves the state’s Office of Drug Control Policy giving notice of the possible existence of an analogue.

### **Definition and Treatment of Controlled Substance Analogues**

NAMSDL’s review of states’ definitions and treatment of controlled substance analogues reveals a fair amount of variation. Summarizing generally, the Model Controlled Substance Analogue Statute (“Model Analogue Law”) contains the following key provisions:

- a suggested definition of “controlled substance analogue,” along with guidance, in the form of three options, regarding the meaning of “substantially similar to”;
- scientific, pharmacological, and market-based factors—some of which must be considered and some of which may be considered—for use in determining whether a particular substance is an analogue;
- treatment of analogues as schedule I substances; and
- formation of a Controlled Substances Analogue Committee within the state to meet as needed to designate emerging substances as analogues by rule.<sup>13</sup>

At this time, it appears that the laws of 12 states do not define a controlled substance analogue, or something substantially akin to it. These states are Arizona, Connecticut, Georgia, Hawaii, Idaho, Iowa, Maine, Mississippi,

New York, Rhode Island, Vermont, and Wyoming. Although Mississippi law concerning the drug testing of employees indicates that an “illegal drug” includes “controlled substance analogs,”<sup>14</sup> that term does not appear to be defined in the Mississippi labor code or anywhere else. Interestingly, in six of these 12 states—Arizona, Georgia, Hawaii, Iowa, New York and Rhode Island—state law does contain a definition for the term “imitation controlled substance.” Although an “imitation controlled substance” is typically thought of as a non-controlled substance explicitly held out as a controlled substance by a seller, in Iowa, legislators intend for newly enacted legislation amending the definition of “imitation controlled substance” to be the means for prosecuting sellers of potentially dangerous synthetic substances that do not fall within schedules I or II.<sup>15</sup> Certainly, it is possible that prosecutors in one or more of the five other states use or attempt to use imitation controlled substance law in a manner similar to analogue laws.

Doing the math, that leaves 38 states and the District of Columbia where the law defines controlled substance analogue. The definition of analogue in the Model Analogue Law is very similar to the definition of analogue in both UCSA § 101(3) and federal law (21 U.S.C.A. § 802(32)). Under the UCSA, an analogue is:

a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in or added to Schedule I or II and: (A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or II; or (B) with respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or II.

Under federal law, an analogue is:

a substance--(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II; (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.<sup>16</sup>

Both of these definitions have three “prongs”—substantially similar chemical structure, actual effect on central nervous system, and represented or intended effect. The difference between the two definitions is grammatical, in that the UCSA definition more clearly indicates that the first prong (a substantially similar chemical structure) is a required element paired with either (A) or (B). In contrast, the syntax of the federal definition could suggest that only one of (i), (ii), or (iii) is necessary. The Model Analogue Law uses the UCSA format, albeit with more detail about the type of substance (capsule, pill, powder, product, or other substance, however constituted) and no limitation on the applicable controlled substance schedule.

Turning to the state laws, 21 states and the District of Columbia utilize the same (or similar) three-prong test as the Model Analogue Law to define a controlled substance analogue. These jurisdictions are Arkansas, Colorado, District of Columbia, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Utah, Virginia, Washington, and Wisconsin.<sup>17</sup> Conversely, in 17 states, the definition of analogue strays a bit more from the model. The table below describes the differences between the definition of analogue in the Model Analogue Law and these 17 state laws:

<u>State</u>	<u>Difference from UCSA/Model Definition of Analogue</u>
Alabama <sup>18</sup>	Defines “synthetic controlled substance analogue” within schedule I of Alabama’s controlled substances list, with the definition consisting of a combination of the model definition and structural class listing of synthetic cannabinoids and cathinones.
Alaska <sup>19</sup>	Criminalizes “illicit synthetic drugs,” where the definition of “synthetic drug” requires a substance designed to mimic or simulate the effect of a drug or controlled substance when in the human body.
California <sup>20</sup>	Two-pronged test, requiring either a similar chemical structure or a similar intended effect.
Delaware <sup>21</sup>	Defines “designer drug” as a substance that has a chemical structure substantially similar to that of a controlled substance or that is specifically designed to or may produce an effect substantially similar to that of a controlled substance.
Maryland, Oregon <sup>22</sup>	Two-pronged test, requiring similar chemical structure and effect on nervous system, but without any consideration of intended or represented effect.
Montana <sup>23</sup>	Defines term “dangerous drug analogue” using three-pronged test, but uses phrase “structurally related to or chemically derived from” instead of “substantially similar to,” and refers to “physiological effect.”
Nebraska, Pennsylvania, South Carolina <sup>24</sup>	Two-pronged test requiring either a substantially similar chemical structure as a controlled substance or a substantially similar effect; in Pennsylvania the term used is “designer drug.”
New Hampshire, New Jersey, New Mexico, Texas <sup>25</sup>	Two-pronged test, requiring both a substantially similar chemical structure and for the substance to be designed to produce a similar effect.
South Dakota <sup>26</sup>	Similar to the federal definition with additional structural considerations that could qualify a substance as an analogue even if the federal three-prong test is not met.
Tennessee <sup>27</sup>	Two-pronged test that requires both the same effect on the nervous system as a controlled substance and a chemical structure which is a derivative of or a structural analogue of the chemical structure of a controlled substance.
West Virginia <sup>28</sup>	Defines “analogue” as a substance that, in relation to a controlled substance, has a substantially similar chemical structure.

State laws also vary on how to treat analogues under the law. Under the Model Analogue Law, as with UCSA § 214, an analogue is treated as a schedule I controlled substance. Unlike § 214, however, the Model does not require that an analogue be intended for human consumption in order for the scheduling treatment to apply. Of the 39 jurisdictions that define analogue or a similar substance, 14 states and the District of Columbia treat them as schedule I substances. Five states treat analogues as either schedule I or II substances, while four other states treat them the same as the controlled substances for which they are analogues. The laws of an additional 14 states do not appear to address the

scheduling of analogues, but do establish criminal penalties for possession or distribution of them. Interestingly, in Oregon, the only criminal penalty is for causing a person to ingest a controlled substance analogue. This leaves West Virginia as the only state that defines an analogue but does not provide a criminal penalty associated with it. The table below summarizes states’ treatment of analogues:

<u>States</u>	<u>Treatment of Analogues</u>
Alabama, Arkansas, District of Columbia, Indiana, Maryland, Minnesota, Missouri, Montana (unless listed in another schedule), Nebraska, Nevada, North Carolina, Ohio, South Dakota, Washington, Wisconsin <sup>29</sup>	Schedule I
California, Colorado, Illinois, Louisiana, Virginia <sup>30</sup>	Schedule I or II
Florida, Massachusetts, New Mexico, Texas <sup>31</sup>	The controlled substance for which it is analog
Alaska, Delaware, Kansas, Kentucky, Michigan, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah <sup>32</sup>	No mention of scheduling, but penalties
West Virginia	No penalty

At this time, it does not appear that any state has created something akin to the Controlled Substance Analogue Committee recommended in the Model Analogue Law. Three states, however, do have advisory boards or committees tasked with some controlled substance responsibility: Delaware, Wisconsin, and Wyoming. In Wisconsin, the entity, the Wisconsin Controlled Substances Board, has scheduling authority. In addition, within the past few years, proposed legislation appeared in at least Hawaii, Illinois, Rhode Island, and South Carolina that would require state scheduling agencies—in conjunction with state law enforcement—to develop a report at least every 90 days concerning the identification of new unscheduled NPS.

