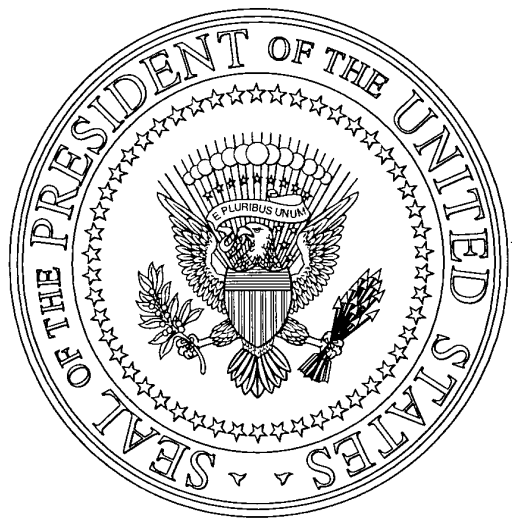
THE WHITE HOUSE

PRESIDENT'S COMMISSION ON MODEL STATE DRUG LAWS



Crimes Code

December 1993

President's Commission on Model State Drug Laws

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OFFICE OF NATIONAL DRUG CONTROL POLICY
EXECUTIVE OFFICE OF THE PRESIDENT
Washington, D.C. 20500

December 1, 1993

Dear Colleague:

Drug use and drug trafficking have affected virtually every town, city, and State in America. Nearly every family has been touched in some way by illegal drug use and the violence it spawns.

The drug problem pervades all aspects of American life. In response, the President's National Drug Control Strategy calls for a broad-based crusade to reduce the demand for drugs, restrict their availability, and deter drug-related crime and violence. A fundamental principle of this Strategy is the idea that the most effective drug control programs are those designed and carried out at the State and community levels.

In recent years States and localities have responded creatively and energetically to the threat posed by illicit drugs, in part by enacting a broad range of codes and statutes. The President's Commission on Model State Drug Laws, a bipartisan group of distinguished Americans with extensive experience in law enforcement, drug treatment, and prevention, has spent the past year reviewing these codes and statutes.

Based on this review, the Commission has developed a comprehensive package of legislative initiatives, with specific recommendations that address not only the need for more effective criminal laws but also, and just as important, the need for legislation to empower and mobilize communities to confront the drug problem. In addition, the Commission's recommendations provide innovative civil remedies to supplement our criminal codes; facilitate the development of comprehensive educational and prevention tools by which to teach our children to resist the temptation of drugs; encourage businesses and their employees to work cooperatively by establishing effective workplace initiatives and employee assistance programs; and enhance our ability to provide drug treatment to those who need it.

The package of State legislative initiatives compiled by the President's Commission is a valuable resource for State legislators, local officials, and other concerned citizens who are seeking additional ways to confront and overcome the problems created by drug trafficking and drug use. I encourage your careful review of these initiatives.

Lee P. Brown
Director

Executive Director's Preface

Alcohol and other drug addiction erodes the vitality of our nation in ways we do not even realize. Drug-trafficking crimes and crack babies grab headlines, but as a society we fail to acknowledge, and public policy fails to reflect, that many of the other major problems of our day have their roots in widespread substance abuse.

Health care costs, for example, are driven up dramatically by untreated addiction; the average alcoholic or other drug addict is conservatively estimated to be using ten times the medical services of a non-addict. The disease of addiction destroys the body in many ways not commonly known, and all of us pay the costs of treating this physical breakdown through higher taxes or higher insurance premiums. Until the health care system provides sufficient access to effective treatment, as recommended in the Commission's model legislation, health care costs will remain unacceptably high no matter how the health care system is redesigned.

Crime and prison overcrowding is another example. Sixty to eighty percent of criminal defendants are addicted. Those who are convicted and jailed continue their habits in prison, where alcohol and drugs are readily available despite regulations and enforcement to keep them out. Offenders not imprisoned for life or executed will ultimately be released into society, still addicted and still dangerous. It is hardly surprising that crime rates remain high even though the number of people imprisoned in America has increased 168 percent since 1980.

Offenders entering the criminal justice system are in the perfect place at the perfect time to be assessed for addiction and referred to treatment. The burglaries, assaults, thefts, rapes and murders committed by that addicted sixty to eighty percent are closely connected to their alcohol and drug problems. Crime and prison overcrowding will not diminish to an acceptable level until the criminal justice and treatment systems are integrated, as recommended in the Commission's Model Criminal Justice and Treatment Act. It will take years before every person arrested is assessed for substance addiction and where appropriate referred into treatment, but our country cannot afford to do anything but begin this transition.

Productivity in the workplace (which affects our global economic competitiveness) is another area where substance abuse has tremendous impact. Untreated addictions cost American businesses from $50 billion to $100 billion each year in increased medical claims and disability costs from illness and injuries, theft, absenteeism, and decreased productivity. These costs are comprehensible when one considers that fully two-thirds of all drug abusers in America are in the workplace.

The workplace is also a highly effective point of intervention for adult abusers. While much of the attention to drug-free workplaces in recent years has focused on drug testing, testing is only one tool to address the problem. A comprehensive drug-free workplace program is essential: written

policy statements, employees assistance programs and rehabilitation resources, employee education programs, supervisor training programs, testing, and confidentiality protections. Employers consistently report that these bring tremendous cost savings.

As staggering as are the obvious economic costs of alcohol and other drug abuse, the costs in human suffering are even greater. Millions of American babies are born into families ruined by the disease of addiction. The neglect, the cruelty and the abuse they suffer rob them of their innate innocence, hope, spontaneity and enjoyment of life. The bewilderment of children who can't count on a rational, nurturing, secure framework to grow up in causes incalculable emotional and spiritual damage.

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Those who offer solutions for our country's drug problems have traditionally misunderstood each other. Many law enforcement officials, for example, have been suspicious of those advocating treatment for criminal offenders. They believe that treatment advocates do not care about making criminals pay for their crimes, that they are cavalier about protecting public safety, and that treatment is just a "soft," easy alternative to the hard prison time that serious offenders should be serving. Many treatment advocates, on the other hand, have countervailing suspicions. They believe the law enforcement community is myopically focused on punishment without looking at the broader picture of how to create a safer society by changing addicted offenders' lives.

The President's Commission on Model State Drug Laws was a microcosm of the diverse viewpoints on the drug crisis. The law enforcement perspective was well represented, with three state attorneys general, five big city prosecutors, and two police chiefs. Those representing the treatment and prevention disciplines, though fewer in number, were not deterred from persuasively championing their own perspectives.

The challenge of reaching consensus initially seemed insurmountable to many of us. But after hundreds of hours of frank, honest exchanges about goals, priorities, concerns and doubts, both during formal meetings and hearings, and informally during off hours, something remarkable happened. Virtually every Commissioner learned that the "other" perspectives were not in opposition to his or her own.

Law enforcement Commissioners learned that treatment providers actually need the support of tough law enforcement; that instead of "special breaks," addicted offenders have to be held responsible for their actions like everyone else. Indeed, some treatment providers complained that the criminal justice system too often is not tough enough, and undermines treatment programs by not carrying out their recommendations to jail criminal justice clients who are not cooperating with the course of treatment.

Similarly, the treatment Commissioners found that prosecutors and police are not opposed to treatment per se. They learned that prosecutors' hesitations have sprung primarily from the public misperception that treatment does not work. When presented with compelling evidence that treatment can be effective in substantially reducing both recidivism and relapse, and thereby protects public safety, law enforcement Commissioners unanimously supported the expansion of treatment resources within both the criminal justice system and the public and private health care systems.

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The model legislation this Commission created integrates an unprecedented diversity of credible approaches into a single, comprehensive proposal. Bringing together leading professionals from different fields to address a common problem, and seeking to broaden the understanding of each by all the others, is itself a model for effective change.

By opening their minds to the broad picture of drug problems and solutions, these Commissioners were able to contribute to a richer whole than any of us thought possible in the beginning. By sincerely striving to understand approaches and perspectives they weren't always familiar with, they helped to create a package of legislation that will finally, and truly, make a difference.

Gary Tennis
Executive Director

Table of Contents

Introduction

The 1988 Anti-Drug Abuse Amendments created a six month bipartisan presidential commission to develop state legislative responses to the drug problem. Funded in 1991, the 23 member Commission was sworn in on November 16, 1992. Twelve Democrats and eleven Republicans, the Commissioners included an urban mayor, a superior court judge, state legislators, a child advocate, a housing specialist, state attorneys general, police chiefs, treatment providers, district attorneys and private practice lawyers. The Commission's mission was:

> to develop comprehensive model state laws to significantly reduce, with the goal to eliminate, alcohol and other drug abuse in America through effective use and coordination of prevention, education, treatment, enforcement, and corrections.

To facilitate its mission, the Commission held public hearings around the country to gather information on five broad topics:

- Economic remedies against drug traffickers
- Community mobilization and coordinated state drug planning mechanisms
- Crimes code enforcement against drug offenders
- Alcohol and other drug treatment
- Drug-free families, schools, and workplaces

The crimes code hearing was held on February 17, 1993 in Tampa, Florida. Oral and written testimony was received from prosecutors, a judge, state and federal regulators, officials and health professionals. Witnesses discussed access to electronic communications through wiretap and digital telephony laws; illegal diversion of precursor chemicals; the dangers of controlled substance analogs; prescription drug abuse; drug testing of arrestees, probationers, and parolees; and driving under the influence of alcohol and other drugs.

Several months of review, analysis and drafting have culminated in the following model crimes code acts recommended by the Commission and discussed in Volume III of the Commission's Final Report:

- Model Prescription Accountability Act
- Model State Chemical Control Act
- Uniform Controlled Substances Act - Controlled Substance Analog Provisions
- Model Wiretapping and Electronic Surveillance Control Act
- Model Law Enforcement Access to Wire and Electronic Communications Act
- Model Driving Under the Influence of Alcohol and Other Drugs Act

Drug testing in the criminal justice system is incorporated as a part of the comprehensive Model Criminal Justice Treatment Act. A collaborative effort between criminal justice and treatment professionals, the Treatment Act is discussed in Volume IV of the Commission's Final Report.

Crimes Code
Policy Statement

Alcohol and other drug abusing individuals represent a significant proportion of America's criminal justice population. A quarter of convicted jail inmates, a third of state prisoners, and two-fifths of youths in long-term, state-operated facilities admit to being under the influence of an illegal drug at the time of their offense.[1] Fifty-four percent (54%) of state prison inmates serving time for a violent offense in 1986 used drugs or alcohol at the time of the offense.[2] Profit seeking drug traffickers and manufacturers also find their way into our jails and prisons. In 1988, 79,503 drug traffickers, 71% of persons convicted of drug trafficking, were sentenced to incarceration in state facilities.[3]

Addressing America's crime problem by necessity means addressing America's alcohol and other drug problem. Criminal justice officials can perform several activities important in reducing the individual and societal harm associated with alcohol and other drug abuse.

First, officials can protect public health and safety through effective enforcement of alcohol and other drug control laws. They can hold offenders accountable for their criminal actions and deter future alcohol and other drug-related activity. Second, officials can prevent offenses by applying statutory monitoring systems which stop illegal diversion of chemicals and controlled substances. Third, officials can use the criminal justice system as leverage to intervene with the cycle of addiction. They can require assessment and treatment of alcohol and other drug addicted offenders. The Commission's model crimes code legislation recognizes and facilitates these vital alcohol and other drug-related functions.

[1] Bureau of Justice Statistics, DRUGS AND CRIME FACTS, 1991 3 (September 1992).

[2] *Id.* at 5.

[3] *Id.* at 13.

Model Prescription Accountability Act

Table of Contents

Model Prescription Accountability Act Policy Statement

This Act is intended to provide new technological solutions to the problem of preventing and controlling the diversion and abuse of prescription drugs whose therapeutic benefits are accompanied by psychoactive effects. While the vast majority of these medications are used for important medical purposes and contribute to a better quality of life for persons suffering from debilitating or lifethreatening disorders, there also are a small but significant number of cases in which these drugs are diverted for the purpose of sustaining abuse and dependence. For example, a survey by the National Institute on Drug Abuse (NIDA) found that, in 1990, 8.5 million persons reported that they had used a pharmaceutical analgesic, stimulant, sedative or tranquilizer for other than medical reasons at some time in the preceding year[1]. The economic dimensions of such diversion suggest a major criminal enterprise: with a single tablet sold in a pharmacy for $1 or less and sold on the "street" for $20-50 each, the federal Drug Enforcement Administration (DEA) estimates that prescription drug diversion constitutes a $25 billion annual market.

Governments and health professionals share a responsibility for promoting the appropriate use of prescription drugs, while preventing their misuse, abuse and diversion to non-medical purposes. This responsibility poses challenges very different from those of the so-called "war" on illicit drugs, because this control must be achieved without impeding the access of patients to needed medical care.

In response to this challenge, governments at all levels have adopted various acts to govern the manufacture, distribution, sale, possession and use of controlled drugs.

For example, international drug control treaties require governments to restrict the production, trade and consumption of certain drugs. While these treaties create stringent control mechanisms, they also require international organizations to work with national governments to assure that restrictions on these drugs are not so rigid as to negatively affect patients' access to them[2].

Federally, the Congress has enacted a number of statutes to regulate the manufacture, importation, distribution, and use of pharmaceutical products that have any degree of potential for abuse [21 CFR]. The Comprehensive Drug Abuse Prevention and Control Act, adopted in l970, consolidated more than 50 federal drug laws into one comprehensive vehicle. The federal Controlled Substances Act (CSA), enacted a year later, created a system for classifying prescription drugs according to their importance in medical use and their potential for abuse. The CSA also required written prescriptions for Schedule II drugs, regulated record-keeping and refills, created information systems to detect diversion, and established a system of criminal penalties for violations[3]. The Congress designated the U.S. DEA as the authority to register practitioners and assure compliance with the CSA and related rules.

The federal CSA also explicitly recognizes that the drugs in Schedules II through V are "necessary to maintain the health and general welfare of the American people[4]."

It is in the states, however, that most of the power to regulate medical and pharmacy practice is vested. Through rules governing the licensure and discipline of health professionals, as well as requirements for registration and inspection of distributors of prescription medications, state governments have acquired the most direct control over prescription drug use and the most effective tools for halting prescription drug abuse.

To this end, almost every state has adopted its own Controlled Substances Act (CSAs). While most of the state CSAs are very similar to the federal CSA, states have the option of adopting additional regulations, and may even classify drugs more restrictively than the federal CSA.

CONTEMPORARY APPROACHES TO DRUG CONTROL

Exercising this authority, the states have experimented with a number of aproaches to prescription drug control:

FORMULARY RESTRICTIONS AND OTHER REIMBURSEMENT RULES

Over the years, most states have experimented with restricting Medicaid formularies (lists of drugs approved for reimbursement) as a diversion control method, with somewhat mixed results[5]. This authority is provided under federal law to limit government's obligation to subsidize medication prescribed for uses that are not essential to treat a diagnosed medical condition. Recently, however, this authority was invoked in an amendment to the Omnibus Budget Reconciliation Act of 1990 (OBRA) to add an entire class of drugs — the benzodiazepines — to the list of drugs that states can exclude from Medicaid reimbursement. Medical groups have argued that this "sweeping exclusion" of benzodiazepines is overly broad since it precludes payment for a variety of medically appropriate uses, including the treatment of epilepsy, panic disorder, generalized anxiety disorder, insomnia, and movement disorder[6].

EXPANDED ARCOS

The DEA's Automated Reports and Consolidated Orders System (ARCOS) tracks sales of all Schedule II drugs and the Schedule III narcotics from the point of original manufacture or importation to the ultimate sale to a retail distributor (typically, a physician, hospital or community pharmacy). Federal law requires that DEA compile and analyze these data, which are provided to selected state agencies at no charge. A subset of ARCOS, the Diversion Analysis and Detection System, tracks direct sales for the wholesale to the retail level.

The DEA recently proposed that the ARCOS system be expanded to cover all controlled substances in federal Schedules II-V, to impose new refill restrictions on drugs in Schedule III, and to change the report categories and distribution.

MEDICAID ABUSE DRUG AUDIT SYSTEM

The Office of the Inspector General of the U.S. Department of Health and Human Services has devised the Medicaid Abuse Drug Audit System (MADAS), a computer software program that

uses Medicaid data specifically for the purposes of diversion control. The MADAS software, offered to the states at no cost, already is being used in a number of jurisdictions with considerable success. In New York, for example, MADAS identifies about 800 potential "doctor shopping" patients each month and drastically curtails their inappropriate drug consumption by restricting them to a single physician and pharmacy[7].

DRUG USE REVIEW

Medicaid, Blue Cross/Blue Shield, and other health insurors conduct drug use review (DUR) — which is defined as "a formal program for assessing data on drug use against explicit, prospective standards, and, as necessary, introducing remedial strategies to achieve some desired end[8] — to determine whether drugs are being prescribed appropriately and cost-effectively. By 1993, all state Medicaid programs will be required to perform such reviews, using the same data as MADAS[9]. An important difference is that DUR traditionally has been an educational rather than a regulatory program[10]. For example, physicians with outdated prescribing knowledge typically have been offered an opportunity to update their knowledge without interrupting patient care. However, utilization review is now more frequently linked to physician reimbursement, with insurors reducing or refusing benefit payments for services that are deemed medically unnecessary. In such an environment, it seems certain that DUR will evolve into an increasingly powerful regulatory tool.

TRIPLICATE PRESCRIPTION PROGRAMS

In an effort to deal with prescription drug diversion, seven states (California, Idaho, Illinois, Indiana, Michigan, New York, Texas) have enacted triplicate prescription programs. Two other states (Hawaii, Rhode Island) have duplicate prescription programs, and Washington State imposes a triplicate requirement on a case-by-case basis. Under these systems, physicians are required to use special state-issued, serially numbered, three-part prescription order forms to prescribe all Schedule II drugs. (In 1989, New York expanded its triplicate program to include Schedule IV anti-anxiety agents.) The physician retains a copy of each completed prescription and gives the remaining copies to the patient. The patient surrenders the copies to the pharmacist, who retains a file copy and forwards a copy to the designated state agency[11].

Critics of triplicate programs — often including physicians and patient-advocacy groups — point to recently published research associating triplicate programs with significant reductions in use of psychoactive drugs for legitimate medical purposes[12]. The significant data entry and processing costs associated with such systems (variously reported as $0.70 to $1.15 per prescription) have slowed the rate of adoption of triplicate programs by additional states, and have led some states with in-place triplicate programs to look toward electronic data transfer programs as a less-expensive alternative.

ELECTRONIC DATA TRANSFER

Already in use in Oklahoma and Massachusetts, and under study in several other states, electronic data transfer (EDT) systems apply new technological resources to state collection of prescription information. In such a system, the sequence of events in preparing and cashing a prescription order might be as follows:

1. A physician writes an order on a customary prescription order form (no special form is required) and gives it to the patient.
2. The patient presents the prescription form to the pharmacist, who dispenses the prescription and then transmits specified data about the prescription (identifying the physician, the patient, and the drug) via a point-of-sale computer terminal to a central mainframe.
3. At the mainframe (perhaps operated by a state agency, but more likely by a contract vendor), the prescription data are compared to pre-established program criteria. These might include (a) whether the physician is registered with DEA and the state to prescribe a controlled drug; (b) whether the drug prescribed is outside the scope of practice (a dentist prescribing amphetamines, for example); (c) whether the drug is prescribed in appropriate amounts or for customary periods of time; and (d) whether the patient has cashed similar prescriptions from other physicians or at other pharmacies.
4. Prescriptions that fail any of these criteria are excepted out for further (manual) review, and possible referral to a licensing board or enforcement agency for follow-up action.
5. Periodically, data in the mainframe are compiled into summary reports, showing the range of prescription activity by geographic region; by physician, pharmacist or patient; and by drug group and specific drug product. "Outliers" in any of these categories (such as the 10% of physicians who prescribed the largest amount of a given drug) are flagged for investigation. System data also can be accessed to answer investigators' questions at any time.

SUMMARIZING THE ARGUMENTS FOR EDT

The essential elements of EDT systems are in use today. Triplicate prescription programs compile data to generate overview reports and flag "outliers." Pharmacists use point-of-sale computer terminals to verify customers' eligibility for prescription drug insurance benefits. (The point-of-sale data transmission technology is universally recognizable in credit approval of charge card purchases.) Drug utilization review (DUR) programs employ therapeutic criteria to assess the appropriateness of prescribing decisions. *EDT programs essentially merge these existing systems to achieve a new level of technology.* (In fact, the federal Omnibus Budget Reconciliation Act of 1990 mandates adoption of a similar system for Medicaid beneficiaries.)

Further, EDT systems appear to protect patient privacy, in that most data exist only in computer-encoded form, and access to information is limited to officials directly involved in investigations. Because it does not require use of special prescription order forms (as does triplicate), EDT is "invisible" to both the physician and patient, and thus has no negative effect on drug therapy.

EDT can provide data to state officials in hours, rather than months, because data are entered electronically at the time each prescription is dispensed, and can be accessed electronically on request.

Because it is computer-based, EDT is flexible, and can accommodate adjustments to program criteria and even the addition or deletion of specific drugs as the diversion problem changes.

Finally, EDT costs significantly less to operate than triplicate programs: in Oklahoma, officials estimate that EDT costs $250,000 per year, as compared with projected costs of up to $600,000 annually for a triplicate program.

[1] National Institute on Drug Abuse, 1990.

[2] Angarola, R., *The Effect of National and International Drug Control Laws on Patient Care, in* BALANCING THE RESPONSE TO PRESCRIPTION DRUG ABUSE: REPORT OF A NATIONAL SYMPOSIUM ON MEDICINE & PUBLIC POLICY (Wilford, B.B. ed. 1990).

[3] *Id.*

[4] *Id.*

[5] Kreling, C., *The Effect of an International Analgesic Formulary Restriction on Medicaid Drug Expenditures in Wisconsin,* 27 MEDICAL CARE 34-44 (1989).

[6] American College of Neuropsychiatry, 1991.

[7] Office of the Inspector General, INITIATIVE TO IMPROVE STATES' INTERNAL CONTROLS OVER PRESCRIPTION DRUGS PURCHASED UNDER THE MEDICAID PROGRAM (Publication No. A-03-90-000204, 1990).

[8] Rucker, T.D., *Drug Utilization Review: Moving Toward an Effective and Safe Model,* in SOCIETY AND MEDICATION: CONFLICTING SIGNALS FOR PRESCRIBERS AND PATIENTS (Morgan, J.P., Kagan, D.C. ,ed. 1983).

[9] Office of the Inspector General, *supra* note 7.

[10] Rucker, T.D., *supra* note 8.

[11] Drug Enforcement Administration, MULTIPLE COPY PRESCRIPTION RESOURCE GUIDE (1987).

[12] The Gallup Organization, Inc., *Physicians' Attitudes Toward the New York Triplicate Prescription Legislation,* (1991); Wientraub, M., Singh, S., Byrne, L., Muharaj, K., Guttmacher, L., *Consequences of the 1989 New York State Triplicate Benzodiazepine Prescription Regulations,* 266(17) J.A.M.A. 2392-2397 (1991).

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Highlights of the Model Prescription Accountability Act

ASSUMPTIONS AND REMEDIAL GOALS

- Recognizes that the diversion and abuse of prescription drugs is a serious public health concern, involving an estimated 8.5 million people 12 years or older in nonmedical use of controlled sedatives, tranquilizers, stimulants, or analgesics.
- Simultaneously acknowledges that controlled substances are essential to the effective care of patients suffering a variety of medical conditions, and that access to these drugs for legitimate purposes must be preserved.
- Improves the state's ability to stop illegal diversion of prescription drugs in an efficient and cost effective manner, without impeding the appropriate prescribing of pain-killing and other prescription drugs or compromising patients' interests in confidentiality.
- Provides assistance to many thousands of individuals who are addicted to prescription drugs and who presently are receiving no professional attention by using the electronic monitoring system to identify such persons and refer to treatment. The benefits to those individuals, and the resulting social and economic benefits to society, will far outweigh the costs of detection and treatment.

PROCEDURES AND REMEDIES

- Creates a process for the collection, analysis and use of essential information on the prescribers, dispensers and recipients of controlled substances in order to prevent the harm to patients and the public that ensues from such drug diversion and abuse.
- Employs an electronic network for rapid and reliable transmission of data from dispensing pharmacies to a central data repository.
- Acknowledges that the value of information in preventing drug diversion depends on its being rapidly and readily available to authorized personnel under appropriate circumstances.
- Requires the designated state agency to use its administrative procedures to determine which substances are being misused and abused, and are therefore subject to monitoring. This approach increases the likelihood that the list of monitored controlled substances will be kept up to date, since it is less cumbersome to administratively identify newly misused or abused substances than to pass another law every time a Schedule II-IV controlled substance starts to be misused or abused in the state; and provides greater governmental flexibility for each state to respond to its particular prescription drug abuse problems.
- Minimizes the financial impact on pharmacies by developing an electronic network that is compatible with (and supportable by) other electronic pharmacy communications equipment and systems already in use.
- Appoints a broadly representative Prescription Accountability and Patient Care Improvement Board to oversee the data collection process and make preliminary determinations as to the ultimate disposition of cases involving questionable drug prescribing, dispensing or use.
- Provides for the establishment of general criteria to determine which cases will be brought to the attention of the Board. These criteria are to be programmed into the electronic monitoring system to automatically detect cases in which "an identified controlled substance has been dispensed for a period of time or in a quantity or manner outside the established norms or standards." Requires that the standards for exception and referral be consistent with

well established and respected guidelines and research in the field.

- Facilitates the sharing of case information among relevant state agencies and between state and federal officials. This reflects the intent to encourage state/federal cooperation and coordination.
- Imposes coding requirements, stringent limitations on access to the data, and other safeguards on sensitive patient information to protect the confidentiality of the physician-patient encounter. Establishes a process for consultation with state medical and other health professional societies or their representatives, recognized patient advocacy groups, and individuals knowledgeable regarding privacy protection issues.

Model Prescription Accountability Act

Section 1. Short Title.

This [Act] shall be known and may be cited as the "Model Prescription Accountability Act."*

Section 2. Legislative Findings.

(a) The inappropriate non-medical use of licit prescribed drugs is a serious public health concern.

(b) According to the 1990 National Household Survey on Drug Abuse, an estimated 8.5 million people 12 years or older used controlled sedatives, tranquilizers, stimulants, or analgesics for nonmedical reasons at least once during the preceding year.

(c) According to the NIDA sponsored Drug Abuse Research Survey of drug treatment facilities around the country, approximately 10% of the patients' principal drugs of abuse were drugs that may be prescribed.

(d) The federal Drug Enforcement Administration (DEA) has estimated that the illegal diversion of legal controlled substances constitutes a $25 billion market.

(e) A federal Health and Human Services Inspector General has reported that roughly one out of sixteen seniors — between 1.5 and 2 million — are addicted or at risk of addiction to benzodiazapenes (tranquilizers such as Valium, Librium, Xanax, and Halcion). Such addiction has been referred to as "America's 'other' drug problem."

(e) It is the policy of this state that any retail monitoring system, in order not to impede the appropriate prescribing and use of prescription drugs, must not be unduly burdensome to prescribing physicians and must fully protect the legitimate confidentiality concerns of patients.

(f) A controlled substance electronic accountable prescription system will efficiently and effectively detect and reduce the use of retail prescription practices to obtain prescription drugs for improper purposes.

Section 3. Purpose.

This [Act] is intended to improve the state's ability to stop illegal diversion of prescription drugs in an efficient and cost effective manner that will not impede the appropriate prescribing of pain killing and other prescription drugs and that will ensure the full protection of patients' interests in preserving the confidentiality of sensitive medical information.

COMMENT

Each year, millions of patients in the U.S. are treated for a variety of serious medical problems with prescription drugs whose therapeutic benefits are accompanied by some potential for abuse and addiction. Federal and state governments and health professionals share a responsibility for promoting the appropriate use of these drugs, while preventing their misuse, abuse and diversion to non-medical purposes. In pursuit of this goal, a number of states have implemented "triplicate prescription" programs to monitor the prescribing and use of pharmaceutical drugs that also have the potential for abuse. In most of them, the triplicate programs were at least initially opposed by organizations of patients, physicians and pharmaceutical manufacturers, on the grounds that such programs are costly, inefficient, and an intrusion into the confidentiality of the doctor-patient relationship.

More recently, several states have moved to convert to "electronic data transfer" systems, which they see as offering important advantages: (1) the functions of trip-

* This [Act] is based in part on H.R. 5051, "Prescription Accountability and Patient Care Improvement Act", introduced by U.S. Representative Pete Stark in 1992.

licate prescription procedures can be fully met by electronic data transfer systems, with no additional time consuming burdens placed on prescribing physicians and with very little additional burden on pharmacies; (2) whereas triplicate programs have been widely criticized as so cumbersome as to cause physicians to substantially reduce even medically appropriate prescribing, early data show no similar untoward effect with electronic systems; (3) electronic systems can be programmed to identify suspect prescribing, dispensing, or receiving practices more rapidly, more reliably and more cost effectively than triplicate programs, resulting in better enforcement and substantial savings to the taxpayer; (4) electronic data transfer systems can be integrated with existing electronic pharmacy inventory systems, minimizing hardware acquisition and data processing costs to pharmacies and, ultimately, to their customers.

Section 4. Definitions.

As used in this [Act]:

(a) "Board" means a Prescription Accountability and Patient Care Improvement Board established under Section 6(b).

(b) "Central repository" means a central repository established under Section 5(c).

(c) "Controlled substance" has the meaning given such term in [section of the state controlled substances act].

(d) [Designated state agency] means the state agency responsible for the functions listed in Section 5(e).

(e) [Director] means the director of the [designated state agency].

(f) "Dispenser" means a person who distributes a Schedule II-IV controlled substance (as defined in subsection (l)), but does not include:

(1) a licensed hospital pharmacy that distributes such substances for the purposes of inpatient hospital care or the dispensing of prescriptions for controlled substances at the time of discharge from such a facility;

(2) a licensed nurse or medication aide who administers such a substance at the direction of a licensed physician; or

(3) a wholesale distributor of a Schedule II-IV controlled substance.

(g) "Identification card" means a valid driver's license, valid military identification card, other valid photo identification card issued pursuant to state law.

(h) "Identification number" means, with respect to an individual:

(1) Social Security account number or the unique number contained on the individual's identification card (as defined in subsection (g)); or

(2) If the controlled substance is obtained for an animal, a number described in paragraph (1) of the animal's owner.

(i) "Patient Panel" means a Patient Care Advisory Panel established under Section 6(e)(2).

(j) "Registration number" means, with respect to a dispensing physician, the dispenser's registration number with [the state narcotics control agency] or, in the case of a pharmacist, the National Association of Board of Pharmacy number for the pharmacy where the dispensation is made.

(k) "Practice Panel" means a Drug Utilization Review Board's Practice Parameter Advisory Panel established under Section 6(d)(2).

(l) "Schedule II-IV controlled substance" means a controlled substance which is listed in Schedule II, III, or IV of the Schedules provided under Section 202 of the [state controlled substances act] or the Federal Controlled Substances Act (21 U.S.C.812).

(m) "System" means an electronic prescription accountability and patient care improvement program, as described in Section 5(a).

COMMENT

The definition of "controlled substance" is made by reference to the state controlled substances act in order to incorporate existing state law. This is intended to provide guidance and certainty as to what is, and what is not, a controlled substance and thus to avoid the unnecessary additional uncertainty and litigation that may be occasioned by using a new definition.

Hospital pharmacies are excluded from the definition of "dispensers" to the extent that they are dispensing drugs on an inpatient basis or to patients being discharged, because these systems — when appropriately supervised — present only limited opportunities for drug diversion. However, to the extent that a hospital pharmacy fills prescriptions for individuals who come from outside the hospital, it would be covered under the

definition of "dispenser" and would be subject to the requirements of the [Act].

Similarly, situations where nurses or medication aides administering drugs to patients at the direction of a physician are excluded because they do not present significant opportunities for diversion.

Wholesale distributors already are monitored and regulated by the federal Drug Enforcement Administration and are required to have special registrations and/or permits by a majority of the states. Therefore, wholesaler distributors are also excluded from the definition of "dispensers."

"Identification cards" and "identification numbers" are defined with sufficient flexibility to provide for those individuals (such as children) who do not have driver's licenses or military identification cards. Most states will find it practical to use Social Security numbers as "identification numbers" since *all* individuals are now required by federal law to have a Social Security number.

Section 5. Requirements for Controlled Substances Electronic Accountable Prescription System; Central Repository; Designation of State Agency.

(a) System Requirements. A controlled substances electronic accountable prescription system shall be established within six months of the effective date of this [Act], which includes the following:

(1) Reporting of Information Required. The [designated state agency] shall determine those schedules of controlled substances, classes of controlled substances, and/or specific controlled substances which, according to federal drug abuse data collection systems and generally accepted medical standards, are being misused and abused in the state. No identified controlled substance may be dispensed unless information relevant to the dispensation of the substance is reported electronically or by universal claim form to the central repository (established under subsection (c), in accordance with state regulations made by the [state agency responsible for scheduling controlled substances].

(2) Information to be Transmitted. Effective not later than nine months after the effective date of this [Act], the information to be transmitted under paragraph (1) shall include at least the following for each dispensation:

(A) The recipient's identification number (as defined in subsection (e)(2));

(B) The recipient's date of birth;

(C) The 8-digit National Drug Code number of the substance dispensed;

(D) The date of dispensation;

(E) The quantity of substance dispensed;

(F) The number of refills authorized;

(G) The prescriber's United States Drug Enforcement Administration (DEA) registration number and other numbers as defined in subparagraph (3)(B);

(H) The dispenser's DEA registration number and other numbers as defined in subsection (e)(3); and

(I) The prescriber's practice specialty and subspecialties, as determined by the state's medical licensure board or the Physician Masterfile of the American Medical Association.

(3) Collection Procedures.