**Methods Used to Schedule NPS**

NAMSDL’s third model document, Scheduling Novel Psychoactive Substances - Model Language (“Model Scheduling Language”) contains recommended controlled substance scheduling language for five types of NPS: (1) synthetic cannabinoids; (2) substituted cathinones; (3) substituted phenethylamines; (4) substituted tryptamines; and (5) certain other unclassified NPS.<sup>33</sup>

With respect to synthetic cannabinoids, the Model Scheduling Language proposes to separate them into the following 13 structural classes, with definitions and examples for each:

- Adamantoylindoles or adamantoylindazoles;
- Benzoylindoles;
- Cyclohexylphenols;
- Cyclopropanoylindoles;
- Naphthoylindoles;
- Naphthoynaphthalenes;
- Naphthoylpyrroles;
- Naphthylmethylenes;
- Naphthylmethyloles;

- Phenylacetylindoles;
- Quinolinyndolecarboxylates;
- Tetramethylcyclopropanoylindoles; and
- Tetramethylcyclopropane-thiazole carboxamides.

All told, the Model contains over 175 examples of synthetic cannabinoids within these 13 classes. In addition, the Model lists a fourteenth category, unclassified synthetic cannabinoids, which encompasses an additional 25 individual substances. As for substituted cathinones, phenethylamines, and tryptamines, the Model recommends for each one a structural class definition along with particular examples. The class definitions for each are as follows:

- Substituted cathinone structural class definition: Any compound (not being bupropion . . . ) structurally derived from 2-amino-1-phenyl-1-propanone by modification in any of the following ways, that is to say, (i) by substitution in the phenyl ring to any extent with alkyl, alkoxy, alkylendioxy, haloalkyl or halide substituents, whether or not further substituted in the phenyl ring by one or more other univalent substituents; (ii) by substitution at the 3-position with an alkyl substituent; (iii) by substitution at the nitrogen atom with alkyl or dialkyl groups, or by inclusion of the nitrogen atom in a cyclic structure.
- Substituted phenethylamines structural class definition: This includes any compound, unless specifically excepted, specifically named in this schedule, or listed under a different schedule, structurally derived from phenylethan-2-amine by substitution on the phenyl ring in any of the following ways, that is to say, by substitution with a fused methylenedioxy ring, fused furan ring, or fused tetrahydrofuran ring; by substitution with two alkoxy groups; by substitution with one alkoxy and either one fused furan, tetrahydrofuran, or tetrahydropyran ring system; or by substitution with two fused ring systems from any combination of the furan, tetrahydrofuran, or tetrahydropyran ring systems. Whether or not the compound is further modified in any of the following ways, that is to say: (a) By substitution of phenyl ring by any halo, hydroxyl, alkyl, trifluoromethyl, alkoxy, or alkylthio groups; (b) By substitution at the 2-position by any alkyl groups; or (c) By substitution at the 2-amino nitrogen atom with alkyl, dialkyl, benzyl, hydroxybenzyl, methylenedioxybenzyl, or methoxybenzyl groups.
- Substituted tryptamines structural class definition: This includes any compound, unless specifically excepted, specifically named in this schedule, or listed under a different schedule, structurally derived from 2-(1H-indol-3-yl)ethanamine (i.e., tryptamine) by mono- or di-substitution of the amine nitrogen with alkyl or alkenyl groups or by inclusion of the amino nitrogen atom in a cyclic structure whether or not the compound is further substituted at the alpha position with an alkyl group or whether or not further substituted on the indole ring to any extent with any alkyl, alkoxy, halo, hydroxyl, or acetoxy groups.

Along with these structural class definitions, the Model Scheduling Language provides over 55 examples of substituted cathinones, over 50 examples of substituted phenethylamines, and over 25 examples of substituted tryptamines. The Model also lists individually over 25 other NPS that do not fall in one of the four above classes.

Among state laws and regulations, the scheduling of NPS generally is the norm. Indeed, as of the time of NAMSDL's review, it appears that controlled substance schedules in only two states—Alaska and California—do not contain more than a nominal number of NPS. Nevertheless, even in these two states, the possession or sale of at least some NPS are

criminalized outside of scheduling. In Alaska, there is a prohibition against the possession or sale of “illicit” synthetic drugs, which are defined in a manner similar to controlled substance analogues.<sup>34</sup> Meanwhile, California law prohibits the possession or sale of “synthetic cannabinoid compounds” and “synthetic stimulant compounds,” both of which are extensively defined similarly to synthetic cannabinoids and substituted cathinones in the Model Scheduling Language.<sup>35</sup>

According to NAMSDL’s review, besides Alaska and California, there are only 12 other states that schedule some or many NPS without use of the structural class definitions for either synthetic cannabinoids or substituted cathinones. These 12 states are Colorado, Connecticut, Delaware, Massachusetts, Nevada, New Hampshire, New York, Tennessee, Utah, Vermont, Washington, and Wyoming. In three of these states, New Hampshire, New York, and Tennessee, structural class definitions for one or both of the types of NPS appear elsewhere in the law besides the controlled substance schedules, typically in provisions specifically criminalizing their use, possession, or sale.<sup>36</sup>

In contrast to the widespread use of structural class definitions for synthetic cannabinoids and substituted cathinones, however, relatively few states presently schedule substituted phenethylamines or substituted tryptamines using structural classes. Based upon our review, it appears that only four states—Florida, Nebraska, North Dakota, and South Dakota—plus the District of Columbia currently use such classes.<sup>37</sup>

**Treatment of Fentanyl and Fentanyl Analogues**

One recently emerging concern in the area of NPS/analogues not specifically addressed in NAMSDL’s four model documents is the specific scheduling or criminalization of synthetic fentanyl analogues. Between July 2015 and May 2017, the federal Drug Enforcement Administration (“DEA”) temporarily placed the following five, fentanyl analogues in schedule I on an emergency basis: (1) acetyl fentanyl; (2) butyryl fentanyl; (3) beta-hydroxythiofentanyl; (4) furanyl fentanyl; and (5) 4-fluoroisobutyryl fentanyl/ para-fluoroisobutyryl fentanyl.<sup>38</sup> In response, several states scheduled one or more of these fentanyl analogues under their versions of UCSA § 201(f) (discussed above), that allow for a state scheduling authority to immediately schedule any substance “designated, rescheduled, or deleted as a controlled substance under federal law.”

In addition to DEA-influenced scheduling actions of individual substances, NAMSDL has uncovered other fentanyl-specific laws or regulations in a number of states. Many of these provisions first took effect in the last few years. In the table below, we provide a non-exhaustive summary of the laws or regulations in 11 states:

<b><u>State</u></b>	<b><u>Fentanyl-related Law or Regulation</u></b>
Arizona <sup>39</sup>	Definition of “narcotic substance” in state’s drug offense section of criminal code includes “[f]entanyl mimetic substances that are any substances derived from fentanyl by any substitution in the phenethyl group, any substitution in the piperidine ring, any substitution in the aniline ring, any replacement of the phenyl portion of the phenethyl group, any replacement of the N-propionyl group or any combination of the above.”
Georgia <sup>40</sup>	Among other things, adds a “fentanyl analog structural class” to state schedule I, with an extensive definition of the structural class.
Illinois <sup>41</sup>	Statute criminalizing the “[m]anufacture or delivery, or possession with intent to manufacture or deliver, a controlled substance, a counterfeit substance, or controlled substance analog” contains specific penalties associated with “a substance containing fentanyl, or an analog thereof.”