(A) Procedures. Under the system:

(i) information shall be reported in numerical format, not less than once every 14 days, on the filling of prescriptions for designated controlled substances and the dispensing of drug samples by a licensed practitioner; and

(ii) each dispenser shall maintain a record of such filled prescriptions (including all information described in paragraph (2)) for a period of two years, shall keep such records separately from other prescription records, and shall make such records available for inspection and copying by authorized appropriate state regulatory agency personnel, and by law enforcement officers conducting a criminal investigation.

(B) Prescriber Information. Effective not later than six months after the effective date of this [Act], the [designated state agency] in consultation with the state's medical licensure board, shall develop procedures to provide information on the state's licensed prescribers and their respective recognized practice specialties (or specialties), as well as their federal DEA [and

state] registration numbers, with the schedules of controlled substances they are registered to prescribe, to the central data repository designated under this [Act]. Through the repository, the state shall make this information available to dispensers in an electronic format compatible with the dispenser's existing electronic transmission system. The state shall update this information on a regular basis.

(C) Consultation. In developing reporting procedures, the [designated state agency] shall seek the counsel of the state health professions licensure boards, state and federal law enforcement agencies, state medical and other health professional societies or their representatives, recognized patient advocacy groups, and individuals and other state agencies involved in and knowledgeable regarding privacy protection issues, and any other interested persons.

(4) Use of Central Repository. The system shall provide for the use of a central repository in accordance with subsection (c).

(5) Designation of State Agency. The operation of the system shall be overseen by the [designated state agency].

(6) Confidentiality. The system shall provide for confidentiality of information in the system, in accordance with Section 6.

(b) Electronic Transmittal Requirement.

(1) In General. Except as provided in paragraph (2), the transmittal of information under this section shall be made:

(A) through an electronic transmitting device which is compatible with the receiving device of the central repository; or

(B) by computer diskette, magnetic tape, or other appropriate electronic means which meets the specifications provided by rules of the [designated state agency]. The [designated state agency] shall pay the direct costs of such transmittal, such as telephone charges.

(2) Temporary Exemption. The [director] may exempt individual dispensing entities from the electronic information reporting requirements of this subsection if:

(A) the imposition of such requirement would result in financial hardship for a particular pharmacist; and

(B) the pharmacist agrees to provide the information to the agency by use of a pharmacy universal claim form.

No individual dispensing entity filing an average of more than 20 universal claim forms per month, over a six month period, shall be exempted from the electronic information reporting requirements of this subsection.

(c) Use of Central Repository.

(1) In General. The system shall provide for the maintenance of information collected in a central repository which meets the requirements of this subsection.

(2) Requirements for Central Repositories.

(A) Information Retrieval Capabilities. The central repository shall be a data processing system maintained by (or under contract with) the [designated state agency]. Such system shall be capable of aggregating and displaying the collected information in formats required by the [designated state agency], including reports showing controlled substances by:

(i) prescriber name and identifying number(s) as specified by the [designated state agency] but including at least the prescriber's federal DEA registration number;

(ii) dispenser name, location, and registration number;

(iii) recipient identification number and date of birth; and

(iv) 8-digit National Drug Code number, frequency, quantity, number of refills, and whether new or refill prescription.

(B) On-Line Access. The central repository shall provide the [designated state agency] with [___hours] per day, on-line access to information. The repository shall be capable of electronic receipt of practitioner disciplinary data from the Federation of State Medical Boards, National Association of Boards of Pharmacy, other national associations of health professional boards, the Health Care Financing Administration, and the National Practitioner Databank.

(C) Security. The central repository shall

secure the information against access by unauthorized persons and shall be subject to review and oversight by the [director] of the [designated state agency] or the [director's] designee to ensure the security of the information and the system.

(D) Information to Board. If the central repository is not operated by the Board or the [designated state agency], the vendor-repository shall provide information in response to Board inquiries within [24] hours, and shall provide routine reports on a regular schedule to be specified by the [director] of the [designated state agency].

(E) Provision of Information to Board Within 30 Days of Termination of Relationship Between Board and Central Repository. If the relationship between the Board and the vendor-repository is terminated, the vendor-repository shall provide to the Board within 30 days all collected information, the database maintained by the vendor-repository, and such software as is needed to access the information and the database.

(3) Selection of Repository. The establishment of the central repository under this paragraph shall be conducted through a competitive bidding process or amendment of a preexisting competitively bid contract. However, the [director] of the [designated state agency] shall select the most overall cost effective and efficient computerization system and automatic data processing services and equipment to ensure the successful implementation of the system. The [director] may enter into a contract with the selected vendor to serve as the central repository under this subsection.

(d) Out-of-State Prescriptions. A prescription from an out-of-state physician may be dispensed: 1) if it conforms in every way to all state requirements; and 2) if the pharmacist enters the required information into the controlled substances electronic accountable prescription system.

(e) Responsibilities of the [Designated State Agency].

(1) In General. The [designated state agency] shall:

(A) oversee and administer the collection of information under the system;

(B) control access to the information in the system; and

(C) produce exception reports described in paragraph (2) for purposes of subsections (c) through (e) of Section 6.

(2) Exception Report Defined. In this subsection, the term "exception report" means a report of aggregated data and information indicating that an identified controlled substance has been dispensed for a period of time or in a quantity or manner outside the established norms or standards, consistent with guidelines established by the Agency for Health Care Policy and Research, peer-reviewed medical literature, printed patient inserts included with prescriptions that are controlled substances, the American Hospital Formulary Service Drug Information, USP-Drug Information, and Drug Evaluations of the American Medical Association, or other established drug utilization review principles, for a prescriber practicing a particular specialty or field of health care, for a dispenser doing business in a particular location, or for other criteria determined by the Board to be reasonable and necessary to carry out the purposes of this [Act].

COMMENT

Section 5 establishes the requirements and mechanisms for the state electronic accountability system.

Subsection (a) sets forth the general system requirements and provides a generous period of time — six months — for the [designated state agency] to establish the system.

Paragraph (a)(1) of the [Act] sets up the mechanism for determining *which substances* must be monitored. Rather than statutorily specifying which controlled substances are subject to monitoring, the [Act] requires the [designated state agency] to use its administrative procedures to determine which substances are being misused and abused, and are therefore subject to monitoring. This approach has several advantages: 1) it increases the likelihood that the list of monitored controlled substances will be kept up to date, since it is less cumbersome to administratively identify newly misused or abused substances than to pass another law every time a Schedule II-IV controlled substance starts to be misused or abused in the state; 2) it provides greater governmental flexibility for each state to respond to its particular prescription drug abuse problems; and 3) it ensures, through the notice and hearing requirements of the state administrative procedures law, well-informed decision-making by the [designated state agency]. Once a controlled substance has been admin-

istratively identified as a substance being abused or misused in the state, *all dispensations must be reported to the central repository.*

Paragraph (a)(2) sets forth *what information* must be transmitted to the central repository. It is designed to provide sufficient identifying information about the patient, the controlled substance, the physician, and the pharmacist. The physician's specialty and sub-specialties are useful in determining whether a controlled substance is generally within a physician's scope of practice, so this information is also required. Later in the [Act], Section 6(a) establishes strict and rigorous mechanisms to ensure full confidentiality of all patient information transmitted under paragraph (a)(2).

It is anticipated that the data collection procedures established in paragraph (a)(3) can be efficiently integrated with the computerized inventory systems already in place with the vast majority of pharmacies. Most pharmacies will transmit the required information by simply "downloading" *via* telephone modem to the central repository. Clause (a)(3)(A)(i) requires that this occur every 14 days, although it is more likely that most pharmacies will do this between each business day. Clause (a)(3)(A)(ii) requires the pharmacies to maintain records of filled prescriptions for two years in the event that they are necessary for purposes of verification, routine inspections or other investigations.

Subparagraph (a)(3)(B) simply requires that the [designated state agency] provides pharmacies information they need about licensed prescribers in order to fulfill their reporting requirements under the [Act]. Subparagraph (a)(3)(C) ensures comprehensive input from a wide variety of interested groups in the development of reporting procedures.

Subsection (b) establishes the general requirement that the information be stored and transmitted to the central repository electronically. It has been established in Oklahoma, Massachusetts, and other locations that this method of storage and transmittal is much more efficient and inexpensive for pharmacies than handling multi-part paper (e.g., triplicate) prescription forms. Such electronic systems also lend themselves to greater confidentiality safeguards and to more rapid and reliable detection of inappropriate prescribing, dispensing or receiving of prescription drugs.

In recognition of the different circumstances faced by a relatively few pharmacies that handle a very small volume of prescriptions, paragraph (b)(2) provides that pharmacies filling twenty or fewer controlled substance prescriptions per month may be permitted to file *paper* "pharmacy universal forms" (rather than storing and transmitting the information *electronically*) if necessary to avoid financial hardship. The vast majority of pharmacies will find it easier and less expensive to handle the information electronically.

Subsection (c) sets forth the requirements for the central repository. Subparagraph (c)(2)(A)'s requirement that the information be retrievable by prescriber, by dispenser, by recipient, or by drug, is critical to the information's value in detecting potential problems.

Similarly, the value of the information depends on its being readily available under appropriate circumstances. It is intended that the [designated state agency] have on-line access to this information pursuant to subparagraph (c)(2)(B), at least during business hours. States may wish to consider making the information accessible around the clock to maximize its utility to all enforcement agencies.

In addition to Section 6(c)'s extensive confidentiality protections, subparagraph (c)(2)(C) requires the central repository to secure the information against unauthorized access, and requires the additional protection of placing responsibility squarely on the [director] of the [designated state agency] to "ensure the security of the information and the system."

Subparagraphs (c)(2)(D) and (E) apply where the central repository is operated by a private vendor (a "vendor-repository"). These subparagraphs ensure, by force of state law, that the vendor will cooperate fully with the Prescription Accountability and Patient Care Improvement Board, and that the availability of the information in the repository in no way be jeopardized because the vendor's contract to maintain the central repository has been terminated.

Paragraph (c)(3) provides that the normal government bidding process be used to select a central repository. However, the system that provides the most cost effective and efficient services to the taxpayer is not necessarily the one with the lowest price tag. For example, a "less expensive" system may actually be more costly if it provides services of significantly lower quality or in a much slower time frame. In recognition of this, the [director] is mandated by this paragraph to "select the most overall cost effective and efficient" system.

Although prescription drug abusers living near state borders may be able, to some degree, to exploit nearby out-of-state pharmacies, a prohibition against filling

out-of-state prescriptions may seriously inconvenience large number of law-abiding citizens and thus is too extreme a response. Subsection (d) represents a reasonable balancing of the need to address this problem with the legitimate need of travelers in our mobile society to occasionally have their home physician's prescriptions filled. Under this subsection, such prescriptions can be filled, but the required information still must be entered into the system. Thus, a prescription drug abuser who obtains drugs through out-of-state prescriptions might delay but would not escape detection.

Because of the strong concerns about confidentiality and about access to information collected under this system, it is critical that the lines of authority and responsibility for oversight, administration and control of the entire system be absolutely clear. Paregraph (e)(1) is intended to accomplish this. Each state legislature will need to determine the most appropriate state agency, under the state's bureaucratic structure, to designate for this responsibility.

Paragraph (e)(2) provides for the establishment of general criteria that are used to determine which cases will be brought to the attention of the Board. These criteria will be programmed into the electronic monitoring system to automatically detect cases in which "an identified controlled substance has been dispensed for a period of time or in a quantity or manner outside the established norms or standards." These cases will be referred to the Board for further review and, if necessary, investigation and action. This subsection requires that the standards for exception and referral be consistent with well-established and respected guidelines and research in the field.

Section 6. Confidentiality of Information; Disclosure of Information.

(a) Confidentiality.

(1) In General. The information collected under this [Act] shall not be available to the public or used for any commercial purpose. Ownership of all data collected shall reside with the state. Data collected pursuant to this [Act] shall not be co-mingled with or used to augment or validate any other database.

(2) Limitations on Access and Use. Responsibility for limiting access to information in the system is vested in the [director] of the [designated state agency]. Information in the system shall be administered by the Board established under subsection (b) and shall only be disclosed:

(A) to the Prescription Accountability and Patient Care Improvement Board (established under subsection (b));

(B) for the purposes of utilizing exception reports established in Section 5(e)(1)(C);

(C) pursuant to subsection (c) (relating to possible violations of controlled substances acts);

(D) pursuant to subsection (d) relating to practice counseling); and

(E) pursuant to subsection (e) (relating to patient counseling).

Nothing in this section shall be construed to preclude the use of information that does not identify specific patients or health professionals, for purposes of reporting pursuant to subsection (b)(4).

(3) Encoding Information.

(A) In General. Information collected under the system shall be formatted through data encryption standard codes or electronic coding techniques so as to fully protect the individual privacy of all patients.

(B) Secrecy of Codes. Under the system:

(i) half of the data encryption standard code shall be known to the two members of the Board described in subsection (b)(1)(B); and

(ii) the other half of the data encryption standard code shall be known to the two members of the Board described in subsection (b)(1)(C).

Only the [director] of the [designated state agency] (or the [director's] designee) shall know the full data encryption standard code.

(C) Consultation. In establishing the confidentiality of the data encryption standard code and any information collected under the system, the [director]:

(i) shall be available to consult regularly with representatives of patient membership organizations and representatives of civil liberties organizations; and

(ii) shall take such steps (in addition to

encryption) as may be appropriate, including the use of public and private key encryption and cryptographic techniques, to ensure the protection of the information.

(4) Violations of Confidentiality.

(A) In General. If the information in a system is disclosed in violation of this section or other applicable state and federal law, the [director] of the [designated state agency], in consultation with state law enforcement officials, shall change the data encryption standard code and take such other immediate steps as are necessary to secure the system, and shall take all steps necessary to enforce subparagraph (B) or any other state or federal privacy statute.

(B) Criminal Punishment. It is a felony to knowingly disclose or attempt to disclose, or to use or attempt to use, information in the system in violation of this section. Violators are subject to a term of imprisonment of not more than [___] years and a fine of not more than [$___].

(5) Purging of Patient Data. The [designated state agency] shall cause to be purged from the central repository system, no later than three years after the date an individual's prescription is made available to the Board, the identification number of the individual unless the information is part of an active investigation.

(b) Establishment of Prescription Accountability and Patient Care Improvement Board.

(1) Board Membership. The [director] of the [designated state agency] shall appoint a Prescription Accountability and Patient Care Improvement Board(Board) consisting of:

(A) the [director] (or the [director's] designee);

(B) two officials or employees of the [designated state agency]; or other health care provider experts — one a pharmacologist and one a specialist in addiction medicine — who have knowledge of and experience in appropriate prescribing of controlled substances for legitimate medical purposes;

(C) two state law enforcement officials or employees with knowledge of and experience with cases involving illegal diversion of controlled substances and the illegal or inappropriate prescribing of controlled substances;

(D) one representative recommended to the Director by the State Medical Association; and

(E) one representative recommended to the Director by the State Pharmacy Association.

A DEA diversion control officer may be invited to attend any or all of the meetings of the Board.

(2) Referral by the Board. If, based on information in the system, the Board determines that there is a reasonable cause for further inquiry into a possible violation of the state or federal controlled substances acts, the Board shall direct the [director] of the [designated state agency]:

(A) in cases involving the inappropriate practices of practitioners or pharmacists, to seek the advice and counsel of the Director of the Practice Parameter Advisory Panel (established under subsection (d)(2)) and recognized medical peer review organizations; or

(B) in cases involving individual recipients of controlled substances, to seek the advice and counsel of the Director of the Patient Care Advisory Panel (established under subsection (e)(2)).

(3) General Trend Reports.

(A) The Board shall regularly prepare and make available to the [single state authority on alcohol and other drugs], and other state and local regulatory, licensing, and law enforcement agencies, a statistical report on patterns and trends of controlled substances distribution, diversion, and abuse.

(B) The Board shall report to the governor and to the presiding officer of each house of the legislature on the outcome of this program with respect to its impact on legitimate distribution and abuse of controlled substances, including recommendations for improving control and prevention of the diversion of controlled substances in the state.

(C) The Board shall convene periodic meetings to coordinate a state diversion prevention and control program, and shall oversee cooperation activities (including exchange of information) among state agencies and with officials of neighboring states and the federal government.

(4) Board Access to Information. Access to information in the system may be provided to members of the Board, other than the [director] or the [director's] designees, only when at least three of the members are present.

(5) Meetings. The Board shall meet regularly at the call of the [director].

(6) Board Appointments. In case of a vacancy, the [director] shall appoint a replacement within 30 days.

(c) Referral to [State Narcotics Control Agency] and Medical Board or Licensing Agencies.

(1) In General. After consultation with the other members of the Board, the [director] shall refer to the [state narcotics control agency] and medical board or other licensing agencies case any information in the system for which, based on the practice parameters established by the Drug Utilization Review Board and after consultation with recognized state medical peer review organizations, there is reasonable cause for further inquiry into the illegal diversion of, or the illegal prescribing of, controlled substances. Identities of the patients involved in such cases shall be encoded except where the [director] makes a finding that disclosure of the patient's identity is of material importance to the investigation.

(2) Uses of Information Disclosed. Responsibility for the use of information disclosed under this subsection to the state narcotics control agency shall be vested in the [director] of the [designated state agency] (or to the [director's] designee). The [director] shall limit the disclosure and use of such information to:

(A) officials authorized under state law who are employed as investigative agents of the [state narcotics control agency];

(B) the United States DEA Group supervisor (or such supervisor's designee) and appropriate officials of the federal Health Care Financing Administration;

(C) the executive director or chief investigator, as designated by each board, of the state health professional licensure boards, but only with respect to information relevant to licensees of their respective boards; and

(D) federal or state grand juries.

(3) Certain Additional Disclosure Authorized. In case of illegal diversion or prescribing activity, this section shall not prevent the disclosure, at the discretion of the [director] of the [designated state agency], in cooperation with the [state narcotics control agency], of investigative information to police officers and investigative agents of federal, state, county or municipal law enforcement agencies, district attorneys and attorneys general in furtherance of criminal investigations or prosecutions within their respective jurisdictions.

(d) Improving Physician Prescribing Practices.

(1) In General. After consultation with the other members of the Board, the [director] of the [designated state agency] shall make available to the state medical board and other licensing agencies, statistical data or encoded case information in the system where, based on the practice parameters established by the state's drug review board established under Section 1927(g)(3) of the Social Security Act (each such board in this section referred to as the DUR Board), there is reasonable cause for further inquiry and investigation of a medically inappropriate prescribing of controlled substances, for the purposes of further inquiry and investigation and taking additional appropriate measures. Information also may be disclosed to the state medical and other health professions societies or their representatives for the purposes of developing rules, procedures and educational initiatives to improve physician prescribing practices and patient care.

(2) Drug Utilization Review Board's Practice Parameter Advisory Panel.

(A) Establishment. The [director] of the [designated state agency], in cooperation with the state DUR Board, shall appoint a Practice Parameter Advisory Panel consisting of the DUR Board and physician specialist organizations representing addiction medicine, oncologist, oncology nurses, psychiatry, podiatrists, dentists, pharmacists, neurologists, specialists in sleep disorders, medical licensure and supervisors, osteopathic examiners, and veterinary medical examiners, and any other representative of a physician group or other health profession designated by the [director] as serving the interests of physicians who treat patients requiring the prescribing of controlled substances.

(B) Duties. Within one year of the effective date of this [Act], the DUR Practice Parameter Advisory Panel shall:

(i) develop practice parameters based on standards consistent with guidelines established by the Agency for Health Care Policy and Research, peer-reviewed medical literature, printed patient inserts included with prescriptions that are controlled substances, the American Hospital Formulary Service Drug Information, USP-Drug Information, and Drug Evaluations of American Medical Association, or other established drug utilization review principles which will serve as advisory guidelines for the Board and health professionals practicing in the state with regard to the prescribing of controlled substances;

(ii) notify and share relevant information on the established practice parameters with the state medical board, licensure agencies, and representatives of the state medical and other health professional societies for the purposes of improving physician prescribing practices, of addressing the undertreatment of cancer pain, AIDS-related pain, mental health-related care, and other medical needs relating to controlled substances, and of addressing the needs of individuals in need of addiction or substance abuse treatment; and

(iii) notify and share relevant information on the established practice parameters with appropriate state agencies for the purposes of identifying and addressing illegal activity and illegal prescribing practices, and informing such agencies of acceptable forms of medical and prescriptive practices.

(e) Improvements in Patient Care.

(1) In General. After consultation with the other members of the Board, the state medical board and other state licensure boards, representatives of the state medical society and other health professions organizations, and specialists in Addiction Medicine, the [director] of the [designated state agency] shall develop procedures, based on the practice parameters developed by the DUR Board, to address the needs of individuals who require substance abuse treatment. These procedures may include physician notification by a certified medical professional within the [designated state agency] of cases of individual patients who, based on the established practice parameters, may be addicted to controlled substances and, at the discretion of the physician, may involve notification of the individual patient by the physician solely for the purposes of facilitating entry into substance abuse treatment or other means of improving patient care.

(2) Patient Care Advisory Panel.

(A) Establishment. The [director] shall establish and seek the advice and counsel of representatives of patient membership organizations, so as to take into account cancer pain, AIDS-related pain, narcolepsy, epilepsy, attention deficit disorder, sickle cell anemia, arachnoiditis, mental health-related care, chronic intractable pain of other organic causes, or any other medical need deemed necessary.

(B) Duties. Within one year of the effective date of this [Act], the Patient Panel shall:

(i) develop standards which will serve as advisory guidelines for the Board; and

(ii) notify and share relevant information in a timely manner with the [director] of the [state narcotics control agency] (or the [director's] designee).

COMMENT

Subsection 6(a) is intended to give effect to a strong policy of maintaining patient confidentiality to the greatest extent possible. Paragraph 6(a)(1) unequivocally prohibits any public or commercial use of the data, as well as any co-mingling of the data to enhance the accuracy or commercial value of any other database.

Responsibility for ensuring confidentiality is placed squarely on the [director] by paragraph 6(a)(2), which also strictly enumerates the ways in which the information may be used. The legislative intent is clear: this information should not be used in any way that does not clearly fall within the scope of this paragraph.

Confidentiality is further assured by the requirements of paragraph (a)(3), which specify that all information be formatted in code. Only *one* individual, the [director], is permitted to be in possession of the full encryption standard code. Additionally, two Board members

with health care backgrounds may possess *half* of the encryption code, while two Board members with law enforcement backgrounds may possess the *other half* of the encryption code. These confidentiality protections are stringent, and they are intended to be. Moreover, the [director] is required to be available to meet with patient membership and civil liberties organizations about the encryption mechanisms to provide additional assurances that confidentiality will be vigorously maintained.

The [Act] deals harshly with knowing violations of the confidentiality requirements. Subparagraph (a)(4)(B) makes any knowing violation a *felony* offense.

Finally, paragraph (a)(5) imposes the general requirement that the patient's identification number be *purged* no later than three years after it is made available to the Board. Obviously, if the information is being used in an active investigation, it should not be purged until it is no longer needed.

Subsection (b) governs the makeup and functioning of the Board. Paragraph (b)(1) ensures that the medical, pharmacological, treatment, and law enforcement perspectives are well represented on the Board. Subparagraph (B) makes clear that the [director] is not *required* to appoint Agency employees or officials, but rather is free to appoint a pharmacological expert and addiction medicine expert from the private sector. Finally, the Board is specifically authorized to invite the DEA diversion control officer. This reflects the legislature's intent to encourage state/federal cooperation and coordination.

Under the [Act], the designated state agency refers exception reports to the Board for review. *See* Section 5(e)(1)(C). Where the Board finds reasonable cause for further inquiry into possible controlled substance act violations, paragraph (b)(2) directs the Board to have the [director] consult with the Practice Parameter Advisory Panel and recognized medical peer review organizations (in cases involving possible violations by physicians or pharmacists) or with the Patient Care Advisory Panel (in cases involving possible violations by recipients). It is, of course, intended that neither the actual identity of the individuals in question nor any information that might compromise a future investigation would be disclosed during this advice and counsel process.

Subsections (c)-(e) provide further guidance on how the Board should pursue a case if it finds reasonable cause for further inquiry into inappropriate or illegal conduct. Where there is reasonable cause for further inquiry into the *illegal* diversion or prescribing of controlled substances, subsection (c) requires the [director] to refer the case to the [state narcotics control agency] *and* to the medical board or appropriate licensing agencies. The concern for confidentiality is reaffirmed by requiring the encoding of the patients' identities when such cases are referred, except where such identities are of material importance to the investigation. Finally, paragraph (3) establishes that the [director] also may exercise discretion (in cooperation with the [state narcotics control agency]) to disclose evidence of illegal diversion or prescribing to other local, state or federal law enforcement and prosecutorial agencies in furtherance of their criminal investigations or prosecutions.

Where there is reasonable cause for further inquiry into *medically inappropriate* (although not illegal) prescribing of controlled substances, paragraph (d)(1) requires the [director] to make the information available to the state medical board or appropriate licensing agencies for further inquiry, investigation, and appropriate action in accordance with existing practice and law.

This [Act] also requires that practice parameters be developed for use in determining whether particular prescribing practices require further inquiry. To ensure that the practice parameters are appropriate for all of the medical disciplines covered, paragraph (d)(2) requires the [director] to appoint a panel consisting of members of the federally required DUR Board and representatives of the relevant professional disciplines. Clause (d)(2)(B)(i) provides guidance to this panel to ensure that the parameters are truly in accord with accepted medical practice. The remainder of subparagraph (d)(2)(B) describes notification and dissemination requirements for the panel, intended to ensure that both medical professionals and state narcotics agencies are knowledgeable about currently accepted practice parameters.

Finally, subsection (e) requires the [director] to develop procedures to address the needs of patients identified under this system who are in need of substance abuse treatment. These procedures serve to emphasize the ameliorative intent of this [Act]. Perhaps the most beneficial feature of the [Act] is contained in this subsection. Many thousands of individuals who are addicted to prescription drugs and who are receiving no professional attention will be detected under the electronic monitoring system and subsequently referred to treatment. The benefits to those individuals, and the resulting social and economic benefits to society, will far outweigh the costs of detection and treatment. (See, Langenbucher, J.W.; McCrady, B.S.; Brick, J.; Esterly, R., Rutgers University, Center of Alcohol Studies,

SOCIOECONOMIC EVALUATIONS OF ADDICTIONS TREATMENT (1993).

Section 7. Uniformity of Construction and Application.

(a) The provisions of this [Act] shall be liberally construed to effectuate the purposes, objectives and policies set forth in Sections 2 and 3.

(b) The provisions of this [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

Section 8. Severability.

If any provision of this [Act] or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provisions or application, and to this end the provisions of this [Act] are severable.

Section 9. Effective Date.

This [Act] shall be effective on [reference to normal state method of determination of the effective date][reference to specific date].

Model State Chemical Control Act

Table of Contents

Model State Chemical Control Act

Policy Statement

Domestic illegal laboratories are capable of producing enough stimulants, depressants, hallucinogens and narcotics to satisfy America's illegal drug demand. Long known as a nation of consumers, the United States has joined the list of producing countries.

These laboratories thrive where chemicals are readily available on the open market or easily diverted from legitimate commerce. Drug production is often a simple process, without need of complex technology, sophisticated education, or training. Illegal lab operators use a recipe mixing together various types of chemicals as the ingredients. Precursor chemicals are critical to the creation of a controlled substance and merge with the resulting drug. Easily obtainable "ingredients" provide ample opportunity to perpetuate and expand illegal production of methamphetamine, amphetamine, and other drugs.

To craft a legislative response to the problem of illegal chemical diversion, the American Prosecutors Research Institute (APRI) brought together investigators and prosecutors from Arizona, California, Oklahoma, Texas, Washington, Drug Enforcement Administration (DEA), and the U.S. Department of Justice[1]. Through a series of drafting meetings and review of comments from the enforcement, chemical, and pharmaceutical communities, the group developed the Model State Chemical Control Act. The Model Act creates a monitoring system which tracks a chemical from its source to its use. Unlike most other criminal laws, it is a preventive measure. It seeks to stop a drug offense before it happens by preventing diversion of precursor chemicals into illegal channels.

An important test of any statute is its ability to carefully balance valid, and sometimes competing, interests. While the enforcement purpose is critical, also important is the need to avoid unnecessary disruption of lawful commerce. The model regulatory structure accommodates business needs without sacrificing the ability to stop illicit chemical transfers.

[1] Steve Brookman, Oklahoma State Bureau of Investigation; Mark Faull, Crime Strike, Phoenix, Arizona; William Holman, San Diego District Attorney's Office; John Duncan, Oklahoma Bureau of Narcotics Enforcement; Katina Kypridakes, California Bureau of Narcotics Enforcement; Richard Wintory, Oklahoma District Attorney's Office; Michael Scott, Texas Department of Public Safety; Gary Sundt, Washington State Patrol; Harry Matz, U.S. Department of Justice; and Ken Ronald, Drug Enforcement Administration.

Highlights of the Model State Chemical Control Act

PREVENTING ILLEGAL DIVERSION

- Regulates transactions involving chemicals frequently used in the illicit production of controlled substances, e.g. ephedrine, methylamine, ethylamine, phenyl-2-propanone.
- Authorizes emergency regulation of chemicals on a temporary basis to avoid imminent hazards to public safety.

CONTROLLING ACCESS TO CHEMICALS

- Requires annual registration of persons who manufacture, provide, sell, furnish, transfer, or deliver regulated chemicals.
- Terminates registration upon registrant's death, cessation of legal existence, discontinuation of business or professional practice or a change in ownership.
- Precludes assignment or transfer of registration without written consent of appropriate state official.
- Requires a permit for each time a person seeks to possess a regulated chemical.
- Excludes from regulation agents, common carriers, law enforcement officers, medical practitioners and pharmacists who handle regulated chemicals in the lawful course of practice, business or employment.

PROTECTING LAWFUL USE AND FACILITATING IMPLEMENTATION

- Requires a permit applicant to submit detailed identification information, including notarized fingerprint cards (except in specified circumstances) and criminal history. Business applicants must provide information for each owner, manager, agent, or representative.
- Allows, upon application by a drug manufacturer, the exemption of a specific drug product from regulation, e.g. Bronkaid, Tedral, Primatene.
- Exempts owners, partners, and corporate officers of publicly held corporations of 35 shareholders or more from permit application requirements to submit criminal history, fingerprint cards, and other identification information.
- Allows submission of retrospective monthly reports in lieu of a permit if the possessor is eligible to apply for a permit and either maintains a regular supply and purchase relationship with a distributor or has a record of lawful use.
- Provides permit applicants the right to appeal if the official fails to act on an application within 21 days after receipt of a completed application.
- Provides a show cause hearing for denial, suspension, or revocation of a registration or permit, or suspension or revocation of a monthly report, with right to appeal.
- Allows distributors and possessors to submit copies of reports submitted under federal law for transactions (involving threshold amounts).
- Allows appropriate state official to charge nonrefundable application fees to cover processing and other administrative costs.

TRACKING THE FLOW OF CHEMICALS

- Requires regulated distributor to obtain identification of purchaser and any vehicle used in the transaction.
- Requires regulated distributor and possessor to prepare annual physical inventory and maintain readily accessible records for four years after the date of the transaction.
- Requires regulated distributor and possessor to

report theft or loss of chemicals, breakage of containers, and suspicious transactions, e.g. method of payment or delivery not in the usual course of business; potential violations of Act or EPA laws.

DETERRING UNAUTHORIZED ACTION AND PROTECTING THE ENVIRONMENT

- Imposes civil fines on corporations in addition to criminal penalties.
- Establishes civil assessments for cleanup of hazardous illegal laboratory sites and enforcement of Act.
- Authorizes forfeiture of chemicals and property pursuant to controlled substances acts.

DETERMINING COMPLIANCE WITH THE ACT

- Provides state official investigatory powers to subpoena witnesses, compel testimony, and require production of documents.
- Requires confidentiality of information obtained through administrative investigation.
- Authorizes administrative inspections of premises where chemicals and records are required to be or are, in fact, kept.

Model State Chemical Control Act

Section 1. Short Title.

This [Act] shall be known and may be cited as the "Model State Chemical Control Act."*

Section 2. Legislative Findings.

(a) Domestic clandestine laboratories are capable of providing enough stimulants, depressants, hallucinogens, and narcotics to satisfy America's illegal drug demand.

(b) Federal and state law enforcement officials seized an increasing number of clandestine laboratories in the 1980s. The Drug Enforcement Administration (DEA) saw a steady rise in the numbers of seized laboratories: from 184 in 1981 to 810 in 1988. The Oklahoma Bureau of Narcotics (OBN) seized 28 laboratories in 1986, an almost 100% increase from the 16 laboratories seized in 1985. Another increase of over 100% occurred in 1988 when OBN seized 62 laboratories as compared to 30 laboratories the previous year. Texas narcotics officers seized 64 laboratories during 1988.

(c) Clandestine laboratories thrive where ever chemicals are readily available on the open market or easily diverted from legitimate commerce. Illegal drug production is a nomadic business. When chemicals are difficult to obtain, illegal lab operators move their operations to locations where chemical acquisition is simple. Effective regulation of chemical transactions dries up sources which supply illegal laboratories.

(d) Despite strict federal regulation of threshold amounts of chemicals since 1988, domestic opportunities for illegal chemical diversion still exist. Illicit operators restructure their actions to avoid federal regulations and focus their efforts in states without effective chemical controls. Only approximately 18 states have specific chemical tracking requirements.

(e) State by state enactment of detailed chemical controls are necessary to halt the existence and spread of clandestine laboratories across the country. The controls are designed to stop illegal drug production before it occurs by preventing illegal chemical diversion.

Section 3. Purpose.

The purpose of this [Act] is to prevent the illegal diversion of precursor chemicals by creating a monitoring system which traces a chemical from its distribution to its use while protecting the transfer of chemicals for legitimate commercial uses.

Definitions and Exemptions

Section 4. Definitions.

(a) The term "administer" means to apply a regulated chemical whether by injection, inhalation, ingestion, or any other means, directly to the body of a patient or research subject by:

(1) a practitioner (or in the practitioner's presence, by his authorized agent); or

(2) the patient or research subject at the direction and in the presence of the practitioner.

(b) The term "agent or representative" means a person who is authorized to receive, possess, manufacture or distribute or in any other manner control or have access to a regulated chemical on behalf of another person.

(c) The term "broker" or "trader" means a person who assists in arranging a transaction of a regulated chemical by negotiating contracts, serving as an agent or intermediary, or bringing a buyer, seller and/or transporter together.

* The Commission has reformatted APRI's Model State Chemical Control Act to be consistent with the Commission's other recommended legislation. The Commission has also corrected typographical errors and made technical changes. APRI's development of the Model Act was funded by the National Institute of Justice and the Bureau of Justice Assistance.

(d) The term "controlled premises" means:

(1) a place where regulated chemical distributors or regulated chemical possessors are required under this [Act] to, or in fact, keep or maintain records related to regulated chemical transactions; and

(2) a place, including a factory, warehouse, establishment and conveyance, in which regulated chemical distributors or regulated chemical possessors are permitted under this [Act] to, or in fact, possess, manufacture, compound, process, sell, deliver, or dispose of a regulated chemical;

(e) The term "delivers" or "delivery" means the actual, constructive, or attempted transfer of a regulated chemical from one person to another, whether or not there is an agency relationship.

(f) The term "dispense" means to deliver a regulated chemical to an ultimate user, patient, or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the regulated chemical for that delivery.

(g) The term "distribute" means to deliver other than by administering or dispensing a regulated chemical.

(h) The term "manager" means one who represents the interest of any owner, partner or corporate officer in the operation of a business involved in the manufacture, distribution or possession of regulated chemicals whose duties include but are not limited to: (1) the making or changing of policy; (2) approving credit; (3) hiring or firing employees; or (4) generally exercising independent judgment in the operation of the business. Such person need not have a financial interest in the business.

(i) The term "manufacture" means to produce, prepare, propagate, compound, convert, or process a regulated chemical directly or indirectly, by extraction from substances of natural origin, chemical synthesis, or a combination of extraction and chemical synthesis, and may include packaging or repackaging of the substance or labeling or relabeling of its container. The term excludes the preparation, compounding, packaging, repackaging, labeling, or relabeling of a regulated chemical:

(1) by a practitioner as an incident to the practitioner's administering or dispensing of a regulated chemical in the course of the practitioner's professional practice; or

(2) by a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of, or as an incident to research, teaching, or chemical analysis and not for sale;

(j) The term "person" means any individual or entity capable of holding a legal or beneficial interest in property.

(k) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacist, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by this state, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a regulated chemical in the course of professional practice or research.

(l) The term "regulated chemical" means a chemical that is used directly or indirectly to manufacture a controlled substance or other regulated chemical in violation of the [state controlled substances act or this Act]. The fact that a chemical may be used for a purpose other than the manufacturing of a controlled substance or regulated chemical does not exempt it from the provisions of this [Act]. The term includes:

(1) Acetic Anhydride.

(2) Anthranilic acid, its esters and its salts.

(3) Benzaldehyde.

(4) Benzyl chloride.

(5) Benzyl cyanide.

[(6) D-lysergic acid.]

(Drafters' comment: Chemical (6) should be deleted if a state already schedules it under the state controlled substances act).

(7) Diethylamine and its salts.

(8) Ephedrine, its salts, optical isomers, and salts of optical isomers.

(9) Ethylamine and its salts.

(10) Ergotamine and its salts.

(11) Ergonovine and its salts.

(12) Hydriodic acid.

(13) Isosafrole.

(14) Malonic acid and its esters.

(15) 3, 4 -methylenedioxyphenyl-2-propanone.

(16) Methylamine and its salts.

(17) Morpholine and its salts.

(18) N-acetylanthranilic acid, its esters and salts.

(19) N-ethylephedrine, its salts, optical isomers and sand salts of optical isomers.

(20) N-ethylpseudoephedrine, its salts, optical isomers, and salts of optical isomers.

(21) N-methylephedrine, its salts, optical isomers, and salts of optical isomers.

(22) N-methylpseudoephedrine, its salts, optical isomers, and salts of optical isomers.

(23) Nitroethane.

(24) Norpseudoephedrine, its salts, optical isomers, and salts of optical isomers.

(25) 1-phenyl-1-chloro-2-methylaminopropane (chloroephedrine; chloropseudoephedrine), their salts, optical isomers, and salts of optical isomers.

[(26) Phenyl-2-propanone.]

(Drafters' comment: Chemical (26) should be deleted if a state already schedules it under the state controlled substances act).

(27) Phenylacetic acid, its esters and salts.

(28) Phenylpropanolamine its salts, optical isomers, and salts of optical isomers.

(29) Piperidine and its salts.

(30) Piperonal.

(31) Propionic anhydride.

(32) Pseudoephedrine, its salts, optical isomers, and salts of optical isomers.

(33) Pyrrolidine and its salts.

(34) Safrole.

(35) Thionylchloride.

(m) The term "regulated chemical distributor" means any person, whether or not the person is registered pursuant to the [Act], who manufactures or distributes a regulated chemical.

(n) The term "regulated chemical possessor" means any person who possesses a regulated chemical.

(o) The term "regulated chemical transaction" means the manufacture of a regulated chemical or the distribution of a regulated chemical within, into, or out of the state.

COMMENT

This section clarifies terminology or "terms of art" specific to this [Act]. Many of these terms are drawn from other model state statutes, federal acts, or state precursor legislation. Consistent use of definitions with well-established interpretations helps eliminate ambiguity and ensure uniformity of purpose and application. With this in mind, the definitions for "administer," "manufacture," and "practitioner" have been substantially taken from the Uniform Controlled Substances Act (UCSA). Necessary modifications ensure the applicability of these definitions to this [Act]. The phrase "regulated chemical" replaces, where appropriate, the phrase "controlled substance." The term "controlled premises" has been expanded to include locations where records and chemicals are in fact kept or maintained.

The complete definitions for the UCSA terms and phrases are included for two reasons. First, to allow full comprehension of the regulatory scheme contemplated by this Act. Second, to help provide a free-standing act which states can adopt separate and distinct from their controlled substances acts (CSAs). States which incorporate sections of this [Act] into their CSA may simply insert "or regulated chemical" and other necessary language into existing definitions.

Other borrowed phrases include "agent or representative," "manager," and "person." The first and second are contributions of California's chemical regulations while the third comes from the federal Racketeer Influenced and Corrupt Organizations Act (RICO). These definitions help identify the type of individuals subject to the [Act's] responsibilities and penalties.

States vary significantly in the number of chemicals they regulate, from 35 in Colorado to 9 in Montana. The differences reflect each state's experience with diversion, abuse, and the potential illicit use of a chemical. The regulated chemicals list in this [Act] includes a comprehensive range of chemicals controlled by states and the federal government. This affords a historical perspective to states with no controls and helps them reach informed decisions about which chemicals they should consider for regulation.

One notable inclusion is ephedrine. Many people recognize ephedrine as an ingredient in their sinus medications. However, the public is often unaware that ephedrine is a primary precursor used illegally to produce methamphetamine. Fifty-three percent (53%) of

the clandestine methamphetamine labs seized by DEA in 1990 used the ephedrine reduction method.

State officials report a similar phenomenon. Illicit meth laboratories in the west and southwest began using ephedrine after state regulation of phenylacetic acid. In northern California 85% of these labs use single ingredient ephedrine tablets. Oregon officials discovered that over-the-counter ephedrine tablets sold in the Portland area became a source of ephedrine for northwest methamphetamine lab operators. Ephedrine reduction's increasing popularity is due to its simplicity and a resulting product with pronounced effect on the user. The regulation of ephedrine is an important step towards curbing the clandestine manufacture of methamphetamine. It provides controlled access to the chemical and helps prevent distribution into illegitimate channels.

Another important step is the regulation of transactions involving any amount of a regulated chemical. This permits state and local officials to supplement federal enforcement efforts. Individuals dealing in below-threshold quantities are exempt from federal record-keeping, reporting, and inspection requirements. They accumulate large amounts of chemicals for clandestine production by engaging in multiple transactions below the threshold limits. Federal officials under current law have no way of regulating this behavior or even obtaining information about the transactions. The [Act] allows state and local officials to address this diversion which would otherwise escape detection until after illegal use of chemicals.

Section 5. Exemptions.

The provisions of this [Act] shall not apply to:

(a) a domestic lawful distribution in the usual course of business between agents or employees of a single regulated distributor or regulated chemical possessor;

(b) a distribution of a regulated chemical to or by a common or contract carrier for carriage in the lawful and usual course of the business of the common or contract carrier, or to or by a warehouseman for storage in the lawful and usual course of the business of the warehouseman;

(c) the administering or dispensing of a regulated chemical;

(d) the receipt of a regulated chemical pursuant to the lawful order of a practitioner;

(e) the purchase, distribution or possession of a regulated chemical by a local, state, or federal law enforcement agency while in the discharge of official duties unless the [director of agency responsible for enforcement of the state controlled substances act] properly notifies the law enforcement agency relying on the exclusion that its investigatory activities are contrary to the public interest;

(f) the purchase, distribution, manufacture, administering, dispensing, or possession of a drug product containing a regulated chemical if the drug product has been granted an exemption pursuant to Section 6 of this [Act].

COMMENT

This section combines in one location for quick reference those transactions which are exempt from regulations under this [Act]. Subsections (a)-(d) are a restatement of the UCSA exemptions for common carriers, agents, pharmacists, physicians and other authorized practitioners. Subsection (e) is drawn from Texas' precursor regulations. In the normal course of their duties, drug enforcement officials often purchase, distribute, or possess regulated chemicals. This exemption allows them to continue their investigations without being subject to the requirements of this [Act]. Subsection (f) reiterates the exemption for specific drug products established in Subsection 6 (c)-(f).

Authority to Regulate

Section 6. Regulated Chemicals List.

(a) The [appropriate state official] may, by rule or regulation adopted pursuant to [state administrative procedures act], add chemicals to or delete chemicals from the list of regulated chemicals in Section 4 (l). In determining whether to add or delete a chemical, the [appropriate state official] shall consider the following:

(1) whether the chemical is already controlled under the [state controlled substances act];

(2) the availability of the chemical for potential illegal diversion;

(3) the historical, actual, or potential use of the chemical in the illegal production of a substance controlled under the [state controlled substances act], including the scope, duration and significance of use;

(4) the nature and extent of the legitimate uses of the chemical;

(5) the clandestine and legitimate importation, manufacture, or distribution of the chemical; and

(6) any other factors relevant to and consistent with public health and safety.

(b) Notwithstanding the requirements in subsection (a), the [appropriate state official] may by rule or regulation add a chemical to the list of regulated chemicals in Section 4 (l) on a temporary basis to avoid an imminent hazard to the public health and safety. With respect to the finding of an imminent hazard, the [appropriate state official] shall consider:

(1) the recent history and current pattern of abuse;

(2) the imminent risk to the public health; and

(3) available information on factors set forth in subsection (a).

An emergency rule may not be adopted until the [appropriate state official] initiates a rulemaking or other regulatory proceeding under subsection (a) with respect to the chemical. Unless the [state administrative procedure act] provides otherwise, an emergency rule will expire on the later of:

(1) one year after its adoption; or

(2) the effective date of the final rule or other conclusion of the rulemaking proceeding initiated under subsection (a).

(c) A manufacturer may apply to the [appropriate state official] for an exemption of a drug product containing a regulated chemical from the provisions of this [Act] on a form which the [official] shall furnish upon request. The [appropriate state official] shall grant the exemption upon finding that the applicant has shown by a preponderance of the evidence that the drug product is manufactured and distributed in a manner which prevents its illegal diversion. In making the finding, the [appropriate state official] shall consider:

(1) evidence of illegal diversion of the drug product, including the scope, duration and significance of the diversion;

(2) whether the drug product is formulated in such a way that it cannot be easily used in the illegal production of a drug;

(3) whether the regulated chemical can be readily recovered from the drug product;

(4) the manner of packaging the drug product, including the package sizes;

(5) the manner of distribution and advertising of the drug product by the manufacturer and others;

(6) any specific actions taken by the manufacturer to prevent illegal diversion of the drug product; and

(7) any other factors which are relevant to and consistent with public health and safety.

The [appropriate state official] shall grant or deny an exemption by rule or regulation in accordance with the [state administrative procedure act].

(d) (1) A drug product that is lawfully marketed in this state on the effective date of this [Act] and which is the subject of a request made under subsection (c) shall be deemed in compliance with this [Act]:

(A) during the pendency of the request; and

(B) for the [60] days after denial of the exemption, unless the denial was based on a finding that the drug product is being illegally diverted.

(2) The manufacturer shall file a request under this subsection no later than [60] days from the effective date of this [Act].

(e) Applications pursuant to subsection (c) that involve a drug product for which an exemption was previously denied may be made only if there is a significant change in the data which led to the denial.

(f) The [appropriate state official] may, by rule or regulation adopted pursuant to [state administrative procedure act], modify or remove an exemption upon finding:

(1) that the drug product is being illegally diverted; or

(2) that there is a significant change in the data which led to the granting of the exemption.

In making a finding, the [appropriate state official] shall consider the factors listed in subsection (c).

(g) If any chemical is designated or deleted as a listed chemical under the provisions of the Federal Controlled Substances Act, the [appropriate state official] may by rule or regulation similarly add or delete a chemical as a regulated chemical without making the determination required under subsection (a).

COMMENT

Section 6 establishes a procedure for modifying the regulated chemicals list which is based on the UCSA scheduling authority for controlled substances. Subsection (a) authorizes the appropriate state official to add or delete chemicals from the list after consideration of illegal diversion and use factors.

Subsection (b) permits the officials to list a chemical on an emergency basis prior to completion of rulemaking activity. Emergency regulation is sometimes necessary to prevent an imminent hazard to public health and safety. Some chemicals have flammable or toxic properties. Their uncontrolled use can lead to explosions, environmental damage, and illness. However, precautionary measures have been included to ensure appropriate use of the authority. The official must initiate general regulatory proceedings under subsection (a) before adoption of an emergency rule which has a defined expiration date.

Subsections (c)-(f) are specially tailored to facilitate the continued use of regulated chemicals for medical purposes. The special exemption ensures manufacturers maintain access to a legal marketing process for legitimate drug products, such as Bronkaid and Primatene. An exemption finding requires consideration of a product's manufacture, packaging, advertising, distribution, and actual or potential illegal diversion. The exemption concept and determination factors are drawn from draft federal (Chemical Diversion and Trafficking Act) amendments negotiated between the DEA and chemical and drug manufacturers. Subsection (e) has been added to prevent abuse of the process through the bad faith filing of repeated applications.

Regulation of Manufacture, Delivery and Possession of Regulated Chemicals

Section 7. Registration of Regulated Distributors.

(a) Except as provided in Section 9, each regulated chemical distributor shall apply annually for a registration from the [appropriate state official] and engage in a regulated chemical transaction only to the extent authorized by the registration and in conformity with this [Act].

(b) The application shall be in such form and provide such information as the [appropriate state official] shall require by rule or regulation pursuant to the [state administrative procedure act.]

(c) The [appropriate state official] shall register an applicant unless the [official] determines that the registration shall be denied in accordance with Section 10(a).

(d) A separate registration is required for each principal place of business or professional practice of the regulated chemical distributor.

(e) A regulated chemical distributor shall notify the [appropriate state official] of any change in business name, address, zip code, area code, and telephone number, or a change in managers, agents or representatives, no later than the seventh calendar day after the date of the change.

(f) A registration shall terminate if and when the regulated chemical distributor dies, ceases legal existence, discontinues business or professional practice, or changes ownership.

(g) No registration shall be assigned or otherwise transferred except upon such conditions as the [appropriate state official] may specifically designate and then only pursuant to the [official's] written consent.

COMMENT

Section 7 draws upon the UCSA, federal controlled substances regulations, and California and Texas law for the [Act's] registration procedure. Annual registration serves dual purposes. First, it supplies information on legitimate chemical sources, persons who can be held accountable, locations, and available quantities. The responsibility for the control of regulated chemicals rests in large part with manufacturers and distributors. To adequately assess the extent of illegal diversion, it is critical to know the legal purpose for production and distribution of chemicals. Officials can more accurately determine if the source of chemicals found at clandestine lab sites is legitimate, an unregulated channel, or an "underground" process. Second, it emphasizes to manufacturers and distributors the critical role they play in eliminating unlawful chemical transfers.

The benefits of registration outweigh any anticipated administrative costs. The number of manufacturers and distributors who will submit applications is both finite and manageable. California, for example, registers approximately 40-45 companies per year. Section 16 authorizes assessment of fees to offset processing expenses of those who do apply. The fees' purpose is to prevent strain on scarce state resources, and not to profit from the application process. Therefore, a fee cannot exceed actual costs.

Section 8. Permit to Possess.

(a) Except as provided in Section 9 and subsection 8(i), a person shall obtain a permit to possess from the [appropriate state official] each time the person seeks to possess a regulated chemical. The person shall possess a regulated chemical only to the extent authorized by the permit and in conformity with this [Act].

(b) An individual applicant shall provide the following information on an application furnished by the [appropriate state official]:

(1) name, residential address other than a post office box, and telephone number;

(2) current and valid driver's license number or other current and valid official state-issued identification number;

(3) social security number;

(4) date of birth;

(5) prior convictions, including those with an appeal pending, which involve a felony violation of state or federal law, or the law of another country, or a misdemeanor violation of this [Act] or the [state controlled substances act];

(6) pending charges involving a felony violation of federal or state law, or the law of another country, or a misdemeanor violation of this [Act] or the [state controlled substances act];

(7) the type and quantity of each regulated chemical to be possessed;

(8) a complete description of the intended uses of each chemical;

(9) the location where each chemical is to be stored and used;

(10) the intended date and method of delivery of each regulated chemical;

(11) the intended method of disposal of any unused chemical or chemical waste; and

(12) any additional information requested by the [appropriate state official] relating to possible grounds for denial as set forth in Section 10.

(c) Each owner, partner, corporate officer or manager, and any agent or representative of a business applicant shall provide the information required in subsections (b)(1) -(b)(6), and (b)(12). An individual making application on behalf of the business shall provide all the information required in subsection (b) in addition to:

(1) the individual's relationship to the business;

(2) an affirmation that the individual is authorized to make application on behalf of the business;

(3) the name, business address, other than a post office address, and business phone number of the individual's immediate supervisor;

(4) the name, address other than a post office address, and telephone number of the business; and

(5) the nature of the business and type of business ownership;

(d) The application shall be signed by the applicant under penalty of perjury, or in the case of a business applicant, by the individual making application on behalf of the business and, except as provided in subsection (f), each owner, partner, corporate officer or manager, and any agent or representative.

(e) An applicant for an initial permit shall submit with the application two notarized sets of ten print fingerprint cards. A business applicant is required to submit cards for the individual making application on behalf of the business and, except as provided in subsection (f), for each owner, partner, corporate officer or manager, and any agent or representative.

(f) An owner, partner, or corporate officer of a business applicant is exempted from the requirements of subsections (c), (d), and (e) of this section if the business applicant is a publicly held corporation of 35 shareholders or more.

(g) The [appropriate state official] shall issue or deny a permit no later than 21 days after receipt of the completed application, unless the [official] determines there is good cause for an extension. The [official] shall state in writing the reasons for the extension and the new time period for issuance or denial of the permit. The applicant shall have a right to appeal the [official's] failure to act within the prescribed time period pursuant to the [state administrative procedure act].

(h) The permit shall consist of five parts, including:

(1) one copy to be retained by the applicant;

(2) one copy to be retained by the [appropriate state official];

(3) one copy to be delivered to the regulated chemical distributor by the applicant;

(4) one copy to be delivered to the [appropriate state law enforcement agency]; and

(5) one copy to be attached to the container of the regulated chemicals and to be kept with the chemicals at all times. In the case of multiple containers related to a single permit, a label reflecting the permit number shall be attached to each additional container.

(i) (1) A possessor may submit a comprehensive monthly report to the [appropriate state official] in lieu of the permit required by this section if the [official] so authorizes upon finding in writing that:

(A) the possessor is eligible to apply for a permit;

(B) there are no grounds for denial of a permit pursuant to Section 10; and

(C) (i) there is a regular relationship of supply and purchase between a regulated chemical distributor and the regulated chemical possessor with respect to the chemical; or

(ii) the regulated chemical possessor has established a record of use of the chemical solely for a lawful purpose.

(2) The comprehensive monthly report shall be submitted no later than 15 calendar days after the end of the calendar month which is the subject of the report. It shall be submitted on a form which the [appropriate state official] shall provide, and shall include:

(A) the quantity of the chemical possessed;

(B) the date and method of delivery of the chemical;

(C) the physical location where the chemical was stored and used;

(D) the use of the chemical;

(E) the method of disposal of any unused chemical or chemical waste; and

(F) any other information required by the [appropriate state official].

(3) The possessor shall notify the [appropriate state official] of any change in status relevant to any grounds for suspension or revocation of a comprehensive monthly report authorization no later than seven calendar days after the change.

(4) The authorization shall consist of four parts and, in lieu of a permit, be retained and delivered as provided in subsection (h) (1), (2), (3), and (4).

(5) (A) The grounds for suspension or revocation of a permit under Section 10 shall constitute grounds for suspension or revocation of the authorization.

(B) The [appropriate state official] shall suspend or revoke an authorization to submit a comprehensive monthly report in accordance with the procedures described in Section 10 (c), (d), and (e).

COMMENT

California law pioneered the permitting process which has served as a model for many other state precursor laws. Texas law expanded the process to require permits for single or multiple purchases in addition to transfers. Oklahoma law, the basis of this section, went one step further. It extended the requirement beyond purchases to possession of chemicals. This extension allows regulation of every non-exempted use of a regulated chemical.

Many illegal "cookers" produce the necessary chemical in their clandestine laboratories and then manufacture the desired controlled substance. Because they do not purchase the chemical, they escape regulation and liability under a requirement applicable solely to purchases. A permit requirement for possession eliminates this loophole.

Section 8 is one more stage in the information cycle begun by regulated chemical distributors through the registration procedure. It looks at the receiving end. Permits identify persons who intend to possess specific quantities of chemicals for a stated purpose. Regulatory and enforcement officials can ascertain the fitness of a potential recipient and ensure the intended use is legitimate. This section facilitates the detection of possible diversion opportunities.

The inherent danger of some regulated chemicals, the potential for abuse, and limited lawful uses justifies the need to obtain the information listed in subsections (b) (c), and (e). Subsection (e) borrows California's requirement that fingerprint cards be submitted with an application. Verification of personal identification and criminal histories helps prevent the mistaken issuance of a permit due to a falsified application.

Persons subject to the disclosure requirements maintain sufficient personal access or control over chemicals to effect an illegal use or transfer. However, many publicly held corporations are sizeable enough so the owners and officers lack a personal relationship with the chemicals. There is no need for detailed background information or fingerprint cards from these people. Therefore, subsection (f) exempts them from the identification requirements.

As subsection (f) illustrates, the extensive application process seeks to avoid undue interference with legitimate commerce. Subsection (i) provides a reporting alternative for possessors who demonstrate a history of regular, lawful use. The risk of illegal diversion associated with them is less than with other possessors. Their retrospective monthly submission of the necessary transaction information reasonably serves regulatory goals. It also prevents their unnecessary expenditure of time and money on permit applications. As with registration, a non-refundable application fee can offset actual processing costs.

Any related costs of a proactive regulatory scheme pale in comparison to the costs attendant to uncontrolled clandestine laboratories. As Section 15 discusses, the clean-up expense of clandestine labs is staggering, ranging in the millions of dollars. The cost of long-term environmental contamination remains unknown. This societal damage is compounded by millions of dollars in domestically produced illegal drugs which feed a thriving market.

In 1991 the California Bureau of Narcotics Enforcement (BNE) seized 1201 pounds of methamphetamine from 328 labs. The statewide average price for a pound of methamphetamine was $8,000 - $14,000. On the streets the product would have resulted in an average of $9 - $16 million in sales. The Oklahoma Bureau of Narcotics (OBN) seized approximately 482 pounds of methamphetamine that year. At approximately $12,000 per pound, sales would have totalled over $5 million. The toll in increased health, welfare and safety costs and human suffering is incalculable. These figures reflect only the actual product recovered from the labs. Many laboratories that are seized routinely contain no product but are capable of producing anywhere from ounce to multiple pound quantities.

A careful weighing of all pertinent costs favors adoption of a comprehensive chemical monitoring scheme.

Section 9. Ineligibility to Apply for Permit or Registration.

(a) A person is ineligible to apply for a permit or registration if the person:

(1) is an individual less than 18 years of age or a business in which an individual under 18 years of age is in the capacity of owner, partner, corporate officer, manager, agent, or representative.

(2) has been convicted of a [felony] violation of federal or state law, or the law of another country, or a federal or state misdemeanor violation involving a controlled substance, [controlled substance analog,] or a chemical subject to regulation; or

(3) has had a federal or state registration, or a registration from another country, to manufacture, distribute, dispense or possess controlled substances or any chemical subject to regulation denied, suspended, or revoked.

(b) An applicant, registrant, or permit holder shall notify the [appropriate state official] of any change in status regarding the conditions listed in this section no later than the seventh calendar day after the change.

COMMENT

Based on California law, this section precludes authorized access to regulated chemicals by unqualified or unscrupulous persons. It is a common sense provision. Individuals who have demonstrated previous illegal or irresponsible behavior involving controlled substances or chemicals should no longer be allowed control over chemicals. Therefore, convicted offenders are ineligible to apply for a permit or registration. The same is true for persons who have had a prior registration or permit denied, suspended, or revoked.

It is also important to exclude minors from positions of total responsibility for chemicals. Drug dealers often employ juveniles because juveniles are subject to less harsh penalties than adults. A minor's ineligibility therefore prevents drug dealers from using juveniles to gain access to chemicals for illegal purposes.

Section 10. Denial, Suspension, or Revocation of Registration or Permit to Possess.

(a) The [appropriate state official] may deny, suspend, or revoke a registration or permit to possess upon finding that the applicant, registrant, or permit holder:

(1) has failed to make proper application to the [appropriate state official] pursuant to Sections 7 and 8 and any applicable rule or regulation;

(2) has failed to demonstrate that the chemical will be used solely for legitimate purposes;

(3) has violated any rule or regulation of the [appropriate state official] or any provision of this [Act] or the [state controlled substances act];

(4) has failed, or does not demonstrate the ability, to maintain effective controls against diversion of regulated chemicals into other than legitimate medical, scientific, research, or industrial channels;

(5) has materially falsified or omitted material information from any application, record, report, inventory, or other document required to be kept or filed under this [Act] or any applicable rule or regulation; or

(6) has committed such acts as would render the person's registration or permit inconsistent with the public interest as determined by the [appropriate state official].

(b) An applicant, registrant, or permit holder shall notify the [appropriate state official] of any change in status regarding the conditions listed in subsection (a) no later than the seventh calendar day after the change.

(c) Before denying, suspending, or revoking a registration or permit under subsection (a), the [appropriate state official] shall cause to be served upon the applicant, registrant, or permit holder an order to show cause why a registration or permit should not be denied, suspended, or revoked. The order to show cause shall contain a statement of its basis and shall call upon the applicant, registrant, or permit holder to appear before the appropriate person or agency at the time and place within 30 days after the date of service of the order. The proceedings shall be conducted in accordance with the [state administrative procedure act] without regard to any criminal prosecution or other proceeding. An applicant, registrant, or permit holder shall have a right to appeal an adverse decision pursuant to the [state administrative procedure act].

(d) The [appropriate state official] shall suspend, without an order to show cause, any registration or permit simultaneously with the institution of proceedings described in subsection (a) if the [appropriate state official] finds there is imminent danger to the public health or safety. The suspension shall continue in effect until the conclusion of the proceedings, including review thereof, unless withdrawn by the [appropriate state official] or dissolved by a court of competent jurisdiction.

(e) [The [appropriate state official] shall promptly provide the [director of agency responsible for enforcement of the state controlled substances act] the name, address, and phone number of any individual whose registration or permit has been denied, suspended, or revoked under this section.]

COMMENT

This section's standards and procedures draw upon those in the UCSA, federal CSA, California, Oklahoma, and Texas law. The grounds for denial, suspension, or revocation are taken from Sections 304 and 305 of the UCSA and Section 824 of the federal CSA. The show cause hearing in subsections (c) and (d) is patterned after Oklahoma law which also draws upon the UCSA and federal CSA. Subsection (e) is intended to facilitate enforcement of the [Act]. It requires inter-agency information sharing when the revoking or suspending authority is not the state drug enforcement agency.

Subsection (b)'s requirement for prompt notice of a change in conditions is a California and Texas addition. It parallels similar requirements in the registration, permit, and application ineligibility sections. Maintenance of updated information is critical to achieving the [Act's] purpose. It helps officials prevent an unfit person from having unlimited access to a regulated chemical for an indefinite period of time.

Records and Reporting Requirements

Section 11. Identification of Purchaser.

(a) Each regulated chemical distributor shall obtain and each purchaser shall present the following identification prior to receipt or distribution of any regulated chemical:

(1) the registration number, or permit, or monthly report authorization of the purchaser;

(2) a current and valid driver's license or other current and valid official state issued identification containing a photograph of the individual purchaser or individual receiving the regulated chemical on behalf of a business, and the purchaser's or recipient's residential or mailing address other than a post office box; and

(3) the motor vehicle license and vehicle identification number of the motor vehicle used in the regulated chemical transaction.

(b) A regulated chemical possessor authorized to submit a monthly report pursuant to Section 8 (i) may designate an individual to receive the regulated chemical on the possessor's behalf for purposes of subsection (a).

COMMENT

State officials for years have confronted a recurring problem with the monitoring of chemicals. In California individuals were using multiple identities and vehicles to conduct numerous transactions at various locations throughout the state. The evasive tactic hampered officials' ability to trace the path of a chemical. Determining the actual purchaser was difficult and at times impossible. In response, California drafted purchaser identification requirements which several state statutes and this [Act] incorporate.

Section 12. Record Keeping Requirements.

(a) Each regulated chemical distributor and regulated chemical possessor:

(1) shall prepare annually a complete, legible, and accurate physical count of all regulated chemicals on hand. The physical count shall be prepared on the effective date of this [Act] and every year thereafter or, if authorized by the [appropriate state official], on the annual general physical inventory date of a regulated chemical distributor or regulated chemical possessor;

(2) shall include on the record of each physical count, the date it was conducted, whether the count was taken as of the opening or as of the closing of business on that day, the name of the preparer, and any other information which the [appropriate state official] may require by regulation. The record shall be maintained for [four] years after the date of the count.

(b) Each regulated chemical distributor and regulated chemical possessor shall keep a record of each regulated chemical transaction in which it engages for [four] years after the date of the transaction.

(c) A record required under subsection (b):

(1) shall be kept in a readily retrievable manner and shall include:

(A) the date of the regulated chemical transaction;

(B) the identity of each party to the transaction;

(C) the description and license number of any vehicle used during the transaction;

(D) a statement of the quantity and form of the regulated chemical;

(E) the permit issued for the transaction; and

(F) a description of the method of transfer.

(2) shall be available for inspection and copying as authorized under Section 17.

COMMENT

This section facilitates the timely and routine monitoring of regulated chemicals. Complementing reporting requirements in Section 13, it helps document the actual distribution and possession of chemicals.

Section 13. Reporting Requirements.

(a) Each regulated chemical distributor and regulated chemical possessor shall report to the [appropriate state official]:

(1) any regulated chemical transaction involving an unusual quantity of a regulated chemical;

(2) a method of payment involving $99.00 or more in cash, currency or money orders;

(3) any loss, spillage, breakage or theft of a regulated chemical or breakage of a container in which a regulated chemical is stored;

(4) any discrepancy between the quantity of regulated chemicals shipped and received;

(5) any regulated chemical transaction involving circumstances which would indicate to a reasonable person that a regulated chemical might be used or disposed of in violation of this [Act] or the [state controlled substances act], or applicable EPA laws or regulations; or

(6) any other regulated chemical transaction required to be reported by the [appropriate state official] as necessary to protect public health and safety.

(b) Submission of the report required by subsection (a)

shall be at the earliest practicable opportunity and no later than three calendar days after any occurrence listed in subsection (a).

(c) Each regulated chemical distributor shall report to the [appropriate state official] all distributions of regulated chemicals in which the distributor has engaged during a calendar month no later than 15 calendar days after the end of the month.

(d) Each broker or trader shall report to the [appropriate state official] all regulated chemical transactions which the broker or trader has helped arrange during a calendar month no later than 15 calendar days after the end of the month.

(e) The [appropriate state official] may supply a common form or format for submission of the reports required in subsections (a), (c), and (d).

(f) A regulated chemical distributor and regulated chemical possessor may satisfy the requirements of any subsection of this [Act] for transactions involving threshold amounts of regulated chemicals under federal law by submitting to the [appropriate state official] copies of reports filed pursuant to federal law which contain all of the information required by that subsection.

COMMENT

Section 13 requires submission of two types of reports. The first, under subsection (a), identifies suspicious transactions or circumstances which alert officials to potential illegal diversion, including unusual quantities of chemicals. "Unusual" refers to an amount outside the range of amounts normally acquired in the regular course of business for a particular distributor or possessor. The second, under subsections (c) and (d), provides retrospective monthly information about all regulated chemical transactions.

Federal and state reporting systems often overlap regarding specific information which persons submit. Subsection (f) prevents unnecessary duplication by accepting copies of federal reports containing the required information.

This section provides the logical follow-up to information obtained through the registration and permit process. Sections 7 and 8 provide a picture of the potential flow of chemicals throughout a state. Section 11 helps trace the actual flow of chemicals. It supplies essential details about the customers of chemical manufacturers and distributors. Officials can identify the true purchaser, ensure the intended use of chemicals is the real use, and address violations of the [Act].

Offenses and Penalties

Section 14. Prohibited Acts; Penalties.