<u>State</u>	<u>Fentanyl-related Law or Regulation</u>
Kentucky <sup>42</sup>	Criminalizes the importation and trafficking of carfentanil, fentanyl, or fentanyl derivatives. Adds fentanyl derivative to schedule I. Defines “fentanyl derivative” using structural class definition.
Maryland <sup>43</sup>	Statute criminalizing the “[i]mporter of certain controlled dangerous substances” notes that unless authorized, it is unlawful to bring into the state “4 grams or more of fentanyl or a fentanyl analogue.”
Massachusetts <sup>44</sup>	Creates enhanced penalties for anyone who “traffics in fentanyl” involving an amount of 10 or more grams fentanyl. Under the law, the term “fentanyl” includes “any derivative of fentanyl and any mixture containing more than 10 grams of fentanyl or a derivative of fentanyl.”
New Hampshire <sup>45</sup>	Adds possession and use of fentanyl-class drugs for the purposes of the penalty under the controlled drug act.
North Dakota <sup>46</sup>	Adds the following “fentanyl derivatives” structural class definition to schedule I, including 15 listed examples: “[u]nless specifically excepted or unless listed in another schedule or are not FDA approved drugs, and are derived from N-(1-(2-Phenylethyl)-4-piperidinyl)-N-phenylpropanamide (Fentanyl) by any substitution on or replacement of the phenethyl group, any substitution on the piperidine ring, any substitution on or replacement of the propanamide group, any substitution on the anilido phenyl group, or any combination of the above.”
Ohio <sup>47</sup>	Adds to the state’s schedule I, by regulation, “any compound that meets one of four “fentanyl pharmacophore requirements to bind at the mu receptor.”
Pennsylvania <sup>48</sup>	Adds to the state’s schedule I “[f]entanyl derivatives—any compound not listed under a different schedule, not a Federal Food and Drug Administration-approved drug or not used within legitimate and approved medical research, structurally derived from N-(1-(2-phenethyl)-4-piperidinyl)-N-phenyl-propanamide,” which includes 11 listed examples.
West Virginia <sup>49</sup>	Among other things, prohibits the production, manufacture, or possession of fentanyl.

**Criminal/Civil Penalties & Economic Sanctions Specifically Addressing NPS/Analogues (other than Fentanyl)**

A final area that warrants review is the status of state laws penalizing the unlawful use, possession, sale, or manufacture of NPS/analogues, either by criminal/civil penalties or economic sanctions. Certainly, where states schedule NPS as controlled substances, or explicitly treat analogues as schedule I or II substances, these states criminalize their improper use, possession, and distribution. Nevertheless, in at least 27 states, NAMSDL has located statutory provisions that specifically either enhance criminal penalties or apply additional penalties, if a controlled substance violation occurs with either a NPS or analogue. These states are Alabama, Alaska, Arkansas, California, Colorado, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont and Washington.<sup>50</sup>

Regarding economic sanctions for businesses caught manufacturing or selling NPS/analogues, the fourth model document emerging from the October 2013 working group, entitled the Model Novel Psychoactive Substances - Economic Sanctions Package (“Model Sanctions Package”), addresses this.<sup>51</sup> Within the Package are the following five separate model acts:

- Model Revocation or Suspension of Business License Act provides for the suspension or revocation of the following licenses in cases of violations: (1) liquor, beer, wine, and tobacco; and (2) retail merchant license or certificate.

- Model Injunctive and Other Equitable Relief Act<sup>52</sup> provides for the imposition of a temporary restraining order, preliminary injunction, temporary forfeiture order, temporary closure order, or order of abatement for violations.
- Model Nuisance Abatement Act<sup>53</sup> provides that violations may result in the declaration of a premises as a public or drug-related nuisance and includes provisions for abatement and suspension or revocation of certain licenses.
- Model Misbranded or Mislabeled Products Act<sup>54</sup> provides for the seizure of all mislabeled/misbranded novel psychoactive substances.
- Model Language for Municipalities and Counties<sup>55</sup> contains model findings of fact, definitions, and penalty provisions that can be used by municipalities and counties in addition to the other provisions of the economic sanctions package.

NAMSDL has located laws in at least nine states and the District of Columbia that contain similar types of sanctions specifically for NPS/analogues as is proposed by the Model. The table below summarizes each of these laws, which involve a combination of nuisance abatement, business license suspension, and deceptive trade practice provisions:

<u>State</u>	<u>Economic Sanction(s) Specified in Law</u>
Colorado <sup>52</sup>	Sale of “cathinone bath salts” or “synthetic cannabinoids” constitutes a deceptive trade practice subject to a civil penalty.
District of Columbia <sup>53</sup>	D.C. Mayor or the Chief of Police may take one of the following actions against an entity that knowingly sells a synthetic drug: fine, revocation of license, or closing the premises for up to 96 hours without a hearing.
Indiana <sup>54</sup>	Court may issue one of the following to an entity found guilty of selling a “synthetic drug” or “synthetic drug lookalike substance”: restraining order, preliminary/permanent injunction, or order of abatement.
Kentucky <sup>55</sup>	Sale of synthetic drugs can be a basis for the revocation or suspension of alcoholic beverage license.
Minnesota <sup>56</sup>	Court must order a person convicted of selling a controlled substance or analog of a controlled substance under the false pretense that the substance is legal to pay restitution for the costs and expenses resulting from the crime.
Nebraska <sup>57</sup>	It is a violation of the Uniform Deceptive Trade Practices Act to sell or offer for sale a product or substance while: (1) making a deceptive or misleading representation or designation, or omitting material information, about a substance; (2) failing to identify the contents of the package or the nature of the substance contained inside the package; or (3) causing confusion or misunderstanding as to the effects a substance causes when ingested, injected, inhaled, or otherwise introduced into the human body.
Nevada <sup>58</sup>	A building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, using or giving away a controlled substance, immediate precursor or controlled substance analog constitutes a nuisance.
New Hampshire <sup>59</sup>	Provides for the revocation of a food service or alcohol license if a licensee distributes any substance containing a synthetic drug.
New York <sup>60</sup>	Commissioner of Health may issue an order to close the establishment of a violator.
Washington <sup>61</sup>	It is an unfair or deceptive trade practice for anyone to sell, attempt to sell, or purchase any product that contains any amount of any synthetic cannabinoid.

## **Conclusion**

As the production, distribution, and use of novel psychoactive substances and controlled substance analogues continues, NAMSDL expects state legislators and regulators to remain active in dealing with these challenges. NAMSDL will continue to monitor legislative activities and keep stakeholders abreast of any changes.

<sup>1</sup><http://namsdl.dynamicwebware.com/News%20Tab/NAMSDL%20News/NAMSDL%20News%20Dec%208%202016.pdf>.

<sup>2</sup>As NAMSDL's review included the District of Columbia, the general term "state" as used in this document includes the District.

<sup>3</sup>These model documents are located at the following webpage <http://www.namsdl.org/synthetic-substances.cfm>, under the "Model Laws" tab.

<sup>4</sup>The Model is located at <http://www.namsdl.org/library/70E10202-1372-636C-DD791BB7CD597FAF/>.

<sup>5</sup>The UCSA is located at [http://www.uniformlaws.org/shared/docs/controlled%20substances/UCSA\\_final%20\\_94%20with%2095amends.pdf](http://www.uniformlaws.org/shared/docs/controlled%20substances/UCSA_final%20_94%20with%2095amends.pdf).

<sup>6</sup>IC § 25-26-13-4.1.

<sup>7</sup>K.S.A. § 65-4102(e).

<sup>8</sup>F.S.A. § 893.035(7); LSA-R.S. 40:962(H); M.S.A. § 152.02(8b); N.R.S. § 453.2184; RCWA § 69.50.201(e); W.S.A. § 961.11 (4m).

<sup>9</sup>VA Code Ann. § 54.1-3443(D).

<sup>10</sup>A.C.A. § 5-64-201(a)(1)(A); District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981 (D.C. Law 4-29; D.C. Official Code § 48-902.01(a) (2014 Repl. & 2015 Supp.)) and Mayor's Order 98-49, dated April 15, 1998; HRS § 329-11(e); KRS § 218A.020(5); M.C.L.A. 333.7203; N.J.S.A. 24:21-31(b); 35 P.S. § 780-103(d); V.T.C.A., Health & Safety Code § 481.03553; V.S.A. § 844; W. Va. Code, § 60A-2-201(a).