(a) It is unlawful for a regulated chemical distributor to:

(1) fail to obtain proper identification as required by Section 11;

(2) engage in a regulated chemical transaction without a registration issued under Section 7 or in a manner not authorized by the registration;

(3) use a registration number which is altered, fictitious, revoked, suspended, or issued to another regulated chemical distributor;

(4) engage in a regulated chemical transaction with knowledge or intent that a regulated chemical will be used in violation of this [Act] or the [state controlled substances act];

(5) engage in a regulated chemical transaction in violation of a rule or regulation of the [appropriate state official].

(b) It is unlawful for any person to:

(1) possess a regulated chemical without a permit or authorization in lieu of a permit issued under Section 8 or in a manner not authorized by the permit or authorization;

(2) acquire or obtain, or attempt to acquire or obtain, possession of a regulated chemical by material misrepresentation, fraud or deception;

(3) knowingly acquire or obtain, or attempt to acquire or obtain, possession of a regulated chemical from anyone other than a regulated chemical distributor properly registered under Section 7;

(4) possess a regulated chemical with knowledge or intent that the chemical will be used in violation of this [Act] or the [state controlled substances act];

(5) possess a regulated chemical with no attached permit or label as required by Section 8; or

(6) remove, alter, or obliterate any attached permit or label required by Section 8;

(7) move or distribute a regulated chemical to, or store or possess a regulated chemical at, a location

other than that identified in the permit or authorization issued under Section 8;

(8) fail to present, or to present false or fraudulent identification when identification is required by Section 11;

(9) knowingly or intentionally furnish false or fraudulent material information in, or omit any material information from, any application, report, record, inventory or other document required to be kept or filed under this [Act] or any applicable rule or regulation;

(10) fail to attach a permit or label as required by Section 8;

(11) possess a regulated chemical in violation of a rule or regulation of the [appropriate state official];

(12) refuse or fail to make, keep, submit or furnish an application, record, report, inventory, notification or other information required under this [Act] or any applicable rule or regulation;

(13) refuse entry into controlled premises for any inspection authorized by Section 8 or 9.

(c) A person who commits an offense described in subsections (a) (1)-(4) and (b) (1)-(9) is guilty of a [felony] and upon conviction may be imprisoned for not more than [ ] years, fined not more than [ ], or both.

(d) A person who commits an offense described in subsections (a)(5) and (b)(10)-(13) is guilty of a [misdemeanor] and upon conviction may be imprisoned for not more than [ ] months, days, or years, fined not more than [ ], or both.

(e) A person who commits a second or subsequent offense described in subsection (c) is guilty of a [felony] and upon conviction is punishable by a term of imprisonment and fine not to exceed [twice] that authorized by subsection (c).

(f) A person who commits a second or subsequent offense described in subsection (d) is guilty of a [felony] and upon conviction is punishable by a term of imprisonment and fine not to exceed [twice] that authorized by subsection (d).

(g) In addition to any other penalty imposed, a corporation which commits an offense described in ( )-( ) shall be subject to a civil fine of not more than [ ].

COMMENT

This section establishes a standard penalty provision based upon the legal obligations imposed under this [Act]. Despite the diversity of state penalty schemes, commonly found categorizations of offenses exist and are reflected in Section 14. Subsections (a) and (b) list offenses according to category of offender. Subsections (c) and (d) divide offenses according to degree of seriousness, felony or misdemeanor. Subsection (g) authorizes additional civil corporate fines. Each state must necessarily tailor Section 14 to fit its own unique sentencing structure. The purpose of this model provision is to give insight into practitioners' views about the types of actions or omissions which constitute violations and their relative gravity.

Section 15. Chemical Cleanup Assessment.

(a) In addition to any fine or imprisonment imposed under Section 14 of this [Act], the following civil assessment shall be imposed:

(1) Ten thousand dollars ($10,000.00) for each violation described in subsections ( )-( ) of Section [ ]; or the actual cleanup costs of illegal laboratory sites, whichever is greater; and

(2) One hundred thousand dollars ($100,000.00) for each violation described in subsections ( ) -( ) of Section [ ] or the actual cleanup costs of illegal laboratory sites, whichever is greater.

(b) The assessment provided for in this section shall be collected as provided for the collection of [other civil assessments and judgments].

(c) All monies collected under this section shall be deposited to the [appropriate state or local revolving fund] and used for the enforcement of this [Act] and the cleanup of illegal laboratory sites.

(d) Monies from the fund shall not supplant any other local, state or federal funds.

COMMENT

This section establishes a civil remedy which serves dual purposes. First, it helps pay for cleaning up clandestine lab sites. Seizures often reveal significant hazardous or toxic waste or by-products. Clean-up costs are staggering as California officials have experienced firsthand. For several years California has paid over $1,000,000 each year for illegal lab clean-up costs. Smaller states as well feel the monetary pinch. Last year

Oklahoma expended approximately $6,000 to clean-up illegal labs. This expense is only the cost to remove bulk contamination. Site restoration through hazardous waste removal and mitigation measures consumes enormous amounts of financial resources. Consequently, it is difficult for states to address long-term environmental contamination. A civil assessment helps stop violators from escaping financial liability for potential health and environmental hazards.

Second, the civil remedy helps recover costs for the enforcement and prosecution of cases pursuant to this [Act]. Clandestine lab cases are not cost effective because of the expense to clean-up hazardous waste and deal with residual contamination. A civil assessment allows states to pursue illegal lab operators without creating additional resource allocation problems.

Enforcement and Administrative Provisions

Section 16. Powers of Enforcement and Regulatory Personnel.

(a) The [appropriate state official] is authorized to conduct any investigation necessary to determine compliance with this [Act], and in accordance with the [state administrative procedure act] may subpoena witnesses, compel their attendance and testimony, and require the production of documentary evidence relevant to the investigation. The [appropriate state official] may invoke the aid of the [appropriate state court] in the jurisdiction of which the investigation is carried on, or in which the subpoenaed person resides, carries on business, or may be found, to compel compliance with the subpoena.

(b) Except as otherwise provided, no documentary material, transcripts, oral testimony, or copies in the possession of the [appropriate state official] shall be available prior to the filing of a criminal proceeding for examination by any individual other than the [appropriate state official], the [official's] designee, or a local, state or federal law enforcement officer without the consent of the person who produced the material or transcripts.

(c) The [appropriate state official] is authorized to promulgate rules and regulations, and to charge reasonable and non-refundable registration, permit, and monthly report authorization fees, which the [official] deems necessary and appropriate for the efficient and effective implementation of this [Act]. All non-refundable fees shall be used for and shall not exceed actual processing costs.

COMMENT

This section authorizes investigative and administrative powers which help effectuate the chemical tracking system. Subsections (a) and (c) grant typical fact-finding and rulemaking authority possessed by regulatory agencies. To ensure proper use of acquired information, subsection (b) creates a confidentiality provision which is drawn from the Model Asset Seizure and Forfeiture Act (MASFA). Finally, subsection (c) plays an important role in maintaining fiscal soundness of the regulatory scheme. A system of non-refundable fees helps offset the state's administrative expense of monitoring chemical transactions.

Section 17. Warrantless Administrative Inspections.

(a) The [appropriate state official], the [official's] designee, or a local, state, or federal officer empowered by law to conduct investigations of or to make arrests for drug law offenses is authorized to conduct administrative inspections of controlled premises in accordance with the requirements of this section.

(b) The [appropriate state official], [official's] designee, or any law enforcement officer, may inspect controlled premises after making a demand to conduct an inspection and presenting appropriate credentials to any person identified in an application submitted under Section 7 or 8, or if no such person is present or readily available, to any person present at the controlled premises.

(c) The demand for inspection must be made and the inspection conducted during regular and usual business hours. The inspection may include:

(1) inventorying any stock of any regulated chemical and obtaining samples;

(2) copying records required by this [Act] to be, or in fact, kept; and

(3) inspecting, within reasonable limits and in a reasonable manner, all pertinent equipment, apparatus, finished and unfinished material, containers and labeling found thereon, and all other things which help determine compliance with the [Act] including records, files, papers, processes, controls and facilities.

COMMENT

This section permits state officials access to the premises of persons who are subject to this [Act]. Administrative inspections allow routine and unimpeded review of inventories, storage facilities, records, papers, files, and equipment. They are important means of identifying noncompliance with the [Act].

Section 17 authorizes warrantless inspections in accordance with the Supreme Court's holding in *New York v. Burger*, 107 S. Ct. 2636 (1987). Burger involved a junkyard owner's business which partly consisted of dismantling automobiles and selling their parts. Pursuant to a New York statute allowing warrantless inspections of junkyards, police inspected the owner's premises and found stolen vehicles and parts. The owner was subsequently charged with possession of stolen property and unregistered operation as a vehicle dismantler.

The Supreme Court held the inspection was a constitutionally reasonable exception to the warrant requirement for closely regulated businesses. The New York regulatory structure satisfied three criteria. First, New York had a substantial governmental interest in eradicating auto theft, a problem which is associated with the junkyard industry. Second, warrantless administrative inspections necessarily further the regulatory goal. Frequent and unannounced inspections are crucial to preventing junkyards from becoming markets for stolen vehicles and parts. Third, the statute supplies a constitutionally adequate substitute for a warrant. It informs the business operator that regular inspections will be made and discusses the limited scope and authority of the inspectors.

Chemical regulation is a relatively new area of government oversight. However, it too qualifies as a closely regulated industry. Illegal diversion of chemicals surfaced as a national problem in the 1980s. Since its widespread recognition, federal and state officials have sought and obtained tight regulatory controls over chemicals. Moreover, chemical regulation is closely related to state regulation of scheduled substances which has existed federally and in every state since the early 1970s.

This [Act's] regulatory system also satisfies the Burger criteria. First, a state has a substantial governmental interest in preventing the transfer of chemicals to the illegal production of drugs. Controlling access to and monitoring the flow of chemicals serves that interest. Second, warrantless inspections are necessary to further the regulatory scheme. Advance notice provides distributors and possessors time to falsify records and conceal or modify inventories. This defeats the [Act's] purpose of ensuring the legitimate distribution, possession, and use of chemicals. Third, the [Act] provides a constitutionally adequate substitute for a warrant. Section 17 clearly informs persons that periodic inspections will be conducted in accordance with specific requirements. Additionally, the section limits the inspectors' discretion in time, place, and scope. Subsection (a) permits the inspection only by appropriate officials. Subsection (b) limits and carefully defines the activities of the inspectors, and subsection (c) permits the inspection only during normal business hours.

Section 18. Administrative Inspection and Seizure Warrants.

(a) In addition to procedures provided in Section 17 and subsection (e), an [appropriate state court judge or magistrate] within the [judge's or magistrate's] jurisdiction, and upon proper oath or affirmation showing probable cause, may issue warrants to conduct administrative inspections and seize property as authorized by this [Act]. For the purpose of issuance of an administrative inspection warrant, probable cause exists upon a showing of a valid public interest in the effective enforcement of this [Act], or rules adopted under this [Act], sufficient to justify administrative inspection of the area, premises, building or conveyance in the circumstances specified in the application for the warrant.

(b) A warrant shall be issued only upon an affidavit of the [appropriate state official], the [official's] designee, or an officer, sworn to before the [judge or magistrate], and establishing grounds for issuing the warrant. If the [judge or magistrate] is satisfied that grounds for the application exist or that there is probable cause to believe they exist, the [judge or magistrate] shall issue a warrant identifying the area, the conveyance, the building or other premises to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any.

(c) The warrant shall:

(1) state the grounds for its issuance and the name of the affiant;

(2) be directed to a person authorized by this section to serve and execute the warrant;

(3) command the person to whom it is directed to inspect the area, conveyance, building or other premises identified for the purpose specified and, if

appropriate, direct the seizure of the property specified;

(4) identify the items or types of property to be seized, if any;

(5) allow the sale or destruction of regulated chemicals or equipment if appropriate and the deposit of the proceeds of any sale with the court; and

(6) direct that it be served during normal business hours or other hours designated by the magistrate and designate the magistrate to whom it shall be returned.

(d) A warrant issued pursuant to this section must be served and returned within [ ] days of its date of issue unless, upon a showing of a need for additional time, the [judge or magistrate] orders otherwise. If property is seized pursuant to a warrant, a copy of the warrant shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken, or the copy and receipt shall be left at the place from which the property was taken. The return of the warrant shall be made promptly, accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person serving the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible person other than the person serving the warrant. A copy of the inventory shall be delivered to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) This section does not prevent warrantless entries and administrative inspections, including seizures of property, during times other than normal business operating hours:

(1) in situations presenting imminent danger to health or safety; or

(2) in an emergency or other exigent circumstance where time or opportunity to apply for a warrant is lacking.

COMMENT

This section establishes a procedure for issuance and execution of administrative inspection warrants in circumstances outside Section 17's scope. For example, a warrant would be required to conduct an inspection during nonemergency times other than normal business operating hours.

The specific language is substantially drawn from Section 502 of the UCSA. The described procedure incorporates the traditional warrant requirements in several states controlled substances acts.

Section 19. Forfeiture.

[(a) all regulated chemicals which have been or are intended to be manufactured, provided, sold, furnished, transferred, delivered, or possessed in violation of this [Act] shall be deemed contraband, seized and summarily forfeited to the state.]

(b) A violation of this [Act] shall constitute conduct giving rise to forfeiture under [forfeiture procedures applicable to the state controlled substances act].

COMMENT

Forfeiture is a potent weapon designed to attack the economic base of criminal activity. It removes equipment, buildings, monies and other property from the cycle of continued illegal use. Subsection (b) applies this remedy through existing state procedures. States may choose to eliminate subsection (a) and include regulated chemicals in the list of property subject to forfeiture under a state drug forfeiture statute.

Section 20. Severability Provision.

If any provisions of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Section 21. Effective Date.

This [Act] shall take effect on [reference to normal state method of determination of effective date][reference to specific date].

Drafters include Steve Brookman, Oklahoma State Bureau of Investigation; Mark Faull, Crime Strike, Phoenix, Arizona; William Holman, San Diego District Attorney's Office; John Duncan, Oklahoma Bureau of Narcotics Enforcement; Katina Kypridakes, California Bureau of Narcotics Enforcement; Richard Wintory, Oklahoma District Attorney's Office; Michael Scott, Texas Department of Public Safety; Gary Sundt, Washington State Patrol; Harry Matz, U.S. Department of Justice; Ken Ronald, Drug Enforcement Administration; and Sherry Green, former Senior Attorney with APRI.

Appendix B

State Chemical Control Statutes

	AL	AZ	AR	CA	CO	HI	IA	LA	MN	MO	MT	NM	OK	OR	PA	TX	UT	WA
Number of Chemicals	17	19	20	32	35	31	12	18	31	20	9	26	20	17	32	16	31	23
Forfeiture of Chemicals	X		X	X		X				X		X					X	
EXCLUDED DRUGS																		
Prescription Drugs	X		X		X					X		X	X			X		X
Over-the-counter Drugs	X		X	●	X	●	○●		●	X[1]		X	X	✪	X	X	●[2]	X ○ ✪
LICENSE																		
Annual Renewal	X		X	X	X	X	X			X		X	X			X	X[3]	X
Reasonable Fee	X		Max. $25	Max. Costs	X	Max. Costs	Max. Costs	X		X		Min. $250	$100/ $10[4]				X	Max. Costs
LICENSE/REPORTING EXEMPTIONS																		
Medical Professionals	X	X	X	X	X	X	X		X	X	X	X		X	X		X[5]	X
Licensed Entities & Agents	X	X	X	X	X	X	X		X	X	X	X	Comm. carrier	X[6]	X			X
College Chemistry Students			X		X						X	X						
Employees of Govt. Agencies			X		X													
Licensed Researchers			X		X						X							
REV./SUSP./DENIAL																		
Drug Conviction or Guilty Plea	X		X		X			X		X		X	X					
Rev./Susp. of Federal Registration	X		X		X			X		X		X						
Violation of Drug Law	X		X	X			X	X		X		X						X
License Obtained by Fraud	X		X	X	X		X	X		X		X	X[7]					X

This chart was prepared by the American Prosecutors Research Institute's National Drug Prosecution Center under a grant from the National Institute of Justice.

Survey information current through April 10, 1993

LEGEND:
Drugs Specifically Exempted: ●=Ephedrine, Pseudoephedrine, Norpseudoephedrine and Phenylpropanolamine ○=Cosmetics ✪=Ephedrine

[1] Also excludes sales or transfers below threshold level and drugs lawfully sold in ordinary course of business.

[2] Also exempts dietary supplement, vitamins, minerals, herbs containing naturally occurring amount of chemicals.

[3] Requires renewal in odd numbered years.

[4] License to sell/permit to possess.

[5] Applies to practitioners holding a substance license and registration from DEA.

[6] Also exempts patients and persons reporting in an alternative manner.

[7] Failure to maintain effective controls is also a reason for rev./susp./denial.

State Chemical Control Statutes

	AL	AZ	AR	CA	CO	HI	IA	LA	MN	MO	MT	NM	OK	OR	PA	TX	UT	WA
RECORDS/REPORTS																		
Years Records Must Be Kept	2		2		2			2	5					2		2		
Common Form	X	X			X	X	X	X			X			X		X		X
Required Delivery Notice (Days Before/After Delivery)		21	21	21/3	21	21	21	21	21	21	/3			3/10		21	3[9]	21
Monthly Report Alternative		X	X[10]	X	X	X	X	X	X	X	X[10]		X[11]	X[10]		X		X
Days to Report Difference in Quan. Shipped vs. Received	3	3	3		3		7	3			3			3		3		7
Purchase Out of State Report		X	X	X	X	X	X	X						X		X	X[12]	X
Days to Report Theft/Loss	3[13]	3	3		3	3	7	3			3		3[13]	3		3	X[14]	7
Records for Chemical Lab Apparatus																X		
Confidentiality of Records						X				X					15			
PURCHASER I.D.																		
Photo I.D.	X		X	X	X	X	X	X	X	X			X		X	X	X[16]	X
Driver's License/I.D. #	X		X	X	X			X					X		X	X		
Birthdate	X		X		X			X					X			X		
Street/Resid. Mailing Addr.	X		X	X	X	X	X	X	X	X			X		X	X		X
Vehicle Lic. #, Year, State	X		X	X	X	X	X	X	X	X					X	X		X
Description of Use of Drugs	X[18]		X	X	X	X	X	X	17	X			X[18]		X[19]	X		X
Signature			X	X	X	X	X	X	X	X					X	X		X
Business Authorization Letter	20		X	X	X	X	X	X	X	X					X	X		X
REGULATORY AGENCY	▲	■	✧✢	◗	✢▲	■	▲	■	◗	✢	◗	▲	☆	✧	✢	■	❄	▲
Subpoena Powers						X												

LEGEND:
Two symbols included within same cell indicates that the agencies share the regulatory duties ■=Dept. of Public Safety ✢=Dept. of Health ▲=Board of Pharmacy ☆=Bureau of Narcotics & Drugs ✧=Dept. of Police ◗=Dept. of Justice ❄=Dept. of Commerce

[9] Applies only to extraordinary or unusual transaction.
[10] Requires both lawful record of use and supply pattern.
[11] Requires only lawful record of use.
[12] Also applies to selling out-of-state.
[13] Also requires 3 day notice for disposal of drug.
[14] No days specified.
[15] Penalty for wrongful use.
[16] Identification required but specifics left to regulation.
[17] Requires type, qty., method of delivery.
[18] Requires also location where stored & used.
[19] Requires also qty., price, manner of payment, date, time, location.
[20] No letter, but applicant must disclose relationship to business.

Citations to State Chemical Control Statutes

1.	Alabama:	Alabama Code §20-2-180 to 20-2-190 (Supp. 1992)
2.	Arizona:	Ariz. Rev. Stat. Ann. §13-3401 to 13-3404 (Supp. 1992)
3.	Arkansas:	Ark. Stat. Ann. §5-64-415 (Supp. 1991)
4.	Colorado:	Colo. Rev. Stat. §12-22-301 to 12-22-322 (Supp. 1992)
5.	California:	Cal. Health & Safety Code §11100 to 11107.1 (Deering Supp. 1993)
6.	Hawaii:	Hawaii Rev. Stat. §329-61 to 329-91 (Supp. 1992)
7.	Iowa:	Iowa Code Ann. §204B.1 to 204B.10 (Supp. 1992)
8.	Louisiana:	La. Rev. Stat. Ann. §40:976.1 (Supp. 1993)
9.	Minnesota:	Minn. Stat. Ann. §152.0972 to 152.0974 (Supp. 1993)
10.	Missouri:	Mo. Ann. Stat. §195.400 to 195.425 (Supp. 1992)
11.	Montana:	Mont. Code Ann. §50-32-401 to 50-32-405 (1991)
12.	New Mexico:	N.M. Stat. Ann. §30-31B-1 to 30-31B-41 (Supp. 1991)
13.	Oklahoma:	Okla. Stat. Ann. Tit. 63 §2-321 to 2-329 (Supp. 1993)
14.	Oregon:	Or. Rev. Stat. §475.940 to 475.965 (Supp. 1992)
15.	Pennsylvania:	Pa. Stat. Ann. Tit. 35 §881 to 888 (Supp. 1992)
16.	Texas:	Tx. Health & Safety Code §481.077 to 481.082 (Supp. 1993)
17.	Utah:	Utah Code Ann. §58-37C-1 to 58-37C-17 (Supp. 1992)
18.	Washington:	Wash. Rev. Code Ann. §69.43.010 to 69.43.100 (Supp. 1993)

FOOTNOTES:

1. The following states control chemicals under CSA schedules like cocaine or LSD: AK, CT, DE, DC, FL, ID, IL, KS, MI, MS, NE, NV, NH, NJ, NY, NC, ND, OH, RI, SC, TN, VA, WV, WI, WY.
2. The following states do not control precursor chemicals: GA, IN, KY, ME, MD, MA, SC, VT.

Uniform Controlled Substances Act (UCSA)(1990) Controlled Substance Analogs

Table of Contents

Uniform Controlled Substances Act (UCSA)(1990) Controlled Substance Analogs

Policy Statement

America has experienced for the past 20 years a growth in the popularity of controlled substance analogs, or "designer drugs." Federal and state drug statutes control substances by listing them on schedules. Each controlled substance is defined according to a precise chemical structure. Manufacture, distribution, and use of a substance with a listed chemical structure is subject to regulation. In the 1970s drug dealers quickly realized they could evade drug laws by creating substances which varied slightly in molecular structure from commonly abused controlled drugs. Because these new analog substances were unscheduled, their production and use were unrestricted. Chemists with rudimentary scientific knowledge and no concern for public health consequences began to manufacture analogs with devastating results.

"China White", an analog of the controlled substance fentanyl, was 3,000 times more potent than heroin and resulted in hundreds of drug overdoses in Southern California and other areas[1]. An analog of Demerol was linked to Parkinson's disease which resulted in near total paralysis of dozens of users and identification of over 400 users believed to be at serious risk of developing Parkinson's disease[2]. The deaths of 11 people in the New York-New Jersey-Connecticut area resulted from ingestion of a potent designer drug called "Tango and Cash." The drug is laced with a powerful tranquilizer which makes it 27 times more potent than the heroin on which it is based[3].

In 1990 the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated legislation to help states deal fairly and effectively with the designer drug problem. The Uniform Controlled Substances Act (UCSA)(1990) provisions define and prohibit the production of designer drugs and allow emergency scheduling of analogs to avoid an imminent hazard to the public safety. Simultaneously, the UCSA permits legitimate scientific research to continue even though the research may result in accidental production of an analog. Protection is also afforded the use of analogs for purposes other than human consumption.

[1] American Prosecutors Research Institute, *Overview* STATE DRUG LAWS FOR THE '90s 37 (1991).
[2] *Id.*
[3] *Id.*

Highlights of the Uniform Controlled Substances Act (UCSA)(1990) Controlled Substance Analogs

- Defines a controlled substance analog as a substance substantially similar to a controlled substance in chemical structure which has, or is represented to have, an effect on the central nervous system substantially similar to that of a controlled substance.
- Excludes from regulation substances which are the subject of legitimate scientific research or are intended for purposes other than human consumption.
- Allows temporary emergency scheduling of an analog to prevent imminent hazards to public safety upon receipt of relevant information by prosecutors.
- Requires commencement of general comprehensive rulemaking proceedings simultaneously with issuance of an emergency scheduling order.
- Authorizes prosecution of illegal manufacturers and distributors of analogs.
- Requires analogs to be treated as Schedule I controlled substances for prosecution and penalty purposes.
- Terminates prosecution of an analog case if the appropriate agency finds that the analog should remain unscheduled.

Uniform Controlled Substances Act (UCSA)(1990) Controlled Substance Analogs

*Section 101. Definitions.**

• • •

(3) (i) "Controlled substance analog" means 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; but;

(ii) the term does not include:

(A) a controlled substance;

(B) a substance for which there is an approved new drug application;

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355] to the extent conduct with respect to the substance is permitted by the exemption; or

(D) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance

• • •

Section 201. Authority To Control. Subsections (b) and (g).

• • •

(b) In making a determination regarding a substance, the [appropriate person or agency] shall consider the following:

(1) the actual or relative potential for abuse;

(2) the scientific evidence of its pharmacological effect, if known;

(3) the state of current scientific knowledge regarding the substance;

(4) the history and current pattern of abuse;

(5) the scope, duration, and significance of abuse;

(6) the risk to the public health;

(7) the potential of the substance to produce psychic or physiological dependence liability; and

(8) whether the substance is an immediate precursor of a controlled substance.

• • •

(g) Upon receipt of notice under Section 214, the [appropriate person or agency] shall initiate scheduling of the controlled substance analog on an emergency basis pursuant to this subsection. The scheduling of a substance under this subsection expires one year after the adoption of the scheduling rule. With respect to the finding of an imminent hazard to the public safety, the [appropriate person or agency] shall consider whether the substance has been scheduled on a temporary basis under federal law or factors set forth in subsections (b)(4), (5), and (6), and may also consider clandestine importation, manufacture, or distribution, and if available, information concerning the other factors set forth in subsection (b). A rule may not be

*The Uniform Controlled Substances Act (UCSA)(1990) was drafted and distributed by the National Conference of Commissioners on Uniform State Laws. The Commission has excerpted the UCSA analog provisions and reformatted them to be consistent with the Commission's other model acts.

adopted under this subsection until the [appropriate person or agency] initiates a rulemaking proceeding under subsections (a) through (d) with respect to the substance. A rule adopted under this subsection lapses upon the conclusion of the rulemaking proceeding initiated under subsections (a) through (d) with respect to the substance.

Section 214. Controlled Substance Analog Treated As Schedule I Substance.

A controlled substance analog, to the extent intended for human consumption, must be treated, for the purposes of this [Act], as a substance included in Schedule I. Within [ ] days after the initiation of prosecution with respect to a controlled substance analog by indictment or information, the [prosecuting attorney] shall notify the [appropriate person or agency] of information relevant to emergency scheduling as provided for in Section 201(g). After final determination that the controlled substance analog should not be scheduled, no prosecution relating to that substance as a controlled substance analog may be commenced or continued.

COMMENT

This section is based on Section 203 of the federal Controlled Substances Act, 21 U.S.C. 813, as added by the Anti-Drug Abuse Act of 1986, §§ 1201-1204 (the "Controlled Substance Analogue Enforcement Act of 1986"). Because a controlled substance analog, as defined by Section 101, is an unscheduled substance, the section provides for procedures to be initiated to schedule the analog as well as to prevent further prosecution if the analog is found to be not appropriate for scheduling as a controlled substance.

ANALYSIS

Section 101. ***Definitions***

Section 201. ***Authority to Control. Subsection (g)***

Section 214. ***Controlled Substance Analog Treated as Schedule I***

Hypothetical

Joe Cooker is a former college student with a rudimentary knowledge of chemistry and a keen interest in illegal drugs both from the standpoint of abuse and economic profit. One day Joe learns through friends that by making a simple alteration in the chemical structure of the controlled substance ABC, he can produce a legal substance that, because it is not listed on any "schedule" is non-controlled and legal. The new drug has the same or greater hallucinogenic effect on the central nervous system as the outlawed ABC. Joe and his friends invest in some laboratory equipment, set up a primitive lab in a garage, and begin manufacturing the new substance ABCX or "Utopia" in bulk quantities. No scientific studies of the physical or psychological effects of ABCX on humans have ever been conducted. Indeed, no animal studies of any kind have taken place. ABCX has not been subjected to any of the controls by the FDA to protect the public, but Joe and his friends continue to manufacture and distribute ABCX in an indiscriminate manner. Soon public health officials are receiving reports of ABCX abusers needing medical and psychological treatment. Law enforcement officials are helpless to stop this activity because ABCX can't become a controlled substance until the lengthy process for scheduling has been completed.

The State of Justice, where Joe resides, adopts an emergency scheduling provision similar to Section 201(g) of the UCSA (1990). The state scheduling agency initiates an "emergency scheduling" proceeding with respect to ABCX by publishing a public notice. Joe and his cohorts catch wind of this proceeding and simply begin to produce a new and even more dangerous analog of the controlled substance ABC which they dub ABCZ or "Eros." Six months later, when the state completes the emergency scheduling of ABCX, there is none being produced or sold on the street. Nearly a year later, law enforcement personnel have identified the new substance as ABCX and, once again, the state initiates "emergency scheduling" proceedings. Joe and his cohorts merely create another variation on the chemical structure of ABC and remain in business fully oblivious to the public health consequences of their activities.

Analysis*

Unless the State of Justice enacts an "analog" statute similar to Section 101(3) and Section 214 of the UCSA (1990), this scenario may be played out indefinitely.

*The analysis, prepared by the National Drug Prosecution Center and Harry Harbin of the U.S. Department of Justice, does not necessarily represent the views of the National Conference of Commissioners on Uniform State Laws. The analysis was excerpted from the publication entitled "STATE DRUG LAWS FOR THE '90s" (1991).

Indeed, such scenarios were common prior to the 1986 enactment of the federal "analog" statutes. As set forth below, the UCSA (1990) provisions are narrower than the federal provisions, provide full protection for legitimate scientific research and for use of analogs for purposes other than human consumption. They also provide safeguards against improper prosecution for mere accidental production of a controlled substance analog and they insure that the final determination of whether an analog is to be treated as a controlled substance is made by the appropriate state scheduling agency.

In 1986, Congress reported that "fentanyl" analogs had resulted in over 100 drug overdoses because they were more than 3,000 times more potent than the heroin molecule on which they were based. Moreover, one designer drug — MPPP, an analog of Demerol (meperidine) had been marketed with processing impurities (MPTP) which caused almost total paralysis in dozens of users because of a suspected link between MPTP and Parkinson's disease. At least 400 additional persons had been identified as being at serious risk of developing Parkinson's disease because of their exposure to these impurities. There was, at the time, no provision under the UCSA (1970) or under federal law for prosecuting those responsible for the manufacture and sale of such uncontrolled substances.

Makers of "designer drugs," operating out of illicit laboratories, chemically alter a controlled substance by making a very slight alteration in the chemical structure of the controlled substance in order to produce a new, uncontrolled — and therefore "legal" — substance which produces an effect on the central nervous system nearly identical to that produced by the controlled substance on which it is based. Such "designer drugs" were originally produced in a successful effort to evade the drug laws. The new substances were produced more quickly than the Drug Enforcement Administration (DEA) could add them to the schedules of controlled substances; thus, the manufacture, distribution, and use of these "designer drugs" were not illegal under either federal or state drug laws. Moreover, each time DEA completed scheduling proceedings, the illicit chemists merely made another variation in the chemical structure and invented a new, uncontrolled designer drug.

There was nothing in the UCSA (1970) which would allow states to deal effectively with the "designer drug" problem in an expedited manner. Indeed all a state scheduling agency could do was to initiate formal scheduling proceedings with respect to the substances which might consume months or even years during which the traffickers of designer drugs could ply their trade at will without any concern for the public health effects of their products. Section 201(g) of the USCA (1990) seeks to rectify this situation by vesting state agencies with "emergency scheduling authority" which allows for the temporary placement of a substance in Schedule I based upon an expedited determination that such action is necessary to "avoid an imminent hazard to the public health." This "temporary scheduling" order may not be made unless the state agency also initiates formal scheduling proceedings under Section 201(a) with respect to the substance.

Section 201(g) of the USCA (1990) is similar to the "emergency scheduling" provision under federal law, which is codified as 21 U.S.C. 811(h). This provision was enacted in 1984 as part of the initial federal response to the "designer drug" problem. It authorized the Attorney General to place a substance in Schedule I on a temporary basis in order to avoid an "imminent hazard to the public safety," after a 30-day public notice period. This "emergency scheduling" order would expire at the end of one year unless extended for a six-month period during the pendency of formal scheduling proceedings. The legislative history of this provision made clear that its purpose was "to protect the public from drugs of abuse that appear in the illicit drug traffic too rapidly to be effectively handled under the lengthy routine scheduling procedures." S.Rep.No. 225, 98th Cong., 2d Sess., at 264, reprinted in [1984] U.S. Code Cong. & Ad. News 3182, 3446. However, even this "emergency scheduling" authority proved ineffective in stemming the tide of "designer drugs."

Indeed, a congressional report noted in 1986 that:

> DEA in the course of its investigation has found a very small number of illicit chemists have been very carefully developing new drugs to stay ahead of DEA's scheduling actions. As a consequence, even with the emergency scheduling authority [of 21 U.S.C. 811(h)(1), the public remains at risk, and dangerous chemists are able to escape prosecution due to the following factors. First, there is an enormous number of drugs which can yet be developed. Second, there is an unavoidable delay in discovering that such drugs are being distributed. Third, there is the unavoidable obstacle of establishing that these drugs are being abused and pose an imminent threat to the public health. Finally, there is the [lapse] of time needed to undertake and complete action to control the drugs. The only way to effectively protect the public is to investi-

> gate and prosecute these chemists... prior to formal control of the drugs.

H.R. Rep. No. 848, 99th Cong., 2d Sess., at 5 (1986) (emphasis added).