<sup>11</sup>A.C.A. § 5-64-414(c); K.S.A. § 21-5715; N.R.S. § 453.219; RCWA § 69.50.214; W.S.A. § 961.25.

<sup>12</sup>Ala.Code § 20-2-23(b)(5)(d).

<sup>13</sup>The Model is located at <http://www.namsdl.org/library/70E230CE-1372-636C-DD1A3C8B8216D8A2/>.

<sup>14</sup>Miss. Code Ann. § 71-7-1.

<sup>15</sup>2017 Iowa H.F. 296 (effective July 1, 2017).

<sup>16</sup>21 U.S.C.A. § 802(32).

<sup>17</sup>A.C.A. § 5-64-414; C.R.S.A. § 18-18-102; DC ST § 48-902.14; F.S.A. § 893.0356; 720 ILCS 570/102; IC § 35-48-1-9.3; K.S.A. § 65-4101; KRS § 218A.010; LSA-R.S. 40:961; M.G.L.A. 94C § 1; M.C.L.A. § 333.7104; M.S.A. § 152.01; V.A.M.S. § 195.010; N.R.S. § 453.043; N.C.G.S.A. § 90-87; NDCC, § 19-03.1-01; R.C. § 3719.01; 63 Okl.St. Ann. § 2-101; U.C.A. § 58-37-2; VA Code Ann. § 54.1-3401; RCWA § 69.50.101; W.S.A. 961.01 (4m).

<sup>18</sup>Ala. Admin. Code r. Ch. 420-7-2, App.

<sup>19</sup>AS § 17.21.090(3).

<sup>20</sup>Cal. Health & Safety Code § 11401.

<sup>21</sup>16 Del.C. § 4701(9).

<sup>22</sup>MD Code, Criminal Law, § 5-402; O.R.S. § 475.908.

<sup>23</sup>MCA § 50-32-101(7)(a).

<sup>24</sup>Neb.Rev.St. § 28-401 (30)(a); 35 P.S. § 780-102; S.C. Code § 44-53-110(7).

<sup>25</sup>N.H. Rev. Stat. § 318-B:1; N.J.S.A. § 2C:35-2; N. M. S. A., § 30-31-2; V.T.C.A., Health & Safety Code § 481.002.

<sup>26</sup>SDCL § 34-20B-1(22).

<sup>27</sup>T. C. A. § 39-17-454.

<sup>28</sup>W. Va. Code, § 60A-1-101(c).

<sup>29</sup>Ala.Code § 20-2-23(b)(5)(c); A.C.A. § 5-64-414(b); DC ST § 48-902.14; IC 35-48-4-0.5; MD Code, Criminal Law, § 5-402(f)(2); M.S.A. § 152.02, Subd. 2; V.A.M.S. § 195.022; MCA § 50-32-101(7)(b); Neb.Rev.St. § 28-405(f); N.R.S. 453.219; N.C.G.S.A. § 90-89.1; R.C. § 3719.013; SDCL § 34-20B-3.1; RCWA § 69.50.214; W.S.A. § 961.25.

<sup>30</sup>Cal. Health & Safety Code § 11401(a); C.R.S.A. § 18-18-203(g), § 18-18-204(g); 720 ILCS 570/402; LSA-R.S. 40:964.1; VA Code Ann. § 54.1-3456.

<sup>31</sup>F.S.A. § 893.0356(5); M.G.L.A. 94C § 1; N. M. S. A. § 30-31-2; V.T.C.A., Health & Safety Code § 481.106.

<sup>32</sup>AS § 17.21.030; 16 Del.C. § 4751C; K.S.A. § 21-5703; §§ 21-5705 to 21-5706; KRS § 218A.1412, § 218A.1415; M.C.L.A. §§ 333.7402 to 333.7404; N.H. Rev. Stat. § 318-B:26; N.J.S.A. § 2C:35-3, § 2C:35-4, § 2C:35-5; NDCC, §§ 19-03.1-22.5 to 19-03.1-23; 63 Okl.St. Ann. § 2-401; O.R.S. § 475.908; 35 P.S. § 780-113; S.C. Code § 44-53-370(a); T. C. A. § 39-17-454; U.C.A. 1953 § 58-37-8.

<sup>33</sup>The Model is located at <http://www.namsdl.org/library/70F88111-1C23-D4F9-7493571099E3F36E/>.

<sup>34</sup>AS §§ 17.21.010 to 17.21.090.

<sup>35</sup>Cal.Health & Safety Code § 11357.5; § 11375.5.

<sup>36</sup>N.H. Rev. Stat. § 359-O:2; 10 NYCRR 9.1; T. C. A. § 39-17-438, § 39-17-452.

<sup>37</sup>F.S.A. § 893.03; Neb.Rev.St. § 28-405; NDCC, § 19-03.1-05; SDCL § 34-20B-14; 22-B DC ADC § 1201.

<sup>38</sup>80 FR 42381-01; 81 FR 29492-01; 81 FR 85873-02; 82 FR 20544-01.

<sup>39</sup>2014 Arizona Laws Chapter 36.

<sup>40</sup>2017 Georgia Laws Act 17.

<sup>41</sup>720 ILCS 570/401.

<sup>42</sup>2017 Kentucky Laws Chapter 168.

<sup>43</sup>MD Code, Criminal Law, § 5-614.

<sup>44</sup>2015 Massachusetts Laws Chapter 136.

<sup>45</sup>2016 New Hampshire Laws Chapter 2.

<sup>46</sup>2017 North Dakota Laws S.B. 2096.

<sup>47</sup>OAC 4729-11-02; eff. Jan. 2016.

<sup>48</sup>2016 Pennsylvania Laws Act 2016-37.

<sup>49</sup>2017 West Virginia Laws H.B. 2329.

<sup>50</sup>Ala.Code § 13A-12-231(12); AS §§ 17.21.030; Ark. Admin. Code 007.15.8-I, et seq.; Cal.Health & Safety Code § 11357.5, § 11375.5; C.R.S.A. §§ 18-18-406.1 to 18-18-406.2; 720 ILCS 542/1, et seq.; IC 35-48-4-10.5; KRS § 218A.1430; LSA-R.S. 40:966; M.C.L.A. §§ 333.7402 to 333.7404; M.S.A. § 152.027; Miss. Code Ann. § 41-29-139; Neb.Rev.St. § 28-471; N.H. Rev. Stat. § 143-A:9-b, § 179:63; N.J.S.A. §§ 2C:35-5.3a to 2C:35-5.3c; N. M. S. A. § 30-31-20, §§ 30-31-22 to 30-31-23; 10 NYCRR 9.1 to 9.4; N.C.G.S.A. § 90-95; NDCC, 19-03.1-23; R.C. § 2925.03; 63 Okl.St. Ann. § 2-401; 35 P.S. § 780-113; RI Gen.Laws §§ 21-28-4.01.1 to 21-28-4.01.2; T. C. A. § 39-17-438, § 39-17-452, § 39-17-454; U.C.A. § 58-37-8; 8 V.S.A. § 4235; RCWA § 69.50.430.

<sup>51</sup>The Model is located at <http://www.namsdl.org/library/70E82150-1372-636C-DD9081698A4D017F/>.

<sup>52</sup>C.R.S.A. § 6-1-723; § 6-1-725.

<sup>53</sup>DC ST § 47-2844.

<sup>54</sup>IC 32-30-8-10.5.

<sup>55</sup>KRS § 243.500

<sup>56</sup>M.S.A. § 152.0273.

<sup>57</sup>Neb.Rev.St. § 87-302

<sup>58</sup>N.R.S. § 40.140.

<sup>59</sup>N.H. Rev. Stat. § 143-A:9-b; § 179:63.

<sup>60</sup>10 NYCRR 9.5.

<sup>61</sup>RCWA § 69.50.455.

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