Section 101(3)(i) and Section 214 of the UCSA (1990) represent a reasonable and measured response to the problems noted by Congress in the foregoing passage. They would allow for prosecution of "designer drug" cases, in limited circumstances, prior to the completion of any "emergency" or routine scheduling proceeding. First, Section 101(3)(i) limits the definition of "controlled substance analog" to substances which:

> (1) are substantially similar to the chemical structure of a controlled substance in Schedule I or II; and
>
> (A) which have a stimulant, depressant or hallucinogenic effect on the central nervous system that is substantially similar to the effect of a controlled substance 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 that of a controlled substance in Schedule I or II.

The definition specifically excludes any substance (1) which is already a controlled substance; (2) which is subject to an approved new drug application; (3) which is subject to an exemption for investigational use by a particular person to the extent of conduct that is pursuant to that exemption; and (4) which is not intended for human consumption before such an exemption takes effect with respect to the substance. Moreover, Section 214 specifically provides that a controlled substance analog may only be treated as a substance included in Schedule I "to the extent [it is] intended for human consumption."

It is important to note, first of all, that the exceptions specified in Section 101(3)(i) insure that no prosecution is brought because of use of controlled substance analogs for legitimate scientific research or for purposes other than human consumption. This is as it should be since the motivating concerns behind these provisions are to protect the public health and safety and to allow for prosecution only of those unauthorized "chemists" and their "clients" who intentionally produce, distribute, and use "designer drugs" for purposes of human consumption. Likewise, this provision would not allow prosecution for the production of a controlled substance analog which was produced accidentally during the course of chemical research because such an "accidental analog" would not be produced for purposes of human consumption. (Such a prosecution would also be barred by the requirements in the controlled substance offense provisions that an offense be committed "knowingly or intentionally.") Equally important is the fact that this provision would apply only to substances which are structurally similar to a controlled substance in Schedule I or II and which are either substantially similar in their pharmacological effect or which are intended or have been represented by the defendant to have such a substantially similar effect.

Moreover, the USCA (1990) contains safeguards against unfair prosecution and conviction even in the limited class of cases which falls within the scope of the statutes. Section 214 requires a prosecutor to notify the state scheduling agency of information relevant to "emergency scheduling" of a controlled substance analog within a certain number of days after initiating a prosecution with respect to that analog. Section 201(g) specifies that the state agency must initiate an "emergency scheduling" proceeding upon receipt of such notice. More importantly, Section 214 specifically provides that no prosecution relating to an analog may continue or take place following a final determination by the state agency that the substance should not be scheduled. Thus, the statutes insure that the final determination of what should be treated as a controlled substance will be made by the agency possessing the expertise to make such determinations scientifically and objectively.

It is also very important to note that the UCSA (1990) is much narrower than the comparable provisions of the Federal Controlled Substance Analogue Enforcement Act of 1986, which Congress enacted as Subtitle E of the Anti Drug Abuse Act of 1986. The federal provisions, which are codified as 21 U.S.C. 802(32) and 813, resemble the UCSA (1990) in that they limit prosecutions only to cases involving analogs intended for human consumption and contain definitional exceptions which safeguard legitimate scientific research and production or use of analogs for purposes other than human consumption. However, where the USCA (1990) allows only two alternative theories of prosecution (i.e., the state must show in all cases that the analog has a chemical structure that is substantially similar to a controlled substance in Schedule I or II and must also show either that the analog, in fact, has a pharmacological effect that is substantially similar to that of a controlled substance in Schedule I or II or that the analog was represented or intended to have such a substantially similar effect by

the particular defendant), the federal provisions allow three alternative and greatly simplified theories of prosecution.

Thus, a person may be convicted of an analog offense under the federal provisions if the government establishes either (1) that the alleged "analog" is substantially similar in structure to a controlled substance in Schedule I or II; (2) that the "analog" has a substantially similar pharmacological effect on the central nervous system as a controlled substance in Schedule I or II; or (3) that the "analog" has been represented or intended to have such a substantially similar effect by the particular defendant in a case. See 21 U.S.C. 802(32)(a).

Thus there is no requirement under the federal provisions, as there is under the UCSA (1990), that an analog be shown to be substantially similar in chemical structure to a controlled substance in Schedule I or II in every case. Moreover, the federal statute does not require a prosecutor to notify the DEA of information relevant to "emergency scheduling" proceedings with respect to a particular substance after an analog prosecution is initiated based upon that substance, and does not provide that an analog prosecution shall not commence or continue if DEA makes a final determination not to schedule a controlled substance.

It should be noted that the federal analog provisions are being used extensively — and with considerable success — by federal prosecutors. A unanimous panel of the United States Court of Appeals for the Fifth Circuit upheld the federal statute against a vagueness challenge in a prosecution involving MDMA. See *United States v. Desurra*, 865 F.2d 651 (5th Cir. 1989).

Finally, it is simply specious to claim, as some have, that enactment of either the analog provisions or the emergency scheduling statute would violate the ex post facto clause. None of the sections would authorize prosecution for activities involving analog substances which occur prior to their enactment by the states. Once the analog provisions are adopted, it would thereafter be illegal to manufacture, distribute or possess "controlled substance analogs" for purposes of human consumption with the exception of legitimate scientific research. Similarly, once a substance is added to Schedule I on an "emergency basis" it will thereafter be illegal to manufacture, distribute or possess the substance at least during the term of the emergency scheduling order. Furthermore, once the USCA (1990) is enacted, persons will be on fair notice of what the law requires for the reasons previously stated.

To summarize, there is no provision in the UCSA (1970) to deal with the "designer drug" problem. Thus, state law enforcement officials are powerless in combatting the manufacture and abuse of such "uncontrolled" substances. Section 201(g) of the UCSA (1990) would go part of the way toward resolving this problem by giving state scheduling agencies authority to do "emergency scheduling" of substances on a temporary basis to avoid "an imminent hazard to the public safety." Section 101(3) and Section 214 of the UCSA (1990) would give state and local law enforcement personnel the power to bring "analog" prosecutions in limited numbers of cases while at the same time, protecting legitimate scientific research and use of analogs for purposes other than human consumption. Finally, these provisions would provide adequate safeguards against criminal prosecution for the accidental production of a controlled substance analog and would insure that the final determination of whether an analog should be treated as a controlled substance be made by the state scheduling agency.

Model Act to Permit Continued Access by Law Enforcement to Wire & Electronic Communications

Table of Contents

Model Act to Permit Continued Access by Law Enforcement to Wire and Electronic Communications

Policy Statement

The nation's various telecommunications systems are often used in the furtherance of serious and sometimes violent criminal activities including illegal drug trafficking, organized crime, terrorism, kidnapping and extortion. One of the most important and effective tools in the investigation of these crimes by federal, state and local law enforcement agencies is the court authorized interception of communications.

The telecommunications industry, which has relied on the same analog technology for approximately 50 years, is now rapidly moving to more advanced telecommunications systems and fundamentally different technology, i.e., personal communication networks, advanced cellular, and integrated services digital networks. These new technologies have the capacity for high speed, simultaneous transmission of multiple, comingled communications.

Advances in technology continue to complicate law enforcement's ability to effect lawful court orders to intercept electronic communications. In some cases, advanced cellular technology and new digital features have already frustrated orders, thereby allowing criminals to circumvent detection by law enforcement.

These technologies inadvertently hamper the ability of law enforcement to investigate crimes and protect the public. These new telecommunications systems frequently transmit multiple communications through a single "wire" thereby preventing law enforcement from discerning the target communication from others simultaneously transmitted. This was not a problem with the old analog technology because every communication was distinct and identifiable and could be accessed at several points within the network. Without modifications to systems software and in some cases, hardware, the telecommunications systems of this country will no longer be able to accommodate access by law enforcement to conduct electronic surveillance. If the legitimate needs of law enforcement were considered during the design and development phases of these new systems, the systems could continue to provide law enforcement access to the types of communications presently available.

The Model Act relies on the telecommunications industry to develop technical solutions which will ensure that telecommunications technology continues to meet the needs of law enforcement while remaining cost effective. The Model Act simply requires the telecommunications service providers, when served with a court order, to be able to identify and provide the entire content of specific telephone conversations to the exclusion of all others, regardless of the technology involved.

The Model Act also ensures that all providers of telecommunications services remain on the same competitive "level playing field" by requiring all telecommunications service providers ultimately to use systems that take into consideration both the legitimate need for law enforcement to access criminal conversations and the intense competitive demands of the market place.

In 1968, Congress carefully considered and passed the Omnibus Crime Control and Safe Streets Act which set forth a meticulous procedure by which law enforcement can obtain judicial authorization to conduct electronic surveillance. This law was enacted after Congress exhaustively debated the government's need to effectively address serious and often violent criminal conduct against an individual's right to privacy. Nothing in the model act seeks to change or enhance this authority or procedure. The 1968 law requires the telecommunications industry to provide the "technical assistance necessary to accomplish the interception." The model act clarifies the duties of the telecommunications industry in responding to court orders and assisting law enforcement in the face of advances in digital telephony technology.

Highlights of the Model Act to Permit Continued Access by Law Enforcement to Wire and Electronic Communications

PRESERVES CURRENT ABILITY TO ACCESS CRIMINAL CONVERSATIONS UNDER NEW TELECOMMUNICATIONS SYSTEMS

- Establishes the responsibilities of electronic communication service providers and private branch exchange operators to provide law enforcement with the technical assistance necessary to conduct the lawful interception of communications.
- Ensures that law enforcement's continued ability to conduct intercepts is not impeded by current to emerging telecommunications technologies.

ASSISTANCE REQUIREMENTS

- Requires real time and identical communication signals as transmitted to or by the individual(s) named in the court order.
- Requires isolation of all communication signals and services directed to and/or from the subject of the intercept to the exclusion of all other users who are not the subject of the lawful interception.
- Authorizes interception availability at a monitoring facility remote from the target of the court order and separate from the facility of the communications service provider.
- Provides access without detection by the subject of the interception or any other subscriber.
- Provides access without degradation or interruption of the subscriber's telecommunications service.

IMPLEMENTATION ISSUES

- Requires providers of electronic communications services within the public switched network, such as local exchange carriers, interexchange carriers, cellular carriers, etc., to ensure that their systems comply with these requirements within 18 months of enactment into law.
- Requires private branch exchange operators to ensure that their systems comply with these requirements within three years of enactment into law.
- Provides the attorney general with the authority to grant exemptions to these requirements as well as exceptions to the implementation deadlines.
- Provides the attorney general specific authority to seek civil penalties and injunctive relief to enforce the provisions of this law.

Model Act to Permit Continued Access by Law Enforcement to Wire and Electronic Communications

Section 1. Short Title.

This [Act] shall be known and may be cited as the "Model Continued Law Enforcement Access to Communications Act."

Section 2. Legislative Findings.

(a) Telecommunications systems and networks are often used in the furtherance of criminal activities including organized crime, racketeering, extortion, kidnapping, and trafficking in illegal drugs.

(b) Recent and continuing advances in telecommunications technology, and the introduction of new technologies and transmission modes by the telecommunications industry, have made it increasingly difficult for government agencies to implement lawful orders or authorizations to intercept wire and electronic communications, and thus threaten the ability of such agencies effectively to enforce the laws and protect the public safety.

(c) The assistance and cooperation of providers of electronic communications services and private branch exchange operators is necessary due to the introduction of new technologies and transmission modes into telecommunications systems without consideration and accommodation of the need of government agencies lawfully to intercept wire and electronic communications, so that the ability of such agencies effectively to carry out their responsibilities for the public safety will not be impeded.

COMMENT

Legislative findings are useful in providing guidance to interpreting courts and publicizing and memorializing the goal and objectives of the [Act]. *Block v. Hirsch*, 256 U.S. 135, 154 (1921)("entitled at least to great respect").

Law enforcement agencies are at a distinct disadvantage in this new age of technology in the telecommunications industry. The use of new types of transmissions in furtherance of criminal activities creates difficulties for law enforcement agencies to obtain and comply with lawful orders and authorizations to intercept these transmissions.

The new technologies pose problems for law enforcement agencies because the agencies are unable to provide the content of communications targeted by the court order, to the exclusion of all other communications by persons not engaged in criminal conduct. The old analog technology avoided this problem because each communication was distinct, identifiable, and could be accessed within the network.

In order for law enforcement agencies to fulfill their responsibilities, providers of electronic communication services and private branch exchange operators must assist the agencies by developing solutions to the problems of lawfully intercepting wire and electronic transmissions.

Section 3. Purpose.

The purpose of this [Act] is to ensure that providers of wire and electronic communication services and private branch exchange operators provide government agencies the necessary assistance to implement lawful court orders or authorizations to intercept wire and electronic communications. Nothing in this [Act] is intended to expand or reduce (1) the authority of the government to lawfully intercept the content of communications; or (2) any criminal penalties for unlawfully intercepting the content of communications.

COMMENT

This [Act] ensures continuing access by law enforcement agencies to the contents of wire and electronic communications as that technology develops and changes.

Section 4. Definitions.

As used in this [Act]:

(a) "Communication" means any wire or electronic communication as defined in 18 U.S.C. §2510(1) and §2510(12).

(b) "Government" means the government of the United States and any agency or instrumentality thereof, any state or political subdivision thereof, the District of Columbia, and any commonwealth, territory or possession of the United States.

(c) "Intercept" shall have the same meaning as set forth in 18 U.S.C. §2510(4).

(d) "Provider of electronic communication service" or "private branch exchange operator" means any service or operator, except the federal government or agency thereof, which provides to users thereof the ability to send or receive wire or electronic communications.

COMMENT

This section defines how four terms used frequently in the [Act] should be interpreted. These definitions should eliminate ambiguities and ensure uniform interpretations of the defined terms.

Section 5. Compliance.

(a) Providers of electronic communication services and private branch exchange operators shall provide within the state capability and capacity for the government to lawfully intercept wire and electronic communications:

(1) concurrent with the transmission of the communication to the recipient of the communication;

(2) in the signal form transmitted by the electronic communication services provider or private branch exchange operator that represents the content of the communication between the subject of the intercept and any individual with whom the subject is communicating, exclusive of any other signal representing the content of the communication between any other subscribers or users of the electronic communication services provider or private branch exchange operator, and including information on the individual calls, including origin, destination and other call set-up information, and services, systems, and features used by the subject of the interception;

(3) notwithstanding the ability of the subject of the intercept or the use by the subject of the intercept of any features of the telecommunication system, including, but not limited to, speed-dialing or call forwarding features;

(4) at a government monitoring facility remote from the target facility and remote from the system of the electronic communication services provider or private branch exchange operator;

(5) without detection by the subject of the intercept or any subscriber: and

(6) without degradation of any subscriber's telecommunications service.

(b) Providers of electronic communication services within the public switched network, including local exchange carriers, cellular service providers, and interexchange carriers, shall comply with subsection (a) of this section within [eighteen months] from the date of enactment of this [Act].

(c) Providers of electronic communication services outside of the public switched network, including private branch exchange operators, shall comply with subsection (a) of this section within [three years] from the date of enactment of this [Act].

COMMENT

Section 5(a) requires the providers of electronic communications services and private branch exchange operators to provide the government, when the government is authorized by law, with the ability to intercept wire and electronic communications at the same time as the person who receives the transmission in order to give law enforcement agencies the latest and most current information without delay.

The interception should be in the original signal form to avoid confusion or misinterpretations of information. These interceptions should also be exclusive of any other user of the providers' services in order to lawfully comply with court orders.

In addition to the content of the communications, the government should have access to information regarding the origins, destinations, set ups, etc. of specific calls as well as information about the extent of the services and systems employed by the subject.

For the sake of convenience and to frustrate any detection, the government should be able to intercept communications at its own facility apart from the subject's

and provider's facilities. The interception should also not be hampered by any of the services provided by the telecommunication provider to the subject. From the subject's end, the interception should be absolutely undetectable. The subject's telecommunication service should not suffer in quality or be disrupted.

Subsections (b) and (c) discuss the deadlines for compliance with the [Act] for various services. Carriers are differentiated by whether they are within or outside the public switched networks, and have different compliance deadlines respectively.

Section 6. Attorney General's Authority.

(a) The attorney general, after consultation with the appropriate state agencies which regulate providers of electronic communications services and private branch exchange operators, may except from the application of any part or all of Section 5 classes and types of providers of electronic communication services and private branch exchange operators. The attorney general may waive the application of any or all of Section 5 at the request of any provider of electronic communication services or private branch exchange operator.

(b) The attorney general shall have exclusive authority to enforce the provisions of Section 5. The attorney general may apply to the [appropriate state court] for an order restraining or enjoining any violation of Section 5. The [appropriate state court] shall have jurisdiction to restrain and enjoin violations of subsection (a) of this section.

COMMENT

The attorney general has the sole authority to grant exceptions from the statute and to enforce its penalties by way of injunction or through a fine.

Section 7. Penalties.

Any person who intentionally violates Section 5 of this [Act] shall be subject to a civil penalty of [$10,000] per day for each day in violation. The attorney general may file a civil action in the [appropriate state court] to collect, and the [appropriate state court] shall have jurisdiction to impose such fines.

Section 8. Severability.

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provisions or application, and to this end the provisions of this [Act] are severable.

Section 9. Effective Date.

This [Act] shall be effective on [reference to normal state method of determination of the effective date][reference to specific date].

Model Wiretapping & Electronic Surveillance Control Act

Table of Contents

Model Wiretapping & Electronic Surveillance Control Act

Policy Statement

An effective and efficient drug control strategy requires law enforcement to target its resources on the middle and upper echelon participants in the illegal drug distribution network. In order to reach these individuals, it is vitally important for each state to entrust its law enforcement community with the legal tools necessary to implement an effective drug control strategy. One of those tools is court ordered electronic surveillance.

The highest ranking members of drug trafficking conspiracies, as is the case in virtually all organized crime groups, are the most culpable offenders. They are motivated principally, if not exclusively, by greed. They are usually highly sophisticated entrepreneurs who are insulated within the bureaucratic layers of the drug trafficking conspiracy. Consequently, many of our traditional enforcement strategies simply cannot reach these more sophisticated offenders. Experience instructs that the way to cripple drug trafficking and other organized crime is the use of electronic surveillance.

The flow of money to these criminal organizations is incredible, and consequently they have the ability to purchase the latest and most sophisticated technological advances in all fields, including communications. Unless law enforcement agencies are given the most modern tools possible, they will never be able to keep pace with the sophisticated technology available to organized criminal conspiracies.

Court ordered electronic surveillance is a critical weapon in any effort to apprehend and prosecute major narcotics traffickers. For example, in Illinois, electronic surveillance enabled agents of the Northeastern Metropolitan Enforcement Group and the Cook County State's Attorney's Office to infiltrate and dismantle a multi-level conspiracy responsible for the sale of 150 kilograms of cocaine a month in the southern metropolitan Chicago area. The investigation culminated in a 45 day wiretap that targeted land based and cellular telephones listed to a nightclub and a limousine service which were used as fronts by the ringleader of the cocaine organization. Prior to the institution of the wiretap, conventional law enforcement techniques were only able to penetrate middle level street dealers. The wiretap quickly revealed that the drug kingpin had insulated himself with a sophisticated distribution structure consisting of 4 levels and 21 conspirators. As a result of the wiretap, law enforcement officials were able to seize a substantial amount of cocaine, identify organizational sources of cocaine, seize laundered assets and return a 58 count indictment charging all 21 members of the cocaine organization with various mandatory imprisonment violations of the Illinois Controlled Substances Act. All persons charged were convicted; the ringleader was

convicted after he escaped from the county jail and became the first person to be successfully extradited from the country of Turkey to the United States.

Despite the effectiveness of sophisticated electronic surveillance, it is still used sparingly. Although 37 states, the U.S. government, the District of Columbia, Puerto Rico and the Virgin Islands all have some type of electronic surveillance statutes, on average, less than 750 intercepts took place, per year, nationwide, from 1982 through 1991. Since this statute, like all other intercept statutes, has such detailed judicial safeguards and because intercepts are usually highly labor intensive and costly, law enforcement has used them in only the most important and difficult cases. Consequently, this is precisely why we have not seen any of the feared abuses claimed by detractors since the U.S. Congress first adopted a broad based intercept statute in 1968.

The Model Wiretapping and Electronic Surveillance Control Act is based on federal law and seeks to combine effective access to this tool and appropriate safeguards. It permits law enforcement to intercept telephone calls, place electronic "bugs" in locations likely to be used in these conspiracies or to place "body wires" on informants. It also allows access to electronic communications such as facsimile, "beeper" and computer to computer transmissions. The Act permits "roving taps" so that law enforcement can follow a conspirator from public phone to public phone, a technique now used to defeat law enforcement efforts. It permits emergency orders in cases of immediate danger of death or serious injury (i.e., kidnapping). With a court approved warrant, law enforcement agencies will be able to access stored electronic communications or acquire a duplicate pager system to monitor a drug dealer's transactions.

Highlights of the Model Wiretapping & Electronic Surveillance Control Act

REMEDIAL GOAL

- Permits law enforcement authorities, subject to court authorization, to intercept any wire, oral or electronic communication that is being conducted to further certain criminal activity.

PROCEDURES

- Permits, subject to court approval, the use of pen register or trap and trace devices as investigative tools, for short, definitive periods of time.
- Provides for the interception of wire, oral or electronic communications, based on court findings of probable cause, for short, definitive periods of time.
- Allows law enforcement to adapt to all new technologies, as they arise, so that law enforcement's ability to intercept cannot be thwarted either by new technology or new criminal techniques.
- Provides for emergency, oral orders, upon a showing of immediate danger of death or serious injury (i.e., kidnapping).

SAFEGUARDS AND PENALTIES

- Requires court authorization for the use of any pen register, trap and trace or interception device.
- Sets time limitations for the use of any of these devices.
- Requires that law enforcement "*minimize*" its intercepts, so that only pertinent, relevant information is intercepted.
- Requires that whenever possible, tapes be made of any and all intercepted material for future scrutiny by the court and counsel for the intercepted party.
- Prohibits the use, in any proceeding, of any improperly intercepted information or the fruits thereof.
- Requires the attorney general to report regularly to the office of the courts and to the legislature the number and types of interception authorizations that were sought and the results thereof.
- Provides for civil and criminal penalties and damages for the unlawful interception of communications and the disclosure of any interception orders or the results thereof.

Model Wiretapping & Electronic Surveillance Control Act

Section 1. Short Title.

This [Act] shall be known and may be cited as the "Model Wiretapping and Electronic Surveillance Control Act."

Section 2. Legislative Findings.

(a) The legislature finds that the nation's various telecommunications systems are often used in the furtherance of serious and sometimes violent criminal activities including organized crime, drug trafficking, kidnaping, murder and extortion.

(b) One of the most important and effective tools in the investigation of these crimes by federal, state and local law enforcement agencies is court authorized interception of communications.

(c) Advanced cellular technology, new digital features and new forms of electronic communications have been and will be able to frustrate court orders unless law enforcement officials are given the right to intercept all forms of wire, electronic and oral communications.

(d) In 1968, the Congress of the United States carefully considered and passed the Omnibus Crime Control and Safe Streets Act which laid out a meticulous procedure by which law enforcement can obtain judicial authorization to conduct electronic surveillance. This law was enacted after Congress exhaustively debated the government's need to effectively address serious and often violent criminal conduct against an individual's right to privacy. Nothing in this [Act] needs to change or enhance this authority or procedure.

(e) It is the obligation of state legislatures to provide law enforcement agencies with the appropriate tools with which to keep pace with modern technology. The world of communications is changing with incredible speed and criminals are all too quick to seize every possible advantage. This [Act] provides law enforcement with the speed and flexibility to keep pace with new technology and criminal techniques, while protecting individual privacy rights.

COMMENT

Legislative findings are useful in providing guidance to interpreting courts and publicizing and memorializing the goals and objectives of the [Act]. *Block v. Hirsch*, 256 U.S. 135, 154 (1921) ("entitled at least to great respect").

Unfortunately, the positive advantages gained from advanced telecommunications technology are tempered by the use of such technology to further criminal activities. Court-authorized interceptions of communications are the best weapons to combat illegal activities. However, interceptions that comply with court orders are becoming increasingly difficult with the advent of advanced cellular, digital, electronic, and wire technology.

States have the responsibility of keeping law enforcement agencies effective. Thus, the states have an obligation to provide those agencies with state of the art investigative and surveillance tools that will not only aid law enforcement, but also will protect individual privacy rights.

Section 3. Purpose.

The purpose of this [Act] is to provide a procedure for law enforcement agencies to seek court-approved wire and surveillance orders that will keep pace with modern technology and criminal techniques, while at the same time protecting individual rights and privacy.

COMMENT

This [Act] creates a modern law that encompasses the broad spectrum of wire and electronic surveillance technology to enable state and local law enforcement agencies to pursue all levels of criminal activity with the most sophisticated technology available without infringing on individual privacy and individual rights.

Section 4. Definitions.

As used in this [Act]:

(a) "Aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.

(c) "Attorney for the state" means the attorney general or [appropriate reference, i.e., district attorney, county attorney, etc.] authorized to commence and prosecute an action under this [Act].

(c) "Aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(d) "Communication common carrier" shall have the same meaning which is given the term "common carrier" by 47 U.S.C. §153(h).

(e) "Contents" when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purpose, or meaning of that communication.

(f) "Court of competent jurisdiction" means a court of general criminal jurisdiction of this state.

(g) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system that affects intrastate, interstate or foreign commerce, excluding:

(1) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;

(2) any wire or oral communication;

(3) any communication made through a tone only paging device; or

(4) any communication from a tracking device.

(h) "Electronic communication service" means any service which provides to its users the ability to send or receive wire or electronic communications.

(i) "Electronic communications system" means any wire, radio, electromagnetic, photo-optical or photo-electronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications.

(j) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than:

(1) any telephone or telegraph instrument, equipment or facility, or any component thereof:

(A) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business, and being used by the subscriber or user in the ordinary course of its business, or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or

(B) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of the officer's duties; or

(2) a hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(k) "Electronic storage" means:

(1) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(2) any storage of such communication by an electronic communication service for purposes of back-up protection of such communication.

(l) "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(m) "Investigative or law enforcement officer" means any officer of the state or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this [Act], and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

(n) "Judge of competent jurisdiction" means a judge of any court of general criminal jurisdiction of the state.

(o) "Oral communication" means any verbal communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. However, such term excludes any electronic communication.

(p) "Pen register" means a device which records or

decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached. However, such term excludes any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider of any device used by a provider, or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

(q) "Person" means any employee, or agent of the United States or any state or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation.

(r) "Readily accessible to the general public" means, with respect to a radio communication, that such communication is not:

(1) scrambled or encrypted;

(2) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(3) carried on a subcarrier or other signal subsidiary to a radio transmission;

(4) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(5) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio.

(s) "Trap and trace device" means a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

(t) "User" means any person or entity who:

(1) uses an electronic communication service; and

(2) is duly authorized by the provider of such service to engage in such use.

(u) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, including the use of such connection in a switching station, furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications or communications affecting intrastate, interstate or foreign commerce, including any electronic storage of such communication. However, such term excludes the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.

COMMENT

This section defines several terms frequently used in the [Act] and should eliminate ambiguities and ensure uniform interpretations of the defined terms. Subsections (p) and (s) are of particular importance because they precisely describe what pen registers and trap and trace devices.

Section 5. General Prohibition on Pen Register and Trap and Trace Device Use; Exception.

(a) Except as provided in subsection (b), no person may install or use a pen register or a trap and trace device without first obtaining a court order under Section 7 of this [Act].

(b) The prohibition of section (a) is inapplicable with respect to the use of a pen register or a trap and trace device by a provider of electronic or wire communication service:

(1) relating to the operation, maintenance, and testing of a wire or electronic communication service or to the protection of the rights or property of such provider, or to the protection of users of that service from abuse of service or unlawful use of service; or

(2) to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful or abusive use of service; or

(3) where the consent of the user of that service has been obtained.

(c) A person who knowingly violates subsection (a) shall be fined [$5,000.00] for each violation, or imprisoned not more than [one year], or both.

COMMENT

Generally, court orders are prerequisites for installing or using any pen register or trap and trace device per Section 7 of this [Act]. However, there are several exceptions that are outlined in subsection (b). Subsection (b) allows a provider of electronic or wire communication service to use or install the device without first obtaining a court order if the device relates to the operation, maintenance, and testing of the services. A court order is also unnecessary if the device protects the rights or property of the provider, or protects the user from abuse or unlawful use of service.

Paragraph (b)(2) allows providers to record that a communication was initiated or completed. The content of the communication is not to be recorded in order to protect providers and subscribers of the service from fraudulent, unlawful, or abusive use of the service.

Subsection (c) imposes a penalty for knowingly installing or using a prohibited device without a court order.

Section 6. Application for an Order for a Pen Register or Trap and Trace Device.

(a) A state investigative or law enforcement officer authorized by the attorney for the state may make application in writing under oath or equivalent affirmation to a court of competent jurisdiction for an order or an extension of an order under Section 7 of this [Act] authorizing or approving the installation and use of a pen register or a trap and trace device under this [Act].

(b) An application under subsection (a) shall include:

(1) the identity of the attorney for the state or the law enforcement or investigative officer making the application and the identity of the law enforcement agency conducting the investigation; and

(2) a certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency.

COMMENT

This section outlines the procedure and requirements for law enforcement authorities to obtain a pen register or trap and trace. Authorities must submit a written application under oath or equivalent affirmation to the court with jurisdiction.

The application must identify the attorney or law enforcement officer, the agency conducting the investigation, and a certification by the applicant that the sought after information is relevant to the agency's ongoing criminal investigation.

The relative simplicity of the application makes court orders readily available for legitimate purposes while the requirement that the application be made under oath should deter authorities from frivolous investigations that may infringe upon individual rights.

Section 7. Issuance of an Order for a Pen Register or a Trap and Trace Device.

(a) Upon an application made under Section 6 of this [Act], the court shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device within the jurisdiction of the court if the court finds that the attorney for the state or law enforcement or investigative officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.

(b) An order issued under this section:

(1) shall specify:

(A) the identity, if known, of the person to whom is leased or in whose name is listed the telephone line to which the pen register or trap and trace device is to be attached;

(B) the identity, if known, of the person who is the subject of the criminal investigation;

(C) the number and, if known, physical location of the telephone line to which the pen register or trap and trace device is to be attached and, in the case of a trap and trace device, the geographic limits of the trap and trace order; and

(D) a statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates; and

(2) shall direct, upon the request of the applicant, the furnishing of information, facilities, and technical assistance necessary to accomplish the installa-

tion of the pen register or trap and trace device under Section 8.

(c) An order issued under this section:

(1) shall authorize the installation and use of a pen register or a trap and trace device for a period not to exceed 60 days; and

(2) may be granted only upon an application for an order under Section 6 of this [Act] after a judicial finding required by subsection (a). The period of extension shall not exceed 60 days.

(d) An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that:

(1) the order be sealed until otherwise ordered by the court;

(2) the person owning or leasing the line to which the pen register or a trap and trace device is attached, or who has been ordered by the court to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court; and

(3) a violation of this subsection may be punished as a contempt of the issuing or denying judge.

COMMENT

This section lists the elements of a court order, time limitations on that order, and the penalty imposed when that order is violated.

The court will grant the order if the court is convinced that the sought after information is relevant to an ongoing criminal investigation.

The order itself shall identify the person who owns or leases the telephone line to the attached device, the person, if known, who is the subject of the criminal investigation, the telephone number, the physical location or geographic limits of the surveillance if known, and the offense the device is being used to expose or prove. Information, facilities, and technical assistance can also be provided by court order if the applicant so requests.

The elements of the court order are specifically documented in order to prevent unnecessary invasions of privacy, mistakes including, "bugging" the wrong line, or exclusion of the intercepted information at trial due to an improper or illegal search.

The surveillance devices can be used for up to but not exceeding 60 days. An extension can be granted for an additional 60 days provided an application that fulfills the requirements of Section 6 is approved by the court. These time limitations protect individual rights of privacy by preventing the authorities from abusing the surveillance privileges, i.e. continuing to monitor a subject after the particular investigation is completed just to keep tabs on the subject.

The court order authorizing the device will be sealed to prevent the subject from being tipped off to the surveillance. Additionally, the service provider and/or any entity involved will be forbidden to disclose the existence of the device to anyone especially the subscriber. If necessary, a separate court order may lift these restrictions.

Lastly, the section details the fact that the issuing or denying judge may charge anyone who violates this subsection with contempt of court.

Section 8. Assistance in Installation and Use of a Pen Register or a Trap and Trace Device.

(a) Upon the request of the attorney for the state or an officer of a law enforcement agency authorized to install and use a pen register under this [Act], a provider of wire or electronic communication service, landlord, custodian, or other person shall furnish such investigative or law enforcement officer forthwith all information, facilities, and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the service that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if such assistance is directed by a court order as provided in Section 7(b)(2) of this [Act].

(b) Upon the request of the attorney for the state or an officer of a law enforcement agency authorized to receive the results of a trap and trace device under this [Act], a provider of a wire or electronic communication service, landlord, custodian, or other person shall install such device forthwith on the appropriate line and shall furnish such investigative or law enforcement officer all additional information, facilities and technical assistance including installation and operation of the device unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the

installation and use is to take place, if such installation and assistance is directed by a court order as provided in Section 7(b)(2) of this [Act]. Unless otherwise ordered by the court, the results of the trap and trace device shall be furnished, pursuant to Section 7(b) or Section 9 of the [Act], to the officer of a law enforcement agency, designated in the court order, at reasonable intervals during regular business hours for the duration of the order.

(c) A provider of a wire or electronic communication service, landlord, custodian, or other person who furnishes facilities or technical assistance pursuant to this section shall be reasonably compensated for such reasonable expenses incurred in providing such facilities and assistance.

(d) No cause of action shall lie in any court against any provider of a wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities or assistance in accordance with the terms of a court order under this [Act] or request pursuant to Section 9 of this [Act].

(e) A good faith reliance on a court order under this [Act], a request pursuant to Section 9 of this [Act], a legislative authorization, or a statutory authorization is a complete defense against any civil or criminal action brought under this [Act].

COMMENT

This section requires providers of communications services, landlords, custodians, or other people in a position to help with a court ordered surveillance, to offer their assistance in installing and using the pen register with the least amount of interference and obtrusiveness.

The same assistance is required in the installation and use of trap and trace devices. The results obtained by this device will be provided to the agency identified in the court order at reasonable intervals during business hours for the duration of the court order.

In return for their assistance, those who cooperated will be reasonably compensated for the reasonable expenses they incurred during their assistance. In addition, service providers, their officers, agents, employees, and other specified persons are immune from liability for certain causes of action. Furthermore, the providers' good faith reliance on court orders, Section 9 requests, legislative authorizations, or statutory authorizations are complete defenses to either civil or criminal actions that do proceed. As a result, providers and others who assist the law enforcement agencies are not punished or disadvantaged. In fact, the agencies become risk-fee clients or customers.

Section 9. Emergency Pen Register and Trap and Trace Device Installation.

(a) Notwithstanding any other provision of this [Act], any investigative or law enforcement officer, specially designated by the attorney for the state may have installed and use a pen register or trap and trace device if:

(1) the officer reasonably determines that:

(A) an emergency situation exists that involves:

(i) immediate danger of death or serious bodily injury to any person; or

(ii) conspiratorial activities characteristic of organized crime, that requires the installation and use of a pen register or a trap and trace device before an order authorizing such installation and use can, with due diligence, be obtained; and

(B) there are grounds upon which an order could be entered under this [Act] to authorize such installation and use; and

(2) within 48 hours after the installation has occurred, or begins to occur, an order approving the installation or use is issued in accordance with Section 7 of this [Act].

(b) In the absence of an authorizing order, such use shall immediately terminate upon the earlier of obtainment of the information sought, denial of the application, or the lapse of 48 hours since the installation of the pen register or trap and trace device.

(c) The knowing installation or use by any investigative or law enforcement officer of a pen register or trap and trace device pursuant to subsection (a) without application for the authorizing order within 48 hours of the installation shall constitute a violation of this [Act] and shall make such person liable to the penalties outlined in Section 5(c) of this [Act].

(d) A provider for a wire or electronic service, landlord, custodian, or other person who furnished facilities or technical assistance pursuant to this section shall be reasonably compensated for such reasonable expenses incurred in providing such facilities and assistance.

COMMENT

This section defines when an emergency situation exists, who has the authority to make and act on that determination, and the procedures, limitations, and potential penalties involved in an emergency authorization without a court order.

Investigative or law enforcement officers, specifically designated by the attorney for the state are the only ones designated in this [Act] to determine whether an emergency situation exists. An emergency situation can exist when there is the possibility of immediate death or serious bodily injury to any person. Another emergency situation can involve the need to install a pen register or trap and trace device before a court order can be obtained with due diligence in order to monitor conspiratorial activities of organized crime. This is an emergency only if there are sufficient grounds for a court order, and one is issued within 48 hours after the installation occurred or begins to occur. If an authorized officer decides there are sufficient grounds for a court order although there is no time to get one, the officer may install the device if again an order is issued within 48 hours of the installations or use occurred or begins to occur.

The amount of time allotted to an emergency authorization is extremely limited to prevent abuses and any invasion of an individual's rights. The emergency authorization expires at the earliest of the following events: when the information sought is obtained, when the application for the court order is denied, or when 48 hours have lapsed since the installation of the device.

A fine, imprisonment, or both according to the penalties imposed by Section 5(c) may await one who knowingly installed a device without applying for a court order within 48 hours of the installation.

As in Section 8(c), providers of assistance to law enforcement agencies will be reasonably compensated for the reasonable expenses of their assistance.

Section 10. Reports Concerning Pen Registers and Trap and Trace Devices.

The attorney general shall annually report to the legislature on the number of pen register orders and orders for trap and trace devices applied for by law enforcement agencies of the state.

Section 11. Unlawful Interception and Disclosure of Wire, Oral, or Electronic Communications.

(a) Except as provided in subsection (c), it is unlawful for a person to intentionally:

(1) intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(2) use, endeavor to use, or procure any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

(A) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(B) such device transmits communications by radio, or interferes with transmission of such communication; or

(C) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in intrastate, interstate or foreign commerce; or

(D) such use or endeavor to use:

(i) takes place on the premises of any business or other commercial establishment the operations of which affect intrastate, interstate or foreign commerce; or

(ii) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect intrastate, interstate or foreign commerce;

(3) disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(4) use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.

(b) A person who violates subsection (a) shall be punished as provided in subsection (e) or shall be subject to suit as provided in subsection (f).

(c) It shall be lawful under this [Act] for:

(1) an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of that person's employment while engaged in any activity which is a necessary incident to the rendition of that person's service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks;

(2) (A) providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with:

(i) a court order directing such assistance signed by the authorizing judge; or

(ii) a certification in writing by the attorney for the state that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required. The certification shall set forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required.

(B) No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this [Act], except as may otherwise be required by legal process and then only after prior notification to the attorney for the state as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in Section 19 and for contempt of court as provided in Section 17.

(C) No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this [Act].

(3) a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception;

(4) a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state;

(5) a person to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(6) a person to intercept any radio communication which is transmitted:

(A) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(B) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(C) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio service; or

(D) by any marine or aeronautical communications system;

(7) a person to engage in any conduct which:

(A) is prohibited by Section 633 of the Communications Act of 1934; or

(B) is excepted from the application of Section 705(a) of the Communications Act of 1934 by Section 705(b) of that Act;

(8) a person to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference;

(9) other users of the same frequency to intercept any radio communication made through a system that utilized frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted;

(10) a person to use a pen register or a trap and trace device as those terms are defined in this [Act]; or

(11) a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(d) (1) Except as provided in paragraph (2) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication, other than one to such person or entity, or an agent thereof, while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(2) A person or entity providing electronic communication service to the public may divulge the contents of any such communication:

(A) as otherwise authorized in Section 11(c) or 15 of this [Act];

(B) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(C) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(D) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(e) (1) Except as provided in paragraph (2) of this subsection or in subsection (f), whoever violates subsection (a) of this section shall be fined under this [Act], or imprisoned not more than five years, or both.

(2) If the offense is the first offense under paragraph (1) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (1) is a radio communication that is not scrambled or encrypted, then:

(A) if the communication is not the radio portion of a cellular telephone communication, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (f), the offender shall be fined under this [Act], or imprisoned not more than [one year], or both; and

(B) if the communication is the radio portion of a cellular telephone communication, a public land mobile radio service communication or a paging service communication, the offender shall be fined not more than [$500].

(3) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted:

(A) to a broadcasting station for purposes of retransmission to the general public; or

(B) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls, is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(f) (1) (A) If the communication is:

(i) a private satellite video communication

that is not scrambled or encrypted and the conduct in violation of this [Act] is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(ii) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this [Act] is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the person who engages in such conduct shall be subject to suit by the state in a court of competent jurisdiction.

(B) In an action under this subsection:

(i) if the violation of this [Act] is a first offense for the person under paragraph (1) of subsection (e) and such person has not been found liable in a civil action under Section 19 of this [Act], the state shall be entitled to appropriate injunctive relief; and

(ii) if the violation of this [Act] is a second or subsequent offense under paragraph (1) of subsection (d) or such person has been found liable in any prior civil action under Section 19, the person shall be subject to a mandatory [$500] civil fine.

(2) The court may use any means within its authority to enforce an injunction issued under paragraph (f)(1)(B)(i), and shall impose a civil fine of not less than [$500] for each violation of such an injunction.

COMMENT

Generally, it is unlawful for any person to intercept or attempt to intercept any wire, oral, or electronic communication. This section describes when the uses of any electronic, mechanical, or other devices are prohibited. Devices that in some way use wirelike connections or radio communications are prohibited as well as those that interfere with radio communication. A person is also prohibited from using such a device passed through the mail, interstate, intrastate, or foreign commerce.

Disclosing and/or using the contents of any wire, oral, or electronic communication violates the [Act] if the person disclosing or using the contents knew or should have known that the contents were obtained through interception.

The blanket punishment stated in subsection (d) imposes a fine under the [Act], imprisonment, or both. The punishments differ for violations of subsection (a) depending on whether the violation was a first offense, what kind of motive was behind the violation, and the manner of the interception.

If a first time offender had no tortious, illegal, or improper motive including private or commercial gain, and the communication is an unscrambled or encrypted radio communication then the exact type of radio communication used must be determined. If the communication is not a radio portion of a cellular phone, a public land mobile radio service, or a paging service, the offender will be fined or imprisoned for not more than one year, or both. If the communication is one of the above then the offender will be fined not more than [$500].

There is no violation if a person intercepts a satellite transmission that is not encrypted or scrambled, and that is transmitted to a broadcasting station with the intention of being transmitted to the public. However, if a person, with the purposes of commercial advantage or private financial gain, intercepts an audio subcarrier intended for redistribution to facilities open to the public, that person has violated the [Act]. However, there would not be a violation without the improper motive. Data transmissions and telephone calls are also prohibited from being intercepted, and those responsible are subject to fines and/or imprisonment.

Subsection (a) also cites subsection (f) to determine where violators are subject to suit, what monetary or injunctive relief is available, and who enforces the relief that is granted. If a person pirates or intercepts satellite video communications for their own viewing pleasure with any other aforementioned improper motives or they intercept a radio communication on a special Federal Communications Commission frequency without an improper motive, they are to be sued by the state in a court of competent jurisdiction.

If a first time offender according to subsection (f) avoids liability in a civil action, the state is entitled to injunctive relief. The court can enforce this injunction, and can impose a mandatory fine for each violation of the injunction.

Subsection (a)'s restrictions on the interception, use, and disclosure of wire, oral, and electronic communications are extensive, but they do not include these people whose jobs necessarily or unavoidably violate these restrictions. Under subsection (c), switchboard operators, officers, employees, or agents of providers of wire or electronic services will not be charged with violating the statute if the violations they commit are incident to or protect the service to the public. There is one caveat, however. Service providers cannot observe or randomly monitor communications except for mechanical or service quality control checks.

Similar to the sections pertaining to pen registers and trap and trace devices, those who assist persons authorized by law to intercept communications or conduct surveillance do not violate the statute as long as they have a valid court order. A letter from the attorney for the state certifying that no warrant or court order is required by law, all statutory requirements have been met, and specifying the assistance and time the authorities need, will suffice for authorization.

Again, those who assist are prohibited from disclosing the fact that they are assisting the law enforcement agency and the contents of the communications they intercepted. They can only disclose with the permission of court order and appropriate notice to the attorney for the state.

If those who assist comply with these rules, they will be immune from any cause of action against them resulting from their involvement with the law enforcement agency. If they disclose, they will be liable for civil damages per Section 19 and contempt of court per Section 17.

The [Act] also allows parties to the communication or those who have the permission of one of the parties to the communication to intercept a communication. The only limitation on those interceptions is that the intent behind the interception not be to violate the Constitution and laws of the United States or any individual state.

Subsection (c) creates obvious exceptions that involve individual and public safety as well as frequencies voluntarily made available to the public. Generally, if a signal, electronic, or radio communication is readily accessible to the general public, it is not unlawful for the public to access that communication or transmission. The accessible transmissions include commercial, CB, and ham radios, and the accessible communications include marine or aeronautical communications. Subsection (c)(6) allows the access, interception, or use of distress signals for people, vehicles, or vessels in order to provide necessary aid or assistance. The same goes for radio communications emitted by governmental, law enforcement, or private land mobile safety systems to inform the public of existing or potential hazards.

Subsection (c)(8) allows interception of wire or electronic communications that cause harmful interference to radio stations or consumer electronic equipment in order to identify the cause and source of the interference. Under subsection (c)(9), users of the same frequency who intercept an unscrambled radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or use of such system, do not violate the [Act].

To maintain continuity and consistency among the various sections of the [Act], subsection (c)(10) and (11) restate that the use of pen registers and trap and trace devices is legal and that service providers can record that fact that a wire or electronic communication was initiated or completed to protect themselves, their colleagues, and their customers from fraudulent, unlawful, or abusive service.

Subsection (d) addresses what contents of communications providers of electronic communication services can and cannot intentionally divulge. Generally, they cannot divulge anything except to the intended recipient of the communication or their agent. The providers are permitted to divulge contents if they are authorized to do so under Sections subsection (c)(1) and Section 15 of the [Act], or if they are given permission by the originator or intended recipient. Providers are also permitted to divulge contents to those employed or authorized to forward the communication to its recipient i.e., secretaries and answering services. Lastly, providers are only permitted to divulge to a law enforcement agency the contents of any communication that was inadvertently obtained which appears to be related to a crime.

Section 12. Unlawful Manufacture, Distribution, Possession, and Advertising of Wire, Oral, or Electronic Communication Intercepting Devices.

(a) Except as provided in subsection (c), it is unlawful for any person to intentionally:

(1) send through the mail, or send or carry in intrastate, interstate or foreign commerce, any electronic, mechanical, or other device, knowing or

having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communication;

(2) manufacture, assemble, possess, or sell any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in intrastate, interstate or foreign commerce; or

(3) place in any newspaper, magazine, handbill, or other publication any advertisement of:

(A) any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire, oral, or electronic communications; or

(B) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire, oral, or electronic communications, knowing or having reason to know that such advertisement will be sent through the mail or transported in intrastate, interstate or foreign commerce.

(b) A person who violates subsection (a) shall be fined not more than [$10,000], or imprisoned not more than [five years], or both.

(c) Notwithstanding subsection (a), it shall be lawful for a person to send through the mail, send or carry in intrastate, interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, if the person is:

(1) a provider of wire or electronic communication service or an officer, agent, or employee of, or a person under contract with, such a provider, in the normal course of the business of providing that wire or electronic communication service; or

(2) an officer, agent, or employee of, or a person under contract with, the United States, a state, or a political subdivision thereof, in the normal course of the activities of the United States, a state, or a political subdivision thereof.

COMMENT

Section 12 attempts to curb the availability of surveillance equipment to the general public to control its use in criminal activities. It applies a three pronged approach to stop the intentional manufacture, assembly, possession, or sale of surveillance equipment by cutting off the transportation and advertising of the products.

First, the section cuts off the option of using independent shipping and delivery companies by prohibiting those who send or carry products they know or should know are primarily used for surreptitious interception from using the mail or carrying them in interstate, intrastate, or foreign commerce. The "should know" clause is used to thwart the companies' intentional ignorance of the contents of the companies' deliveries or cargo.

Second, the section directly attacks the manufacturers, assemblers, possessors, and sellers of devices they know or should know will be primarily used for surreptitious interception. It prohibits them from shipping, carrying, or mailing their products in interstate, intrastate, or foreign commerce.

Third, the section prohibits people from intentionally advertising in newspapers, magazines, handbills, or other publications. If a person knows or has reason to know that the product they are advertising is primarily used for surreptitious interception of wire, oral, or electronic communications, they are prohibited from placing the ad. The same goes for advertising that promotes the use of the equipment for surreptitious interception if the advertiser knows or should know the ad will be sent or carried in the mail or interstate, intrastate, or foreign commerce.

Section 12 also creates exceptions that allow providers of wire or electronic services, their employees, officers, agents, and those who are under contract with the United States, a state, or their many divisions to mail, carry, manufacture, assemble, possess, or sell any device they know or should know to be primarily useful for purposes of surreptitious interception of wire, oral, or electronic communications.

Section 13. Confiscation of Wire, Oral, or Electronic Communication Interception Devices.

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of this [Act] is hereby declared a nuisance and may be seized and forfeited to the state.

Section 14. Prohibition of Use as Evidence of Intercepted Wire or Oral Communications.

No part of the contents of any wire or oral communication intercepted in violation of this [Act], and no evidence derived therefrom, may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this state, or political subdivision thereof.

COMMENT

This section makes any improperly intercepted communication or the fruits thereof inadmissible in any proceeding. This exclusionary rule eliminates the possibility of reaping benefits from an illegal interception.

Section 15. Authorization for Interception of Wire, Oral, or Electronic Communications.

(a) The attorney for the state may authorize an application to a judge of competent jurisdiction for, and such judge may grant in conformity with Section 17 of this [Act] an order authorizing or approving the interception of wire or oral communications by an investigative or law enforcement officer, or an agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of:

(1) any offense punishable by death or by imprisonment for more than one year;

(2) any offense which involves murder, kidnapping, robbery, or extortion;

(3) any of the following offenses: [bribery of public officials and witnesses], [relating to bribery of bank officials], [bribery in sporting contests], [unlawful use of explosives], [relating to concealment of assets], [transmission of wagering information], [relating to escape], [relating to loans and credit applications generally; renewals and discounts], [influencing or injuring an officer, juror, or witness generally], [obstruction of criminal investigations], [obstruction of state or local law enforcement], [interference with commerce by threats or violence], [intrastate, interstate and foreign travel or transportation in aid of racketeering enterprises], [relating to violent crimes in aid of racketeering activity], [prohibition of business enterprises of gambling], [violation of the Model Money Laundering Act or similar state law], [theft from intrastate, interstate shipment), [fraud by wire, radio, or television], [relating to bank fraud], [sexual exploitation of children], [intrastate and interstate transportation of stolen property], [relating to trafficking in certain motor vehicle or motor vehicle parts], [relating to hostage taking], [relating to penalty for failure to appear]; [violation of Model Ongoing Criminal Conduct Act or similar state law];

(4) any felony violation of the [state controlled substances act, [Model State Chemical Control Act] or similar state law, or other applicable state law involving controlled substances or other dangerous drugs];

(5) any felony violation of Sections 11 and 12;

(6) any felony violation [relating to obscenity];

(7) any felony violation [relating to firearms];

(8) any conspiracy to commit any offense described in this subsection;

(9) the location of any fugitive from justice from an offense described in this subsection;

(b) The attorney for the state may authorize an application to a judge of competent jurisdiction for, and such judge may grant, in conformity with Section 17 of this [Act], an order authorizing or approving the interception of electronic communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made.

COMMENTS

The attorney for the state may authorize an application for a court order permitting an interception. The section lists the offenses for which an application may be sought in the course of an investigation.

Section 16. Authorization for Disclosure and Use of Intercepted Wire, Oral, or Electronic Communications.

(a) Any investigative or law enforcement officer who, by any means authorized by this [Act], has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may:

(1) disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure; or

(2) use such contents to the extent such use is appropriate to the proper performance of the officer's official duties.

(b) Any person who has received, by any means authorized by this [Act], any information concerning a wire, oral, or electronic communication, or evidence derived therefrom, intercepted in accordance with the provisions of this [Act] may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of this state or political subdivision thereof.

(c) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this [Act] shall lose its privileged character.

(d) An investigative or law enforcement officer engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, who intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, may disclose or use the contents thereof, and evidence derived therefrom, as provided in subsection (a) of this section. Such contents and any evidence derived therefrom may be used under subsection (b) of this section if a judge of competent jurisdiction so authorizes after finding on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this [Act]. Such application shall be made as soon as practicable.

COMMENTS

Section 16 addresses how the contents of a properly intercepted communication may be used once they are obtained. Investigative or law enforcement officers can use the information in the course of their official duties if the information is appropriate to those duties. An officer may also disclose the contents to a fellow officer if the contents will help either officer fulfill the officer's official duties.

Any person can disclose the contents of a properly intercepted communication while testifying under oath or affirmation in any state proceeding. However, if the obtained information is privileged in some way, the privilege remains, and the information is treated accordingly.

Subsection (d) addresses the situation when the contents of a properly intercepted communication relate to an offense other than the offense specified in the court order of authorization. It may be used by officers or disclosed to other officers to perform official duties of law enforcement under subsection (a). The contents may be discussed in testimony under oath if a subsequent application for authorization is submitted as soon as practicable and is approved by a judge under this [Act]. This section outlines how and under what circumstances lawfully intercepted communications may be disclosed.

Section 17. Procedure for Interception of Wire, Oral, or Electronic Communications.

(a) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this [Act] shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state:

(1) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(2) the applicant's authority to make such application;

(3) fully and completely the facts and circumstances relied upon by the applicant, to justify the applicant's belief that an order should be issued, including:

(A) details as to the particular offense that has been, is being, or is about to be committed;

(B) except as provided in subsection (o) of this section, a particular description of the nature and location of the facilities from which or the

place where the communication is to be intercepted;

(C) a particular description of the type of communications sought to be intercepted; and

(D) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(3) fully and completely whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(4) the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(5) fully and completely the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(6) where the application is for the extension of an order, the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(b) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(c) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the state, if the judge determines on the basis of the facts submitted by the applicant that:

(1) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in Section 15 of this [Act];

(2) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(3) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and

(4) except as provided in subsection (o), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(d) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this [Act] shall specify:

(1) the identity of the person, if known, whose communications are to be intercepted;

(2) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(3) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(4) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(5) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(e) An order authorizing the interception of a wire, oral, or electronic communication under this [Act] shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or

technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance.

(f) An order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for the shorter of 30 days or the period necessary to achieve the objective of the authorization. Such 30 day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted only upon application for an extension made in accordance with subsection (a) of this section and the court making the findings required by subsection (c) of this section. The period of extension shall be the shorter of 30 days or the time the authorizing judge deems necessary to achieve the purposes for which it was granted. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this [Act], and must terminate upon the earlier of 30 days or the attainment of the authorized objective. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception.

(g) An interception under this [Act] may be conducted in whole or in part by state, county or municipal personnel, or by an individual operating under a contract with the state, county or municipality acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(h) Whenever an order authorizing interception is entered pursuant to this [Act], the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(i) Notwithstanding any other provision of this [Act], any investigative or law enforcement officer, specially designated by the attorney for the state, may intercept a wire, oral or electronic communication prior to issuance of an order approving the interception if:

(1) the officer reasonably determines that:

(A) an emergency situation exists that involves:

(i) immediate danger of death or serious physical injury to any person;

(ii) conspiratorial activities threatening the national security interest; or

(iii) conspiratorial activities characteristic of organized crime, that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained; and

(B) there are grounds upon which an order could be entered under this [Act] to authorize such interception; and

(2) an application for an order approving the interception is made in accordance with this section within 48 hours after the interception has occurred, or begins to occur.

(j) In the absence of an order approving an interception described in subsection (i), such interception shall immediately terminate upon the earlier of obtainment of the communication sought or denial of the application.

(k) In the event an application for approval of an interception described in subsection (i) is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this [Act], and an inventory shall be served as provided for in subsection (p)(4) of this section on the person named in the application.

(l) (1) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this [Act] shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under the judge's directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use

or disclosure pursuant to the provisions of Section 16(a) of this [Act] for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, under Section 16(b).

(2) Applications made and orders granted under this [Act] shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(3) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(4) Within a reasonable time, not to exceed 90 days, after the filing of an application for an order of approval under subsection (k) which is denied, or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine is in the interest of justice, an inventory which shall include notice of:

(A) the fact of the entry of the order or the application;

(B) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(C) the fact that during the period wire, oral, or electronic communications were or were not intercepted.

The judge, upon the filing of a motion, may make available to such person or such person's counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(m) The contents of any wire, oral, or electronic communication intercepted pursuant to this [Act], or evidence derived therefrom, shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a court of this state unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten day period may be waived by the judge if the judge finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(n) (1) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of this state, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this [Act], or evidence derived therefrom, on the grounds that:

(A) the communication was unlawfully intercepted;

(B) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(C) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this [Act]. The judge, upon the filing of such motion by the aggrieved person, may make available to the aggrieved person or such person's counsel for inspection such portions of the intercepted communication, or evidence derived therefrom, as the judge determines to be in the interests of justice.

(2) In addition to any other right to appeal, the state shall have the right to appeal from an order granting a motion to suppress made under paragraph (1) of this subsection, or the denial of an application for an order of approval, if the attorney for the state certifies to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within 30 days after the

date the order was entered and shall be diligently prosecuted.

(3) The remedies and sanctions described in this [Act] with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this [Act] involving such communications.

(o) The requirements of subsections (a)(3)(B) and (c)(4) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted are inapplicable if:

(1) in the case of an application with respect to the interception of an oral communication:

(A) the application is by an investigative or law enforcement officer and is approved by the attorney for the state;

(B) the application contains a full complete statement as to why such specification is not practical and identifies the person committing the offenses and whose communications are to be intercepted; and

(C) the judge finds that such specification is not practical; and

(2) in the case of an application with respect to a wire or electronic communication:

(A) the application is by an investigative or law enforcement officer and is approved by the attorney for the state;

(B) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing of a purpose, on the part of that person, to thwart interception by changing facilities; and

(C) the judge finds that such purpose has been adequately shown.

(p) An interception of a communication under an order to which the requirements of subsections (a)(3)(B) and (c)(4) of this section do not apply by reason of subsection (o) shall not begin until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communications service that has received an order as provided for in subsection (o)(2) may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the state, shall decide such a motion expeditiously.

COMMENTS

Section 17 is a broad section of the [Act] that covers nine topics. Section 17 illustrates the elements of a valid application for the authorization of an interception; lists what is necessary for a judge to approve that application; describes the elements of the court order itself and what that order specifically authorizes; lays out the procedures for emergency situations, and procedures for preserving the records of applications, authorizations, and orders; and includes information regarding notice to opposing parties and motions to suppress. Rounding out Section 17's topics are penalties and sanctions for violations of the section and exceptions to certain requirements for authorization.

The first topic Section 17 covers is the elements of the application requesting authorization to intercept communications. A judge of competent jurisdiction must receive a written application made under oath or affirmation that states the applicant's authority to submit such an application. The application must also identify both the investigative or law enforcement officer making the application and the officer authorizing the application.

The applicant should then describe the case itself by providing all of the facts of the case including the details of the suspected offense, the description and location of the targeted facility, the type of communications to be intercepted, and the identity, if known, of the targeted person. The applicant should also include information about other investigative techniques that were either used and failed or not attempted because they seemed doomed from the start. In addition, other applications, known to this perspective applicant, that were submitted to gain authorization to intercept communications of any of the same people as in the current application or at any of the same places must be included.

The application should next describe and discuss the time frame in which the authorization is necessary. If the applicant needs the authorization to continue beyond the time when the sought communication is obtained, the applicant must establish probable cause to believe that those sought after communications will continue. If an extension is requested, the progress or lack of progress of the current interceptions must be included. In addition to all of the above elements or

requirements, a judge may require applicants to furnish testimony or evidence beyond what was originally included.

Judges may approve the application and grant the authorizing order on the basis of the application if four requirements are fulfilled. First, there must be sufficient probable cause that the particular offense is, was, or will be committed. Second, there must be sufficient probable cause that particular communications sought will concern that offense. Third, the judge must determine that normal investigative techniques have been or will likely be unsuccessful or too dangerous. Finally, there must be a determination that the targeted facility is, in fact, leased to, listed in the name of, owned by, or commonly used by that targeted person.

The authorizing order itself is very specific in order to prevent misunderstandings as to what exactly has been authorized, constitutional violations like improper searches, and any problems regarding the admissibility of the recovered evidence. The order lists exactly whose communication will intercepted, where and what kind of place the targeted facility is, and the type of communication to be intercepted. To prevent the order from becoming a blanket order for any agency or person to claim authorization for separate interceptions, the court order also identifies the agency authorized to intercept the communication and the person authorizing the application. Further, the order contains the exact time period allowed for the authorized investigation and whether or not it will be continued beyond the moment when the sought after communication is obtained.

Additionally, the order will direct providers of communications service and those others in a position to give assistance like landlords and custodians to aid the authorized agency in any manner including providing information, equipment, facilities, etc. The agency, in turn, will conduct its investigation with as little interference as possible as well as providing the assistants with reasonable compensation for the reasonable expenses they incurred while aiding the investigation.

The order may only authorize interceptions for the amount of time necessary to obtain the sought information, and that time cannot exceed 30 days. That time begins either on the day the interception begins or ten days after the order is entered, whichever is earlier. A new application must filed to get extensions. The new application should meet all of the requirements of the initial application for the interception including an explanation of the need for the extension. Each extension will be for the amount of time the judge decides is appropriate, and it will be for no longer than 30 days. The time restrictions may be reasonably extended if the targeted communication is in a foreign language or code to allow for the interpretation or translation of intercepted material, and to allow personnel to separate out extraneous communications.

Section 17 also lists those people, agencies, or entities who are able to conduct these types of investigations including the states, countries, or municipalities and those under contract with them. The order may direct them to conduct the interceptions as quickly and efficiently as possible, and to provide the authorizing judge with progress reports.

Emergency situations are the next topic addressed in Section 17. These situations occur when an interception must be conducted immediately, thus without a court order. The circumstances that constitute an emergency situation and the people involved in it are similar to those enumerated in the pen register and trap and trace sections of this [Act]. A law enforcement officer who is either specifically designated by the attorney for the state can make the determination of whether there is an emergency. Only these people are authorized in order to prevent abuse of the emergency provisions. Thus, any officer cannot bypass the court order requirement just because they believe a situation is an emergency.

An emergency can exist in three types of situations. If there is immediate danger of death or serious physical injury to any person, or a conspiracy that threatens national security is involved then an emergency exists. The third type of emergency involves conspiratorial activities characteristic of organized crime that require interception before an order could be authorized with due diligence. In this situation, the agency who conducted the interception must have grounds for the interception in compliance with the [Act]. They must file a complete application within 48 hours after the interception occurred or begins to occur, and the interception must end when the sought after information is obtained or when the order is denied, whichever is earlier.

If the order is indeed denied, then the contents of the communication shall be treated as the product of tainted search or interception. The judge who denied or terminated the order or extension will also provide an inventory to whomever the judge believes to be appropriate. This inventory will be given within 90 days of the filing of the application as provided for in subsection (p)(4). The inventory will include the facts that the application

was filed, an order was entered, the dates they were filed and entered, the disposition of the application, and that the communication was or was not intercepted. The inventory may be postponed if good cause is shown. The parties may also request the judge to grant their motion to inspect the materials.

Section 17 next provides regulations for the storage and use of the recordings of intercepted communications, applications, authorizations, and orders. These regulations are intended to not only protect the privacy of individuals and their communications but also to protect the privacy of law enforcement operations in order to maintain their efficiency. The actual recordings should be on tape, wire, or something comparable, and should be resistant to outside editing to avoid tampering.

After an authorized interception is completed, it is to be turned over to the authorizing judge who will seal it. The communication will be kept for at least ten years unless a judge orders its destruction prior to then. The agency who conducted the interception may use duplicates of the original communication or share them with colleagues if the communication will aid them in their official duties as stated in Sections 16(a). If the communication is to be used as evidence or in a testimony, Section 16(c) requires that communication to be sealed. If there is no seal, it still can be used if the seal's absence is satisfactorily explained.

Applications, authorizations, and orders must also be sealed and kept for ten years unless a judge orders their destruction earlier. The judge will determine where those documents are to be kept. The judge will also determine if they are ever to be disclosed on the basis of good cause. Further, the judge has the power to enforce the preservation of the communications and/or records with a contempt of court charge.

If the contents of an intercepted communication are to be received into evidence or disclosed at any state court proceeding, the application and order authorizing the interception are sent to the opposing party to serve as proper notice. A copy of each must be furnished to the opposing party at least ten days before the proceeding. As in other rules of procedure, the notice may be waived if a judge determines it would be impossible to serve notice at least ten days before trial, and that the party lacking notice would not be prejudiced.

Section 17 further documents the options of each party to the suit. They could oppose the introduction or use of the communication or oppose the order approving the authorization. Motions to suppress the contents of an intercepted wire or oral communication or any evidence derived from them can be entertained in or before ANY state court, department, officer, agency, regulatory body, etc. Claims that the communication was illegally intercepted, that the order authorizing the interception was insufficient on its face, or that the interception violated or went beyond the authorizing order are sufficient grounds for such a motion to suppress. The motion must be filed before the proceeding in which the communications are to be used. If there was no opportunity to file the motion, or if the party was unaware of the grounds for the motion then a late motion may be considered. The judge may also allow the aggrieved party to inspect portions of the communications or evidence according to the judge's discretion.

If the motion to suppress is granted or an application is denied, the state may appeal if the state proves that the appeal is not intended for purposes of delay. That appeal must be filed within 30 days of the day that contested order was entered, and it should be diligently prosecuted.

Section 17 also ensures that the remedies and sanctions provided within this [Act] are the only ones for nonconstitutional violations of Section 17 involving the communications described in it.

Section 17(k) provides exceptions to the requirement that the targeted facility must be specifically described. These exceptions allow authorizations even though some application requirements are impossible to comply with. In the case of an oral communication, first the investigative or law enforcement officer's application is approved by the attorney for the state. Second, the application must completely explain why the specification is impractical, identify the subjects of the offense, and identify whose communications are to be intercepted. Third, the judge must agree that it is impractical to provide the specifications. In the case of a wire or electronic communication, the requirements mirror those in an oral communication except the application must show that the subject is purposely thwarting interception by changing facilities and the judge agrees that the purpose was shown.

If the judge does not allow the application to be proved without the specifications, the interception cannot begin until the target facility is ascertained by the person implementing the interception order. In addition, a service provider may move to quash an order because its assistance with respect to the interception cannot be per-

formed in a timely or reasonable fashion. The judge will then decide the motion quickly to avoid delay, waste, or the loss of the suspect.

This section also provides a procedure for emergency intercepts. This section requires that, if possible, all intercepted information should be recorded for future judicial review; mandates the sealing and storage of all applications and orders and sets a time limit for their destruction; and provides a penalty of contempt of court for any violations of this section. Section 17 also provides for notification of parties against whom intercept orders were granted and the procedures for those parties to challenge said orders and their results. This section establishes an appeal procedure for state officials in the event of adverse rulings and allows service providers to challenge an intercept order on the grounds that the intercept cannot be performed in a timely or reasonable fashion.

Section 18. Reports Concerning Intercepted Wire, Oral, or Electronic Communications.

(a) Within 30 days after the expiration of an order, or each extension thereof, entered under Section 17, or the denial of an order approving an interception, the issuing or denying judge shall report to the [appropriate court official]:

(1) the fact that an order or extension was applied for;

(2) the kind of order or extension applied for, including whether or not the order was an order with respect to which the requirements of Sections 17(a)(3)(B) and 17(c)(4) of this [Act] did not apply by reason of Section 17(k) of this [Act];

(3) the fact that the order or extension was granted as applied for, was modified, or was denied;

(4) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(5) the offense specified in the order or application, or extension of an order;

(6) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(7) the nature of the facilities from which or the place where communications were to be intercepted.

(b) In [appropriate month] of each year the attorney general shall report to the [appropriate court official]:

(1) the information required by paragraphs (1) through (7) of subsection (a) of this section with respect to each application for an order or extension made during the preceding calendar year;

(2) a general description of the interceptions made under such order or extension, including:

(A) the approximate nature and frequency of incriminating communications intercepted;

(B) the approximate nature and frequency of other communications intercepted;

(C) the approximate number of persons whose communications were intercepted; and

(D) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(3) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(4) the number of trials resulting from such interceptions;

(5) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(6) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(7) the information required by paragraphs (2) through (6) of this subsection with respect to orders or extensions obtained in a preceding year.

(c) In [appropriate month] of each year the [appropriate court official] shall transmit to the legislature a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire, oral, or electronic communications pursuant to this [Act] and the number of orders and extensions granted or denied pursuant to this [Act] during the preceding year. Such report shall include a summary and analysis of the data required to be filed with the [appropriate court official] by subsections (a) and (b) of this section. The [appropriate court official] is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (a) and (b) of this section.

COMMENTS

Section 18 sets up a reporting system that runs from the courts and the attorney general to the [appropriate court official], and from the [appropriate court official] to the legislature in order to create an accurate record of intercepted wire, oral, or electronic communications. In case of appeals, new suits, etc., the issuing or denying judge must file a report to the [appropriate court official] within 30 days of the completion of the order or its extensions. The report should include the fact that an order was applied for, the type of such order including any exceptions that were requested like the waiver of specifying the target facilities, and whether the order was granted, modified, or denied. The report must also state the time allowed and any extensions of it, the offense specified in the order or exceptions, the identities of the investigative or law enforcement officer and the person who authorized their application, and the nature of the targeted facilities.

The attorney general must file a report chronicling the interceptions of the previous year and documenting the results therefrom. In general, the report documents the success or failure of using interception as a surveillance technique. The report should include all that the issuing or denying judge reported to the [appropriate court official] plus a general description of the interceptions made under the judge's order. The descriptions will document the approximate nature and frequency of both incriminating communications and other extraneous communications intercepted. The approximate number of persons whose communications were intercepted and an approximate description of the money, time, and resources expended should be included.

The attorney general's report should also provide other result-related statistics like the number of arrests, the number of trials, the total number of motions to suppress, the number of those motions that were granted or denied, and the number of convictions resulting from interceptions. In addition to those numbers, the attorney general must list the offenses the suspects were arrested and/or convicted for, as well as a general assessment of the importance of interceptions.

It is important to note that the [appropriate court official] has the authority to issue binding regulations as to the content and form the judges and attorney general file. On the next level of the hierarchy, the [appropriate court official] must submit a report to the legislature. The report must include numbers of applications for orders authorizing interceptions, and the numbers that were granted or denied. These statistics should pertain to the preceding year. The report should also provide a summary and analysis of the listed data.

Section 19. Authorized Recovery of Civil Damages.

(a) Except as provided in Section 11(c)(2), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this [Act] may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) In an action under this section, appropriate relief includes:

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) (1) In an action under this section, if the conduct in violation of this [Act] is the private viewing of a private satellite video communication that is scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted, and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engages in that conduct has not previously been enjoined under Section 11(f) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than [$50] and not more than [$500].

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under Section 11(f) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than [$100] and not more than [$1000].

(2) In any other action under this section, the court may assess as damages whichever is the greater of:

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) [$100] a day for each day of violation; or

(C) [$10,000]; or

(D) statutory damages.

(d) A complete defense against any civil or criminal action brought under this [Act] is a good faith reliance on:

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under Section 17(i) of this [Act]; or

(3) a good faith determination that Section 11(d) of this [Act] permitted the conduct complained of.

(e) A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

COMMENTS

Section 19 authorizes civil damages to those who were injured because their wire, oral, or electronic communications were intercepted, disclosed, or intentionally used in violation of this statute. Those damages will recovered from the person or entity who violated the statute.

The injured party may receive appropriate preliminary relief, other equitable relief, or declaratory relief, as well as reasonably incurred attorney's fees and litigation costs. Punitive damages may also be available. The damages themselves are computed according to the type of communication intercepted or used and the violator's motive.

The private viewing of a scrambled or encrypted private satellite video communication and the interception and/or use of an unscrambled, unencrypted radio communication that is transmitted on frequencies under subpart D of part 74 of the Federal Communications Commission rules are treated differently in regard to damages than all other types of communications as long as there is no improper motive behind the violations pertaining to them. An improper motive is one for tortious or illegal purposes, or for indirect or direct financial gain.

Generally, the court can assess the greater of the sum of the plaintiff's actual damages plus any profits the violator earned as a result of the violation, or statutory damages. Offenders who have not been enjoined under Section 11(f) as a first time offender not found liable in a prior civil action under Section 19, the offender shall be penalized the greater of the amount of actual damages the plaintiff suffered or statutory damages.

If the offender had been previously enjoined under Section 11(f) or was found liable in a civil action, the court shall impose a fine in an amount equal to the greater of the sum of actual damages the plaintiff suffered or statutory damages.

Section 19(d) outlines complete defenses afforded to an offender who relied in good faith that the offender was complying with the statute. If a suspected offender had a good faith reliance on a court warrant or order, a grand jury subpoena, legislative authorization or statutory authorization, the offender has a complete defense against any civil or criminal action brought under the [Act]. The same goes for good faith reliance on a request of an investigative or law enforcement officer under Section 17(i) in an emergency situation or a good faith determination that Section 11(c) permitted them to intentionally divulge information.

Section 19 also states the statute of limitations on civil actions under this [Act]. An action must be commenced within two years of the date the plaintiff had reasonable opportunity to discover the violation.

Section 20. Injunction Against Illegal Interception.

Whenever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a felony violation of this [Act], the attorney for the state may initiate a civil action in [appropriate court] of this state to enjoin such violation. The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the state or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the state Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the state Rules of Criminal Procedure.

COMMENTS

The attorney for the state can file for injunctive relief in state court against anyone who appears about to engage or be engaging in a felony violation of this [Act]. The court may enter a restraining order, a prohibition, or any action before the final determination of the case to prevent continuing or substantial injury to the state or any person.

Section 21. Severability.

If any provisions of this [Act] or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provisions or application, and to this end the provisions of this [Act] are severable.

Section 22. Effective Date.

This [Act] shall be effective on [reference to normal state method of determination of the effective date][reference to specific date].

Appendix E

National District Attorneys Association Case Summaries: Wiretap and Electronic Surveillance

ORGANIZED CRIME

Multi-Million Dollar Bookmaking Operation

A recent prosecution involved an organized crime individual named Ronald Sacco and his associates. In October, 1988, search warrants were executed in Las Vegas and Los Angeles at approximately a dozen different locations resulting in the break up of a multi-million dollar bookmaking operation.

The probable cause for the search warrants was gained partially through surveillance but mostly through pen registers and phone taps which showed a pattern of communications between "suspect", locations and "known" locations (betting information services, residences of known or convicted book makers, etc.). Telephones are obviously the life support system of this type of crime and we have, of course, found the same to be true of the narcotics trade.

Jewelry Theft and Triple Homicide

Our most consequential wiretap case involved a triple homicide occurring December 11, 1985 in Clark County (Las Vegas), Nevada. These homicides occurred inside the Tipton residence and were motivated by the theft of a large amount of jewelry. Telephone communications between the principals and those involved in the distribution of the jewelry resulted in the drafting and execution of search warrants, the recovery of some of the jewelry and successful prosecution of the principals. Steven Michael Homick is presently on death row and is undergoing prosecution in the State of California for a double homicide alleged to be a contract killing. That prosecution was made possible as a direct result of the electronic intercepts.

NOTE: Although we utilize electronic surveillance sparingly, it has proven to be a remarkably successful investigative tool. Evidence obtained from electronic surveillance in narcotics cases, illegal gambling, murder, pandering and attempted murder/solicitation for murder has been critical to several major prosecutions.

Honorable Rex Bell
District Attorney
Clark County, Nevada

Distict Attorney Investigation Infiltrates Computer Bookmaking Operation

The investigation, begun by the Westchester County District Attorney's Office in February of 1990, and which later became a joint investigation with the United States Customs Service in New York and Dallas, Texas, made extensive use of wiretaps and video surveillance, in both Westchester and Dutchess Counties, where the Dutchess County Narcotics Task Force provided invaluable assistance. The investigation also involved, for the first time in New York State, the court ordered electronic accessing of computer information where records of betting activity were stored.

For over a year before the investigation began, James Monteleone and the principal of a Fort Worth currency exchange were collaborating on the development of a computer system specifically created for bookmakers. The system was designed to keep track of scheduled sporting events, the "lines" (or odds) on each event, the names of bettors and other subordinate bookmakers (runners), the amounts each wagered on each event and the commissions earned by members of the operation, and of course, the amount of money won or lost by each bettor on each event and the status of his/her account. The computer system was to be marketed to bookmakers throughout the country and had a unique feature for their benefit. All the data contained in the computer was to be "down loaded" automatically to a main computer in Mexico where a duplicate set of the bookmakers' records would be stored indefinitely. Should the police raid the bookmaker's office, (the theory went) he need only type a combination of letters into the computer which would erase the entire program, leaving prosecutors with no gambling records to use as evidence. After the police would leave the office empty handed, the bookie could, for a fee, retrieve all his data from the Mexican computer and be back in business within minutes.

So attractive was this technology that in July of 1990, a bookmakers' convention was held at the Hotel San Remo in Las Vegas to demonstrate the system. What the dozen bookies, including Monteleone, did not know was that the technician who helped demonstrate the computer and who was to be responsible for installing and maintaining the computers in the New York area, was actually a Westchester County D.A.'s investigator who had infiltrated the operation. The conventioneers were also unaware that the entire seminar demonstrating the computer system was videotaped in cooperation with the Las Vegas Police Department's intelligence unit for use as evidence in one of the conspiracy counts of the indictment.

Monteleone, confident he was bringing bookmaking into the twenty-first century, purchased and had installed one of the computers in an Ardsley location for use in his own operation. He was unaware that the technician doing the installation was a D.A.'s investigator. He was also unaware that, rather than the Mexican computer being the safe haven for all his gambling records, the computer was, in fact, being down loaded (Pursuant to Court Order), into a computer in the Westchester County D.A.'s Office in White Plains. Those records represent several counts in the present indictment.

In October of 1990 D.A.'s investigators executed several search warrants at locations used by the Monteleone operation. Gambling records and approximately $30,000 in cash were seized at that time. Immediately Monteleone contacted the "technician" (investigator) and asked him to remove

the computer from the Ardsley location "before the cops found it." He obliged. The computer is now being held as evidence at the Courthouse in White Plains. The records electronically seized show over $4.5 million in bets for the period July 30 through August 28, 1990.

Honorable Carl A. Vergari
District Attorney
Westchester County, New York

NARCOTICS

"Almost two-thirds of all court orders for surveillance are used to fight the war on drugs, and electronic surveillance has been critical in identifying and then dismantling major drug trafficking organizations. Although the benefits of these operations are difficult to quantify, their impact on the economy and people's lives is potentially enormous. In 1988, the Public Health Service estimated the health, labor, and crime costs of drug abuse at $58.3 billion [7]. The FBI estimates the war on drugs and its continuing legacy of violent street crime in the form of near daily drive-by murders would be substantially, if not totally, lost if law enforcement were to lose its capability for electronic surveillance."[1]

Kingpin Busted in Four State Cocaine and Heroin Distribution Ring

A recent investigation by the Baltimore State's Attorney and the Baltimore City Police Department focused on a large cocaine and heroin distribution organization. The investigation revealed that the sources of supply for the cocaine and heroin were located in the states of New York, Florida, and California. There was no informant who knew the sources of supply. Further, surveillance could not be maintained by a local police department over a four state area. The only avenue of investigation of all of the co-conspirators was a wiretap. As a result of several wiretaps on residential and cellular phones, three sources of supply for the cocaine and heroin were identified and arrested along with the entire criminal organization in Baltimore.

As a result of the wiretaps and further investigation, evidence in federal court revealed an organization which distributed in excess of 300 kilograms of cocaine in the Baltimore metropolitan area. The kingpin is presently serving life without parole in the federal system. This type of investigation and eventual outcome would have been impossible without the use of wiretaps.

Fentanyl Induced Deaths of Young Adults Halted

In another recent Baltimore City Police Department investigation, it was determined that a drug known as fentanyl had entered the Baltimore Metropolitan area causing death of numerous young adults. It was learned that fentanyl was a controlled substance 100 times more powerful than heroin and was being sold in the Baltimore area under the trade name of China White. Again, normal investigative procedures revealed no information in reference to the source of supply. Due to a wiretap being executed on a local heroin dealer, however, it was learned that this heroin orga-

[1] Denning, Dorothy E., *Communications from the ACM*, March 1993, Vol. 36, No. 3, page 29.

nization was responsible for the smuggling of the fentanyl from the State of New York. The source of the fentanyl was identified and arrested and the heroin and fentanyl distribution organization in the Baltimore area was dismantled. Several individuals have been charged with the deaths resulting from the fentanyl and drug trafficking charges. The cases are pending in both state and federal courts. Further, the drug fentanyl has not been seen in the Baltimore metropolitan area since the above arrest based on the utilization of the wiretaps.

Present investigations into the trafficking of cocaine and heroin in the Baltimore metropolitan area are revealing that the sources of supply are in the states of Florida, New York, Pennsylvania, and California. These investigations, without the use of wiretaps, would only result in the arrest of local retail drug offenders and would not do anything to address the sources of supply.

NOTE: Thorough and effective drug prosecution in the 1990s and beyond will require continued usage of court authorized electronic surveillance. In my professional opinion and based on the experience of my staff, even slight disruption in the access to any and all advanced telephone systems would significantly impair law enforcement's ability to thoroughly investigate drug offenses. In the mid-Atlantic region, as in other jurisdictions, drug distribution organizations are becoming more sophisticated and the majority of the drug smuggling organizations have inter-jurisdictional, inter-state and even international connections and sources of supply. As a result, the conventional investigative techniques such as surveillance, undercover purchases, and the use of informants are becoming increasingly limited as a means to obtain the evidence necessary for the prosecution of the sources of supply without the use of electronic surveillance, which includes both pen registers and wiretaps.

Honorable Stuart O. Simms
State's Attorney
Baltimore, Maryland

Interceptions Uncover Importation of 2,600 Kilos of Cocaine; Seventy Defendants

In the past year, the Philadelphia District Attorney's Office has conducted three separate investigations of major drug distribution networks in which fourteen court ordered interceptions of wire, oral and electronic communications were utilized to intercept criminal conversations and communications on telephones, electronic paging devices and mobile cellular telephones. In each of these investigations, informants and undercover officers were only able to obtain the confidence of and conduct business with mid-level dealers in these distribution networks. The use of electronic surveillance enabled this office to uncover the full extent of these conspiracies as well as to identify their sources of drugs in New York, Miami, Houston, and Cali, Colombia. These investigations have resulted in the arrest of seventy defendants, the seizure of over two hundred kilograms of cocaine, and the confiscation of over two million dollars in assets. The confiscation of records from one of these groups, the "Jude Patrick Thomas" organization, detailed the importation to Philadelphia of 2,600 kilograms of cocaine over an eighteen month period.

The prospect that such criminal groups will be allowed to poison the poor of our cities with impunity is a virtual reality should law enforcement's ability to intercept telecommunications be curtailed.

NOTE: Simply stated, in today's fast paced technological society, electronic surveillance is the eyes and ears of law enforcement. The inability of law enforcement to effectively utilize electronic surveillance will make it virtually impossible to successfully investigate and prosecute organized crime, drug trafficking and official corruption.

As you are well aware, complex criminal conspiracies are by their very nature clandestine affairs, not spectator sport. The identities of conspirators, the nature and mechanics of their illicit enterprise and their innermost thoughts and communications are not for public scrutiny. Yet the conversion of telecommunications to a digital system without preserving law enforcement's ability to intercept conversations is tantamount to giving law enforcement a cheap seat in the bleachers, with only a far removed glimpse of the action.

The use of electronic surveillance has made it possible to penetrate the inner sanctum of criminal conspiracies. Informants and undercover police officers are seldom able to infiltrate the upper echelon of these groups or flush out the true scope of the conspiracy. Only by utilizing electronic surveillance has law enforcement been able to obtain evidence that could not otherwise be gathered and convict defendants with their own words.

Honorable Lynne Abraham
District Attorney
Philadelphia, Pennsylvania

Five Police Officers Busted for Cocaine Distribution

On May 7 of 1992, a five month narcotic investigation utilized at least 21 court ordered wiretaps and registers to dismantle a metropolitan New York conspiracy to sell cocaine. Of the more than 45 defendants charged, five were New York Police Officers who were identified and traced solely through their telephonic communications while dealing drugs. Without the ability to obtain electronic surveillance orders and effectively implement them we would have been unable to bring these malefactors to justice. Obviously, if the defendants' telephone systems incorporated technology which limited law enforcement's ability to intercept, all five of these drug dealers would still be actively selling cocaine while continuing to work as police officers.

1,777 Pounds of Cocaine Confiscated

In December 1989 a team of the Suffolk County District Attorney's investigators, police and Drug Enforcement Administration (D.E.A.) agents concluded a year long investigation with the arrest of nine individuals and the confiscation of 1,777 pounds of cocaine in what was the largest seizure ever in Suffolk County. Three U.S. citizens and six Colombian nationals were arrested in connection with a cocaine smuggling ring that stretched from Colombia through Guatemala, Mexico, Texas, Georgia, and Ronkonkoma, New York. The case was developed primarily through elec-

tronic surveillance and culminated with the interception of a communication that the ring leader Richard Espinosa would arrive at the Long Island warehouse at a designated date and time. The arrest ultimately led to the seizure of an additional 700 pounds of cocaine in Georgia, as well as a forfeiture in excess of $2 million. The cornerstone of this investigation was a series of electronic surveillance orders without which the case could never have been made.

NOTE: Without the ability to intercept communications we would be unable to arrest and convict those sophisticated individuals who control illegal activities in organized crime, including gambling, extortion, robbery, burglary, and the distribution of controlled substances. The proliferation and improvement of pagers or "beepers", cellular phones, and the like has greatly enhanced organized crime's ability to communicate and coordinate their activities.

Honorable James M. Catterson, Jr.
District Attorney
Suffolk County, New York

Model Driving While Under the Influence of Alcohol and Other Drugs Act

Table of Contents

Model Driving While Under the Influence of Alcohol and Other Drugs Act

Policy Statement

Alcohol and other drug use significantly contribute to this country's annual highway death toll. Traffic accidents are the leading cause of death for individuals between 6 and 33 years of age. Fifty-six percent (56%) of those fatalities involve alcohol and/or other drugs. Ten to twenty percent (10%-20%) of all fatally injured drivers have drugs, often in combination with alcohol, in their bloodstream. In 1992, alcohol-related crashes resulted in approximately 20,000 deaths. The rate of alcohol involvement among drivers under age 21 is approximately twice that of older drivers. Twenty percent (20%) of 15 to 20 year old drivers involved in fatal crashes in 1991 were intoxicated.

To reduce these alcohol or other drug-related traffic deaths, several states have adopted strict laws to deter drinking and driving. California, Maine, Oregon, Utah, and Vermont prohibit a person from operating a motor vehicle with a blood or breath alcohol concentration (BAC) of .08% or more. Research shows that the overwhelming majority of drivers have impaired driving skills at this BAC level. In fact, over 80% of drivers involved in fatal crashes with positive BACs exceeded the .08% level. Studies suggest that reduction of the legal BAC limit from .10% to .08% has notable deterrent effect. A survey of California drivers 15 months after passage of the state's .08% law found that 50% of survey respondents were less likely to drive after drinking alcohol as a result of the lowered limit.

For drivers under age 21, some states have adopted zero tolerance laws. These laws typically prohibit individuals under 21 years of age from driving with a BAC of .02% or more. A National Highway Traffic Safety Administration (NHTSA) review of Maryland's .02% law reveals a significant decrease in the number of under age 21 drivers involved in accidents who had been drinking. A study of Maine's .02% law based on self-reported behavior indicates that persons under age 21 drive less often after drinking and experience fewer crashes.

Driver's license revocation or suspension effectively reduces highway accidents and prevents reoccurrence of alcohol-related driving offenses. Thirty-one states and the District of Columbia revoke licenses administratively. Minnesota, New Mexico, Nevada, North Carolina, Oklahoma, Oregon, West Virginia, and Wisconsin have noted substantial reductions in alcohol-related fatal crashes following application of administrative revocation procedures.

The Model Act follows the lead of states dedicated to decreasing alcohol or drug-related highway fatalities. It incorporates a per se illegal BAC limit of .08% for adults; makes it per se illegal for persons under age 21 to operate a motor vehicle with an alcohol concentration of any measurable or detectable amount (.02% or more); and authorizes administrative revocation of licenses for refusal to take a chemical test or for a chemical test failure. While permitting swift revocation, the administrative procedures protect an offender's due process rights through an appeals and judicial review process.

The research information in this statement was provided by the National Highway Traffic Safety Administration.

Highlights of the Model Driving While Under the Influence of Alcohol and Other Drugs Act

- Makes it a per se criminal offense for a person to operate a motor vehicle with an alcohol concentration of .08% or above.
- Makes it a per se criminal offense for a person under age 21 to operate a motor vehicle with an alcohol concentration of any measurable or detectable amount.
- Makes it a per se criminal offense to operate a motor vehicle with the presence of a controlled substance in the person's blood.

DEFINITIONS

- Defines alcohol concentration for breath or blood specimens.
- Defines a drug broadly to include any substance which can affect a person's ability to operate a motor vehicle.
- Defines a conviction to include any adjudication of guilt, regardless whether the sentence has been suspended.

ADMINISTRATIVE LICENSE REVOCATION

- Makes the refusal to take a chemical test or a chemical test failure grounds for immediate revocation of the driver's license.
- Provides for the immediate taking of the license; issuance of a temporary license; and serving of notice of the revocation by the arresting officer at the time of the arrest.
- Protects the offender's due process rights by providing for an administrative appeals hearing and judicial review according to the uniform administrative procedures act.
- Maintains the distinction between the administrative proceedings and the criminal proceedings so that the outcome of either will not affect the other procedure.
- Provides for revocation periods rather than restricted driving privileges.

Model Driving While Under the Influence of Alcohol and Other Drugs Act

Section 1. Short Title.

This [Act] shall be known and may be cited as the "Model Driving While Under the Influence of Alcohol and Other Drugs Act."

Section 2. Legislative Findings.

(a) Alcohol use continues to be America's number one highway safety problem. In 46 percent of all fatal crashes in 1992, either a driver or a pedestrian had been drinking. This figure was 57 percent in 1982.

(b) Nearly 20,000 people were killed in alcohol-related crashes in 1992. In addition, several studies have found other drugs that can impair driving performance in the bloodstream of 10 to 22 percent of all fatally injured drivers, often in combination with alcohol.

(c) Reduced blood alcohol concentration (BAC) limits (.08% for adult drivers and lower for drivers under the age of 21) are supported by research. Deterrence begins with laws that define and prohibit impaired driving, and permit a broad range of administrative and judicial sanctions.

(d) Administrative license revocation has proven to be the single most effective method to deter impaired driving.

Section 3. Purposes.

(a) The purposes of this [Act] are: (1) to provide safety for all persons using the streets or other roadways of this state by quickly revoking the driving privileges of those persons who have shown themselves to be safety hazards by driving with an excessive concentration of alcohol in their bodies; and (2) to ensure drivers in need of drug education or treatment are identified and provided the appropriate assistance.

COMMENT

Legislative findings are useful in providing guidance to interpreting courts and publicizing and memorializing the goals and objectives of the [Act]. *Block v. Hirsch*, 256 U.S. 135, 154 (1921) ("entitled at least to great respect").

Section 4. Definitions.

The following words and phrases when used in this [Act] shall have the following meanings:

(a) "Alcohol Concentration" means either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

(b) "Conviction" means that a court of original jurisdiction has made an adjudication of guilt. An unvacated forfeiture of bail or collateral deposit to secure a defendant's appearance in court, a plea of nolo contendere accepted by the court, the payment of a fine or court costs, a plea of guilty, or a finding of guilt on a traffic violation charge shall be the equivalent to a conviction, regardless of whether the penalty is rebated, suspended, or probated. For purposes of this [Act] only, an authorized administrative tribunal shall constitute a court.

(c) "Department" means the [state department of motor vehicles.]

(d) "Drive" means to operate or be in actual physical control of a vehicle.

(e) "Driver's license" means any license to operate a motor vehicle issued under the laws of the state.

(f) "Drug" means any chemical substance, natural or synthetic which, when taken into the human body, can impair the ability of the person to operate a motor vehicle safely.

(g) "License" means any driver's license or any other license or permit to operate a motor vehicle issued under, or granted by, the laws of this state, including:

(1) Any temporary license or instruction permit;

(2) The privilege of any person to drive a motor vehicle whether or not the person holds a valid license;

(3) Any nonresident's operating privilege as defined in subsection (h).

(h) "Nonresident's operating privilege" means the privilege conferred upon a nonresident by the laws of this state pertaining to the operation by that person of a motor vehicle, or the use of a vehicle owned by that person, in this state.

(i) "Revocation" means the termination by formal action of the [department] of a person's license or privilege to operate a motor vehicle on the highways, which terminated license or privilege shall not be subject to renewal or restoration except that an application for a new license may be presented and acted upon by the [department] after the expiration of the applicable period of time prescribed in this [Act].

(j) "State" means a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a province of Canada.

(k) "Suspension" means the temporary withdrawal by formal action of the [department] of a person's license or privilege to operate a motor vehicle on the highways, which temporary withdrawal shall be for a period specifically designated by the [department.]

COMMENT

General. The definitions in this section are based on the driver licensing definitions in the Uniform Vehicle Code (UVC). They are basic terms which are already defined in the driver licensing laws of many states. They should be a part of the legal context into which the law fits. If they are not part of the overall driver licensing law, they should be specifically adopted as part of this [Act].

Drug Definition. This definition is taken from the California Vehicle Code and is expanded beyond the definition used in controlled substances acts to include substances causing impairment and creating dangerous drivers.

Section 5. Revoking or Suspending Resident's License Based Upon Conduct in Another State.

(a) The [department] shall revoke the license of any resident of this state, and may suspend or revoke a nonresident's license, upon receiving notice of such person's conviction in another state of an offense described in [Section 7 of this Act].

(b) The [department] is authorized to suspend or revoke the license of any resident or nonresident upon receiving notice of the conviction of such person in another state of an offense, other than those described in [Section 7 of this Act], which if committed in this state, would be grounds for suspension or revocation of the license of a driver.

(c) The [department] may give such effect to conduct of a resident in another state as is provided by the laws of this state had such conduct occurred in this state.

COMMENT

This section is taken from UVC Section 6-203 (1992) and it ensures that offenders will not escape the administrative sanctions of the criminal offense by crossing state lines to obtain new licenses. By informing other states of the action taken against the driver, it will also alert the other states to the driver's record and potential safety risk. This section also provides for uniformity of license action in all the states.

Section 6. When Court to Forward License to Department and Report Convictions.

(a) The court in which a person is convicted of any offense for which this [Act] requires revocation of the person's license by the [department], shall require the surrender to the court of any driver's license then held by the convicted person. The court shall thereupon forward the license together with a record of such conviction to the [department].

(b) Every court having jurisdiction over offenses committed under this [Act], or any other law of this state or municipal ordinance adopted by a local authority regulating the operation of motor vehicles on streets or other roadways, shall forward to the [department] within [10 days] a record of the conviction of any person in said court for a violation of any said laws other than regulations governing standing or parking, and may recommend the suspension of the driver's license of the person so convicted. The court shall also report to the department any conviction of a person for any violation of a person's written promise to appear given to an officer upon issuance of a traffic citation, and any failure to appear in court at the time specified by the court.

COMMENT

This section is taken from UVC Section 6-205 (1992). It ensures that the judicial and administrative sanctions will go hand in hand. This section provides part of the linkage between the two systems so that they will work

together and punishment will be swift, certain, and more effective.

Section 7. Mandatory Revocation of License by Department.

The [department] shall forthwith revoke the license of any driver upon receiving a record of the driver's conviction of any of the following offenses:

(a) Homicide by vehicle (or manslaughter resulting from the operation of a motor vehicle);

(b) Driving a motor vehicle while under the influence of alcohol or other drugs as prohibited by Section 19 of this [Act];

(c) Any felony in the commission of which a motor vehicle is used;

(d) Failure to stop, render aid, or identify the driver in the event of a motor vehicle accident resulting in the death or personal injury of another;

(e) Perjury or the making of a false affidavit or statement under oath to the [department] under this [Act] or under any other law relating to the ownership or operation of motor vehicles;

(f) Unauthorized use of a motor vehicle belonging to another which act does not amount to a felony;

(g) The unlawful use of a license as prohibited by the fraudulent use of identification provision in the [Model Underage Alcohol Consumption Reduction Act].

COMMENT

This section is taken from the UVC Section 6-206 (1992). It complements the license revocations found in the Commission's [Model Underage Alcohol Consumption Reduction Act.] It also provides the coverage for offenses involving motor vehicles. Most states currently provide for these revocations and for the reporting of such convictions to other states for license action when appropriate.

Section 8. Revocation of License for Refusal to Submit to Chemical Test or Having a BAC of .08% or More.

(a) Any person who drives upon the streets or other roadways of this state shall be deemed to have given consent, subject to the provisions of Section 20 of this [Act], to a test or tests of the person's blood, breath, or urine for the purpose of determining the person's alcohol concentration or the presence of other drugs. The test or tests shall be administered at the direction of a law enforcement officer who has probable cause to believe the person has violated Section 19 of this [Act], and one of the following conditions exists:

(1) The person has been arrested for a violation of Section 19 or any other offense alleged to have been committed while the person was violating Section 19;

(2) The person has been involved in an accident;

(3) The person has refused to submit to the preliminary screening test authorized by Section 10 of this [Act]; or

(4) The person has submitted to the preliminary screening test authorized by Section 10 of this [Act], which disclosed an alcohol concentration of .08% or more.

The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered.

(b) Any person who is dead, unconscious or otherwise in a condition rendering the person incapable of refusal, shall be deemed not to have withdrawn the consent provided by paragraph (a) of this section, and the test or tests may be administered, subject to the provisions of Section 20 of this [Act].

(c) A person requested to submit to a test as provided above shall be warned by the law enforcement officer requesting the test that a refusal to submit to the test will result in revocation of the person's license to operate a motor vehicle for [six months, one year, or other appropriate time]. Following this warning, if a person under arrest refuses upon the request of a law enforcement officer to submit to a test designated by the law enforcement agency as provided in paragraph (a) of this section, none shall be given.

(d) If the person refuses testing or submits to a test which discloses an alcohol concentration of .08% or more under this section, the law enforcement officer shall submit a sworn report to the [department], certifying that the test was requested pursuant to subsection (a) and that the person refused to submit to testing or submitted to a test which disclosed an alcohol concentration of .08% or more.

(e) Upon receipt of the sworn report of a law enforcement officer submitted under subsection (d), the

[department] shall revoke the driver's license of the person for the periods specified in Section 13.

(f) On behalf of the [department], the law enforcement officer submitting the sworn report under subsection (d) shall serve immediate notice of the revocation on the person, and the revocation shall be effective [7, 10, 15, or other appropriate number] days after the date of service. If the person has a valid license, the officer shall take the driver's license of the person, and issue a temporary license valid for the notice period. The officer shall send the license to the [department] along with the sworn report under subsection (d).

In cases where no notice has been served by the law enforcement officer, the [department] shall give notice as provided in [the state statute governing notice of license action to be given to the licensee] and the revocation shall be effective [7, 10, 15, or other appropriate number] days after the date of service. If the address shown in the law enforcement officer's report differs from that shown on the [department] records, the notice shall be mailed to both addresses.

COMMENT

General. This section is taken from the UVC Section 6-207 (1992). It provides the basis for administrative action. Instead of waiting for the criminal adjudication process to be completed, the [department] makes its own independent determination of the same fact and revokes if it appears warranted.

The model law provides for revocation rather than suspension because at the conclusion of the sanction period, the license is not automatically returned. Instead, the person may apply for a new license. Whenever a license is withdrawn due to an offense relating to the use of alcohol or other drugs, it is important that the [department] determine that it will be reasonably safe to allow the person to drive before it issues a new license. One of the ways a [department] can make that determination is to look to the person's successful completion of assessment and treatment as indicated for the criminal offense. See Section 21.

Subsection (d). In most states, the [department] receives records of convictions and implied consent refusals. The [department] would be unaware of most impaired driving enforcement contacts until a conviction is reported. This section provides the mechanism for immediately providing information concerning all arrests for driving with an unlawful alcohol concentration to the [department].

In developing the forms and regulations required by this section, the [department] should consider encouraging the utilization of copies of documents which must be prepared by the enforcement officer for other purposes, whenever feasible.

Section 9. Revocation of License for Refusal to Submit to Chemical Test or Having a BAC of any Measurable and Detectable Amount for Person Under Age 21.

(a) The phrase "any measurable and detectable amount of alcohol" shall be defined as the alcohol concentration in a person's blood or breath which is .02% or more based on the definition of "alcohol concentration" as defined in Section 4 of this [Act].

(b) Any person under age 21 who drives upon the streets or other roadways of this state shall be deemed to have given consent, subject to the provisions of Section 20, to a test or tests of the person's blood, breath or urine for the purpose of determining such person's alcohol concentration or the presence of other drugs. The test or tests shall be administered at the direction of a law enforcement officer who has probable cause to believe the person has violated Section 19, and one of the following conditions exists:

(1) The person under age 21 has been arrested for a violation of Section 19 or any other offense alleged to have been committed while the person was violating Section 19;

(2) The person under age 21 has been involved in an accident;

(3) The person under age 21 has refused to submit to the preliminary screening test authorized by Section 10; or

(4) The person under age 21 has submitted to the preliminary screening test authorized by Section 10, which disclosed an alcohol concentration of any measurable and detectable amount.

The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered.

(c) Any person under age 21 who is dead, unconscious or who is otherwise in a condition rendering the person incapable of refusal, shall be deemed not to have withdrawn the consent provided by paragraph (b) of this section and the test or tests may be administered, subject to the provisions of Section 20.

(d) A person under age 21 requested to submit to a test as provided above shall be warned by the law enforcement officer requesting the test that a refusal to submit to the test will result in revocation of the person's license to operate a motor vehicle for [six months, one year, or other appropriate time]. Following this warning, if a person under arrest refuses upon the request of a law enforcement officer to submit to a test designated by the law enforcement agency as provided in paragraph (b) of this section, none shall be given.

(e) If the person under age 21 refuses testing or submits to a test which discloses an alcohol concentration of any measurable and detectable amount under this section, the law enforcement officer shall submit a sworn report to the department, certifying that the test was requested pursuant to subsection (b) and that the person refused to submit to testing or submitted to a test which disclosed an alcohol concentration of any measurable and detectable amount.

(f) Upon receipt of the sworn report of a law enforcement officer submitted under subsection (e), the [department] shall revoke the driver's license of the person for the periods specified in Section 13.

(g) On behalf of the [department], the law enforcement officer submitting the sworn report under subsection (e) shall serve immediate notice of the revocation on the person, and the revocation shall be effective [7, 10, 15, or other appropriate number] days after the date of service. If the person has a valid license, the officer shall take the driver's license of the person, and issue a temporary license valid for the notice period. The officer shall send the license to the [department] along with the sworn report under subsection (e).

(h) In cases where no notice has been served by the law enforcement officer, the [department] shall give notice as provided in [the state statute governing notice of license action to be given to the driver's license holder] and the revocation shall be effective [7, 10, 15, or other appropriate number] days after the date of service. If the address shown in the law enforcement officer's report differs from that shown on the [department] records, the notice shall be mailed to both addresses.

COMMENT

General. This section is taken from the UVC Section 6-208 (1992). Young persons aged 15 to 20 are killed in alcohol-related crashes at a significantly higher rate than adults, based on miles driven, licensed drivers, or total population. One reason is that the relative risk of a fatal crash increases much more rapidly at low blood alcohol levels for young drivers than for adults. In 1991, over 1,400 young drivers (ages 15 to 20) killed in traffic crashes nationally had alcohol in their systems. Over one-quarter of these drivers had blood alcohol levels less than .10 percent. In the same year, over 3,100 young people died in alcohol-related crashes.

Zero tolerance laws complement existing minimum drinking age laws. Since it already is illegal for persons under 21 to purchase or possess alcohol in public, it also should be illegal for them to drive with any alcohol in their systems. Zero tolerance laws send a strong message to underage drivers not to drive after drinking any alcohol at all.

It is recommended that the BAC limit be .02% or less and that it apply to all drivers under the age of 21, to be consistent with the legal age for purchasing alcohol. It is recommended that immediate driver's license revocation be invoked for persons who violate the law.

See also the Comments of Section 8.

Section 10. Preliminary Breath Test.

When a law enforcement officer has articulable grounds to suspect that a person may have violated Section 19, the officer may request the person to submit to a preliminary screening test of the person's breath to determine such person's alcohol concentration using a device approved by the [state department of health or other appropriate state agency] for that purpose. In addition to this test, or upon a refusal to submit to testing, the officer may require further testing under Section 8 or Section 9.

COMMENT

This section is taken from the UVC Section 6-209 (1992). Preliminary screening tests provide assistance to the law enforcement officer who suspects impairment due to alcohol. A test result indicating no or a low alcohol level provides grounds for investigating the use of drugs other than alcohol.

Section 11. Chemical Test of Drivers in Serious Personal Injury or Fatal Crashes.

Notwithstanding the provisions of Section 7 and Section 8, when the driver of a vehicle is involved in an accident resulting in death or serious personal injury of another person, and there is reason to believe that the driver is

guilty of a violation of Section 19, the driver may be compelled by a police officer to submit to a test or tests of the driver's blood, breath, or urine to determine the alcohol concentration or the presence of other drugs.

COMMENT

This section is taken from the UVC Section 6-210 (1992). Nearly all states have laws allowing the taking of a chemical test due to the exigent circumstances of an accident involving death or injury.

Section 12. Opportunity for Hearing Required.

(a) A revocation of a license under Section 8 or Section 9 shall become effective [7, 10, 15, or other appropriate number] days after the date of service of the notice of revocation.

(1) At any time prior to the hearing provided in subsection (a)(2), the person may request in writing an administrative review of the order of revocation. Upon receiving the request the [department] shall review the order, the evidence upon which it is based, including whether the person was driving or in actual physical control of a motor vehicle, and any other material information brought to the attention of the [department], and determine whether sufficient cause exists to sustain the order. Within 15 days of receiving the request, the [department] shall report in writing the results of the review. The availability of the administrative review of the order shall have no effect upon the availability of judicial review as provided in Section 17 of this [Act].

(2) Any person whose license is revoked under Section 8 or Section 9 may request a hearing in writing. The request shall state the grounds upon which the person seeks to have the revocation rescinded. The request for hearing shall not stay the revocation. The hearing shall be held, within 20 days after receiving the request, in the county in which the alleged offense occurred unless the person and the [department] agree to a different location. The hearing shall be recorded, and be conducted by the [department's] designated agent. The hearing may be conducted upon a review of the law enforcement officer's own reports; provided, however, that the person may subpoena the officer. Upon request, the [department] shall issue subpoenas to compel the attendance of witnesses.

(b) The scope of the hearing shall be limited to the issues of:

(1) Whether the law enforcement officer requested the test pursuant to Section 8 or Section 9;

(2) Whether the person was warned as required by Section 8 or Section 9;

(3) Whether the person was driving a motor vehicle;

(4) Whether the person refused to submit to the testing as provided in Section 8 or Section 9; and

(5) Whether a properly administered test or tests disclosed an alcohol concentration of .08% or more, or any measurable or detectable amount of alcohol for a person under age 21.

COMMENT

General. This section is taken from the UVC Section 6-212 (1992). It provides for a two-step administrative review and hearing process.

Paragraph (a)(1). The administrative review in this section is not a hearing. Rather, it is a review by the [department] of papers submitted by the officer and the offender. It affords the offender a limited opportunity to state the offender's side of the story, and to call attention to any obvious errors in the [department's] determination of facts. If promptly requested, this review can be provided before the effective date of the revocation. The purpose of the review is to provide sufficient due process to prevent clearly erroneous license deprivations which could cause irreparable injury to the licensee.

Paragraph (a)(2). This section contains substantive and procedural provisions relating to the hearing. This law does not permit a stay of the revocation. Experience has indicated that many drivers request hearings for the purpose of obtaining a stay of revocation if it is afforded. States which allow a stay of revocation pending the hearing, actually encourage more requests for hearings because of the advantage to the offender to take advantage of the "technicalities." The result is the obstruction of one of the most basic goals of administrative revocation - revoking the license and removing the driver from the highways quickly.

Section 13. Period of Revocation.

(a) Unless the revocation was for a cause which has been removed, any person whose license or privilege to drive a motor vehicle on the public highways has been revoked shall not be eligible to apply for a new license nor restoration of such person's nonresident operating privilege until the expiration of:

(1) [six months, one year, or other appropriate time] from the date on which the revoked license was surrendered to and received by the [department] or from such other date as shall be determined by the [department] in cases of revocation for refusal to submit to a chemical test under the provisions of Section 8 or Section 9.

(2) [three months, six months, or other appropriate time] from the date on which the revoked license was surrendered to and received by the [department] or from such other date as shall be determined by the [department] in cases of revocation for submitting to a test disclosing an alcohol concentration of 0.08% or more under the provisions of Section 8, or 0.02% or more under the provisions of Section 9.

(3) one year from the date on which the license was surrendered to a court under the provisions of Section 6.

(4) One year from the date on which the revoked license was surrendered to and received by the department under the provisions of Section 7; or

(5) in all other revocation cases, one year commencing on a date determined by the [department].

(b) Following a license revocation under Section 7(b) or 8 and 9, the [department] shall not issue a new license or otherwise restore the driving privilege unless and until the person presents evidence satisfactory to the [department] that it will be reasonably safe to permit the person to drive a motor vehicle upon the streets or other roadways. No driving privilege may be restored until all applicable reinstatement fees have been paid.

(c) Except for revocations under Sections 7, 8 and 9, the [department] shall not issue a new license nor restore a person's revoked nonresident operating privilege unless and until it is satisfied after investigation of the character, habits and driving ability of such person that it will be safe to grant the privilege of driving a motor vehicle on the streets or other roadways.

(d) Where a license or driving privilege has been revoked under Section 8 or Section 9 and the person is also convicted on criminal charges arising out of the same event for a violation of an offense under Section 19, and a revocation has been imposed under Section 7, both revocations shall be imposed but the total period of revocation shall not exceed the longer of the two revocation periods.

COMMENT

This section is taken from UVC Section 6-214 (1992).

Subsection (a). It is the intent of these provisions to establish a longer period of license revocation for a person who refuses a chemical test than for a person who takes the chemical test, even if the person's alcohol or other drug level in the person's breath or blood is over the limit. The subsection intends to encourage suspected impaired drivers to take the chemical test so that a precise determination of alcohol or other drug level can be made.

Subsection (d). This subsection addresses the relationship between the administrative revocation and the conviction revocation based on the same offense. It specifies that both of the revocation periods are to be imposed, but that they run concurrently, and the total period of revocation imposed is equivalent to the longer of the two periods.

Section 14. Limited License.

Notwithstanding the provisions of Sections 13 and 18, following a license revocation under Sections 7, 8 or 9 the [department] may issue after 30 days a limited license to the driver if no prior limited license has been issued within the preceding 12 months and there have been no other such prior revocations. The [department] in issuing a limited license may impose the conditions and limitations which in its judgment are necessary to protect the interests of the public safety and welfare. The license may be limited to the operation of particular vehicles and to particular classes and times of operation. The limited license issued by the [department] shall clearly indicate the limitations imposed and the driver operating under a limited license shall have the license in the driver's possession at all times when operating as a driver.

COMMENT

This section is taken from the UVC Section 6-215 (1992).

Section 15. Surrender and Return of License; Duty of Officers.

(a) The [department] upon canceling, suspending or revoking a license shall require that such license shall be surrendered to and retained by the [department].

(b) Any person whose license has been canceled, suspended or revoked shall immediately return the license to the [department].

(c) A law enforcement officer who in the course of duty encounters any canceled, suspended, or revoked driver's license shall seize and return such license to the [department] immediately.

COMMENT

This section is taken from the UVC Section 6-217 (1992). It ensures that no offender will have the ability to use a driver's license while it is revoked.

Section 16. No Operation under Foreign License During Suspension or Revocation in This State.

Any resident or nonresident whose driver's license or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this [Act] shall not operate a motor vehicle in this state under a license or permit issued by any other jurisdiction or otherwise during such suspension or after revocation until a new license is obtained when and as permitted under this [Act].

COMMENT

This section is taken from the UVC Section 6-218 (1992). This section prohibits the attempt to circumvent the revocation laws by crossing state lines.

Section 17. Right of Appeal to Court.

(a) Except as provided in subsection (b), a person whose license has been denied, cancelled or revoked by the [department] shall have the right to file a petition within 30 days thereafter for a hearing in the matter in [a court of record] in the county wherein such person resides, or in the case of a nonresident's operating privilege, in the county in which the main office of the [department] is located. The [court of record] is hereby vested with jurisdiction and it shall set the matter for hearing upon 30 days' written notice to the [department], and take testimony, examine the facts of the case, and determine whether the petitioner is entitled to a license or is subject to denial, cancellation or revocation of license under the provisions of this [Act].

(b) Subsection (a) is inapplicable to a person whose license cancellation or revocation is mandatory under this [Act], or whose license has been revoked under Section 8 of this [Act].

(c) Any person whose driving privilege has been revoked under the provisions of Section 8 may petition the [court of record] in the county in which he resides for review of the decision on administrative review conducted under Section 12. The petition for review shall state the factual and legal claims upon which the petitioner relies, and shall be filed within [15, 30, or other appropriate number] days after notice of the decision on administrative review, together with proof of service of a copy thereof upon the [department]. The court shall set the matter for review upon thirty days' written notice to the [department] upon receipt of the record. The review shall be on the record without taking additional testimony. If the court finds that the [department] exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse the [department's] determination. Otherwise, the court shall affirm the [department's] determination. Filing the petition for appeal shall not stay the revocation.

(d) Any person whose license has been suspended is entitled to judicial review under [cite law comparable to § 15 of the Model State Administrative Procedure Act, 14 Uniform Laws Annotated (1980)].

COMMENT

General. This section is taken from the UVC Section 6-219 (1992). This section specifies the substantive and procedural requirements relative to judicial review of the administrative determination following a hearing: note that the person must exhaust the administrative hearing remedy before judicial review is available. The review is on the record established by the [department] at the hearing. The law does not permit the court to hold a new hearing or to redetermine the facts. The court's review is strictly limited to the grounds for reversing the [department] which are listed in this section.

Section 18. Driving While License Suspended or Revoked.

(a) Any person who drives a motor vehicle on any street or other roadway of this state at a time when

such person's privilege to do so is suspended or revoked shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than [two days] nor more than [six months] and there may be imposed in addition thereto a fine of not more than [$500].

(b) Upon receiving a record of conviction of any driver for a violation of subsection (a) or any law or ordinance regulating the operation of motor vehicles where the offense was committed at a time when such person's license was suspended or revoked, the [department] may extend the period of suspension or revocation for an additional period of one year from and after the date upon which the period of suspension or revocation would otherwise have terminated.

COMMENT

This section is taken from the UVC Section 6-303 (1992). For license revocations to be effective, they must be enforced. It is important to attach meaningful sanctions for failure to comply. A minor fine or minimum punishment is usually viewed by the offender as worth the risk of violating the revocation. To maximize the deterrent value of license revocation, it must be certain and highly visible. The offense of driving while license revoked makes it clear that this is not acceptable behavior or even behavior which we will tolerate. It ensures safety to the public on the highways by keeping drivers off the road who are already known dangerous drivers.

Section 19. Driving While Under the Influence of Alcohol or Other Drugs.

(a) A person shall not drive a motor vehicle while:

(1) the alcohol concentration in such person's blood or breath as measured within three hours of the time of driving is .08% or more; (if proven by a preponderance of evidence, it shall be an affirmative defense to a violation of this subsection that the defendant consumed a sufficient quantity of alcohol after the time of driving a motor vehicle and before the administration of the evidentiary test to cause the defendant's alcohol concentration to be .08% or more. The foregoing provision shall not limit the introduction of any other competent evidence bearing upon the question whether or not the person violated this section, including tests obtained more than three hours after such alleged violation.)

(2) under the influence of alcohol;

(3) under the influence of any other drug or combination of other drugs to a degree which impairs the person's ability to drive safely;

(4) the presence of a controlled substance is in the person's blood;

(5) under the combined influence of alcohol and any other drug or drugs to a degree which impairs the person's ability to drive safely; or

(6) the alcohol concentration in such person's blood or breath as measured within three hours of the time of driving is any measurable or detectable amount and the person is under age 21.

(b) It is a defense to subsection (a)(4) that the accused person consumed the controlled substance under a valid prescription or order of a practitioner who acted in the course of the practitioner's professional practice.

(c) In addition to the provisions of Section 21, every person convicted of violating this section shall be subject to the provisions of the [Model Demand Reduction Assessment Act] and be punished by imprisonment for not less than [10 days] nor more than [one year], or by fine of not less than [$100] nor more than [$1,000], or by both such fine and imprisonment, and on a second or subsequent conviction, such person shall be punished by imprisonment for not less than [90 days] nor more than one year, and, in the discretion of the court, a fine of not more than [$1,000].

COMMENT

General. This section is taken from the UVC Section 11-902 (1992). Paragraphs (a)(4) and (6) creating a per se violation for the presence of a controlled substance in the body are taken from the Indiana Code Section 9-30-5-1(b) and (c).

Paragraph (a)(1). This subsection makes it a per se violation to have an alcohol concentration of .08% or more. This level is based on the research which shows that ability to drive is dangerously affected at this level. It is also based on the reduction in fatalities which has occurred in several states, California in particular, by lowering the per se to this level.

Paragraph (a)(2). The violation in this subsection is simply being under the influence of alcohol. No statutory definition is provided for the phrase "under the influence", however, all states have a definition in their state jury instructions.

Paragraph (a)(3). This subsection makes it a violation to be under the influence of drugs other than alcohol. The same definition of "under the influence" may be used in both paragraphs (2) and (3).

Paragraph (a)(4). A per se violation is established in paragraph (6) at any measurable amount for under age 21 persons because it is a violation for them to consume any alcohol. With the same type of rationale, this subsection creates a per se violation for the presence in the body of a controlled substance. A defense for prescriptions is given in subsection (b). However, a person who is impaired by drugs, whether used under prescription or not, is a danger to the public and must be removed from the highways.

Paragraph (a)(5). Polydrug use is common. This paragraph ensures that individuals who combine drugs will not be able to avoid the arm of the law. For example, a person who consumes alcohol but at an amount lower than the per se violation, and combines it with another substance, such as marijuana, will still commit this violation if the person's ability to drive is impaired.

Paragraph (a)(6). This paragraph matches the driver's license sanction for driving with a measurable or detectable amount of alcohol for drivers under age 21, with a criminal sanction. Since drivers under age 21 are prohibited from consuming alcohol at all, this provides for a criminal penalty as well. The options available under this statute are available to the offender under age 21. Assessment and treatment at this stage is crucial to avoiding an alcohol or other drug abuse problem or stopping it from growing. This youthful offender will also still have the options of deferred sentencing, probation, etc. to avoid a criminal record, if he or she successfully completes the programs ordered by the court.

Subsection (b). This subsection provides a defense after the per se violation for use of controlled substance with a prescription. However, it is not a blanket defense. The controlled substance must have been used according to the prescription and the prescription should be according to normal professional practice. If a person abuses a prescription it will not be a defense. The practitioner must also state that the prescription was given according to usual practice. If a driver uses a prescription drug which should not be used while operating machinery and the practitioner has told the driver this or a warning label appears on the container, the driver has still committed the criminal offense. Even though it is a properly dispensed prescription, the driver is required to follow the directions and restrictions of the drug prescribed.

Subsection (c). This subsection establishes the parameters for criminal penalties in terms of fines and incarceration. It is important that a minimum incarceration sentence be given, even though part of it may be suspended, in order to assure completion of any treatment or educational program ordered under Section 21 of this [Act]. It is also important that the seriousness of this offense be reflected in the penalties.

Section 20. Chemical and Other Tests.

(a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving a motor vehicle while under the influence of alcohol or other drugs, evidence of the concentration of alcohol or other drugs in a person's blood or breath at the time alleged, as determined by analysis of the person's blood, urine, breath or other bodily substance, shall be admissible. Where such a test is made the following provisions shall apply:

(1) Chemical analyses of the person's blood, urine, breath, or other bodily substance to be considered valid under this section shall have been performed according to methods approved by the [state department of health or single state authority on alcohol and other drugs] and by an individual possessing a valid permit issued by the [state department of health or single state authority] for this purpose. The [state department of health or single state authority] is authorized to approve satisfactory techniques or methods; to ascertain the qualifications and competence of individuals to conduct such analyses; and to issue permits which shall be subject to termination or revocation at the discretion of the [state department of health or single state authority].

(2) When a person shall submit to a blood test at the request of a law enforcement officer under the provisions of Sections 8, 9 or 11, only a physician or a registered nurse [or other qualified person] may withdraw blood for the purpose of determining the alcohol or other drug content therein. This limitation shall not apply to the taking of breath or urine specimens.

(3) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or

other qualified person of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

(4) Upon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to the person or the person's attorney.

(b) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving a motor vehicle while under the influence of alcohol or other drugs, the concentration of alcohol or other drugs in the person's blood or breath at the time alleged as shown by analysis of the person's blood, urine, breath, or other bodily substance shall give rise to the following presumptions:

(1) If there was at that time an alcohol concentration less than .08%, or in the case of persons under age 21, an alcohol concentration less than .02%, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol.

(2) If there was at that time an alcohol concentration of .08% or more, it shall be presumed that the person was under the influence of alcohol.

(3) The foregoing provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of alcohol.

(c) If a person under arrest refuses to submit to a chemical test under the provisions of Sections 8 or 9, evidence of refusal shall be admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol or other drugs.

COMMENT

General. This section is taken from the UVC Section 11-903 (1992). It establishes the procedures to ensure that proper chemical tests are taken without risk to the persons involved. It also defines the presumptions that will arise out of the use of the chemical tests.

Subsection (a). This paragraph makes it clear that the provisions of this section apply to civil or criminal actions or proceedings.

Paragraph (a)(1). This subsection requires the appropriate state agency to establish the rules, procedures, protocols, or regulations for making chemical analyses of bodily substances. This provides the standard for a court to judge admissibility and credibility of chemical test evidence. The agency may wish to consider testing procedures for alcohol and other drugs by scientific methodology associated with hair or other such sample of the human body capable of revealing the presence of alcohol or other drugs or their metabolites. In approving such an alternative testing procedure, the agency should be satisfied that the scientific methodology equals or exceeds the quality and protection established by the National Laboratory Certification Program's certification and testing procedures involving urine.

Paragraph (a)(2). This subsection provides additional requirements for competent personnel in the taking of blood tests which do not apply in the case of breath or urine specimens.

Paragraph (a)(3). The person being tested may also have a separate test taken by the qualified person of the person's choice. Although the person may have this independent test, any failure or inability to get one will not preclude the use or admission of the state's test.

Paragraph (a)(4). Full information about the test is available to the person who submitted to the test, upon his or hers request.

Subsection (b). This subsection establishes several presumptions which apply to both civil and criminal actions or proceedings.

Paragraph (b)(1). There is no presumption that a person was not under the influence of alcohol with an alcohol concentration below .08%. Significant scientific research has shown that impairment of the ability to drive a vehicle occurs well below .08% BAC.

Paragraph (b)(2). An alcohol concentration of .08% or more does give rise, however, to the presumption that the person was under the influence of alcohol. Research has shown that all persons are impaired and should not drive a vehicle at this level.

Paragraph (b)(3). The presumptions about alcohol concentrations will not limit the introduction of any other kinds of competent evidence. Regardless of the chemical test result and any presumptions which may arise, the parties may still present evidence of driving behavior, field test performance, statements, physical evidence, and any other competent evidence.

Subsection (c). Under this subsection the person's refusal to submit to a chemical test is admissible in a civil or criminal action or proceeding. This is a well established principle which was decided by the U.S. Supreme Court in 1983 in *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748. In that case, the court held that it is not a violation of a person's constitutional right against self incrimination to admit evidence of a refusal to take a chemical test in this type of case.

Section 21. Post Conviction Examination and Remedies.

Option 1 [(a) If at the time of sentencing of any person convicted of violating Section 19, the person has not undergone an assessment pursuant to the [Model Criminal Justice Treatment Act], the court shall order an assessment to be conducted pursuant to the [Model Criminal Justice Treatment Act.] If recommended by the assessment program, the court shall order the person to participate in a treatment program under conditions set forth in the [Model Criminal Justice Treatment Act.]

(b) Upon application for a driver's license by any person ordered to participate in a treatment program, whose license has been suspended or revoked, the results of the assessment referred to in subsection (a) and a report of the progress of the treatment ordered, shall be forwarded by the applicant to the [department] for consideration [by the health advisory board.]

(c) The department may [after receiving the advice of the health advisory board] issue a license to such person with conditions and restrictions consistent with the person's treatment or education program and with protection of the public, notwithstanding the provisions of Section 13.]

Option 2 [(a) Before sentencing any person convicted of Section 19, the court shall order an assessment to be conducted by an assessment program as defined by the [single state authority on alcohol and other drugs] to determine whether the person needs or would benefit from substance abuse or addiction treatment.

(b) In addition to the penalties imposed by Section 19, and after receiving the results of the assessment in subsection (a), the court shall order a person to participate in a treatment program recommended by the assessment program, including an inpatient treatment facility at a state institution. Constructive participation in a treatment program may be a condition of probation. The court shall designate a treatment program as defined by the [single state authority on alcohol and other drugs] to provide treatment to the convicted person. Nothing in this [Act] shall prevent a designated treatment program from refusing a referral under this [Act] if the program deems the person inappropriate for admission. In addition, a treatment program has the right to immediately discharge any person who fails to comply with the program rules and treatment expectations or who refuses to constructively engage in the treatment process.

(c) Any person subject to this section may be examined by a physician of such person's own choosing and at such person's own expense, and the results of any such examination shall be considered by the court.

(d) At any time after a court orders a person to participate in a treatment program, the person or the person's attorney, relative or attending physician, may petition the court to modify the order. In determining whether to make a modification, the court shall consider the recommendations of the treatment program.

(e) Upon application for a driver's license by any person ordered to participate in a treatment program, whose license has been suspended or revoked, the results of the assessment referred to in subsection (a) and a report of the progress of the treatment ordered, shall be forwarded by the applicant to the [department] for consideration [by the health advisory board.]

(f) The department may [after receiving the advice of the health advisory board] issue a license to such person with conditions and restrictions consistent with the person's treatment program and with protection of the public, notwithstanding the provisions of Section 13.]

COMMENT

General. This section is taken from the UVC Section 11-904 (1992).

Section 21 provides two options which require that all offenders convicted (definition of conviction is given in Section 4 of this [Act]) of the crime of driving under the influence of alcohol and other drugs shall be given an assessment to determine whether the person has a sub-

stance abuse problem and what type of treatment is most appropriate for the type of problem identified. Option 1 applies in states which adopt the [Model Criminal Justice Treatment Act.] The assessment and subsequently ordered treatment are to be conducted in accordance with the [Treatment Act.] Option 2 provides assessment and treatment requirements for states which do not enact the [Model Criminal Justice Treatment Act.] This section imposes assessment and treatment where appropriate, in addition to the other penalties in Section 18. Treatment and assessment are not to be done in lieu of other sanctions. In fact, a combination of sanctions including treatment is most appropriate because it provides for mechanisms to ensure that treatment is completed. In addition, successful completion of an appropriate treatment program reduces the chances that the person will commit additional crimes. The court has authority to review the offender's progress in treatment and modify any order applicable thereto.

In many states the department will have a health advisory board, perhaps with another name, which reviews applications for driver's licenses from individuals with health problems which may impact the ability to drive, i.e. epilepsy, heart conditions, eye impairments, and so forth. This board can also be drawn upon for review of the applicant's progress or lack thereof, in treatment regarding alcohol and other drug problems. This advisory board can advise the department on whether the applicant should be given a driver's license and if it should be restricted in any way. The safety of the public will be a major concern to the department in this case.

Section 22. Severability Provision.

If any provisions of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Section 23. Effective Date.

This [Act] shall take effect on [reference to normal state method of determination of effective date][reference to specific date].

Appendix F

State Legislative Fact Sheet

.08 Illegal Per Se Level

The U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) encourages states to have laws that make it illegal for a person to operate a motor vehicle if he or she has a blood alcohol concentration (BAC) of .08 or more (i.e., an illegal per se law at this level). Alcohol concentration is to be based on either the number of grams of alcohol in 100 milliliters of blood or the number of grams of alcohol in 210 liters of breath.

- At the present time only five states have an illegal per se law at the .08 level: California, Maine, Oregon, Utah and Vermont.
- Forty-one other states and the District of Columbia have illegal per se laws at the .10 level.
- Four states have no illegal per se law: Maryland, Massachusetts, South Carolina and Tennessee. In addition, the Commonwealth of Puerto Rico has no such law.

Key Facts

- In 1991, 48 percent of the 41,462 motor vehicle related deaths were alcohol-related. This percentage translates into 19,900 alcohol-related deaths last year.
- Over 80 percent of drivers involved in fatal crashes with positive BACs had levels exceeding .08.
- A BAC level of .08 means about four drinks within one hour on an empty stomach for an average male weighing 160 pounds.

Why .08?

Research indicates that many drivers are impaired at low blood alcohol levels. Some research indicates that such impairment starts as low as .015. By the time a level of .08 is reached, even experienced drinkers show driving skill impairment.

Recent research indicates that the relative fatality risk for drivers in single vehicle crashes with BACs between .05 and .09 is over 11 times greater than for drivers with a zero BAC.

Lowering the limit to .08 would set the boundary at a level at which driving skills are proven to be compromised for the vast majority of drivers. It is a limit which is reasonable and necessary for the driving safety of all.

This "Fact Sheet", published by the National Highway Traffic Safety Administration (NHTSA), has been reformatted to be consistent with the other material in Volume III.

Life Saving Benefits of 0.08

On January 1, 1990, California reduced the legal limit for blood alcohol concentration from .10 to .08. Six months later, it instituted an Administrative Per Se law, allowing police and driver licensing authorities to suspend the driver's license of drivers who fail or refuse an alcohol test. NHTSA studied the effects of these laws, and found that while the study could not quantify the separate effects of each law, alcohol-related facilities declined by 12 percent after January 1, 1990. A survey of 1,600 California drivers in May, 1991 disclosed that eight out of ten were aware that the BAC limit had become stricter. In addition, half of the survey respondents who drink alcohol indicated they are less likely to drive after drinking, as a result of the lowered limit.

Impact on the Criminal Justice System

California found that the lowered limit had little impact on court administrators or judges. The main impact has been on prosecutors' decisions concerning whether cases should be filed. Previously, DWI arrestees with BACs below .12 typically were allowed to plea to reduced charges. Since the limit was changed, this plea-bargain "cut off" has dropped to about .10 percent. No increases have been reported in the proportion of DWI defendants pleading guilty, requesting jury trials or appealing convictions.

Who Supports .08?

The following organizations support a BAC limit of .08 or lower:

- American Medical Association
- American Association of Neurological Surgeons
- American Spinal Injury Association
- National Safety Council
- National Committee on Uniform Traffic Laws and Ordinances
- National Commission Against Drunk Driving
- National Highway Traffic Safety Administration
- Mothers Against Drunk Driving (MADD)
- Remove Intoxicated Drivers (RID)
- Insurance Institute for Highway Safety

A number of countries have BAC limits of .08 or below. For example, Austria, Canada, Denmark, France, Italy, New Zealand, Spain, Switzerland, and the United Kingdom have an .08 limit, while Finland, Iceland, Japan, the Netherlands, and Norway have an .05 limit. In 1990 Sweden lowered its BAC limit to .02. Australian states have adopted either .08 or .05 limits.

Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991

ISTEA provides incentive grants to states that achieve at least four of the following milestones:

- An expedited administrative procedure for suspending the license of drunk drivers;
- A law setting a .10 blood alcohol concentration as evidence of driving while intoxicated (after three years, it must drop to .08);
- A statewide sobriety checkpoint program;
- A self-sustaining drunk driving prevention program; and
- A program to prevent drivers under age 21 from obtaining alcoholic beverages.

States can also earn supplemental grants, one of which is based on **meeting the .08 BAC criteria in the first three years of the incentive program.**

Additional Sources of Information

Alcohol Limits for Drivers: A Report on the Effects of Alcohol and Expected Institutional Responses to New Limits. NHTSA, Report Number DOT-HS-807-692, April 1991.

Alcohol-Related Risk of Fatal Driver Injuries in Relation to Driver Age and Sex. Zador, Paul, Insurance Institute for Highway Safety, Arlington, VA, April 1989.

Driving Under the Influence: A Report to Congress on Alcohol Limits. NHTSA, in press, 1992.

The Effects of Low Doses of Alcohol on Driving Skills: A Review of the Evidence. Moscowitz, Herbert and Robinson, Christopher D., National Technical Information Service, Springfield, VA, July 1987.

The Effects Following the Implementation of an 0.08 BAC Limit and an Administrative Per Se Law in California. NHTSA, Report Number DOT-HS-807-777, August 1991.

Impaired Driving Issues Compendium. Prepared by Mothers Against Drunk Driving, Irving, TX 1988.

Zero Alcohol and Other Options. Special Report 216, Transportation Research Board, National Research Council, Washington, DC, 1987.

State Legislative Fact Sheet

Zero-Tolerance Laws to Reduce Alcohol-Impaired Driving by Youth

The U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) encourages States to have laws designed to reduce drinking and driving among younger drivers. Such laws would:

- establish that any measurable amount of alcohol in the blood, breath, or urine of a driver under age 21 would be an "illegal per se" offense; and
- provide for immediate driver license suspension periods for those under age 21 who exceed the applicable blood alcohol concentration (BAC) limit.

All 50 States and the District of Columbia now have laws that prohibit the purchase and public possession of alcoholic beverages by those under the age of 21. Therefore, it would seem reasonable to expect drivers under the age of 21 to have no alcohol in their systems, and the appropriate BAC for these drivers would be zero. However, NHTSA recognizes that, given the present level of technology of alcohol breath testing devices, it is difficult for law enforcement officers to detect extremely low amounts of alcohol in the body. It is for this reason that the agency generally supports States that have laws establishing a BAC level of .02 or less at which it is illegal for those under the age of 21 to operate a motor vehicle. Also, it should be noted that underage drinking drivers represent a greater risk for crash involvement than do older drivers.

Younger drivers place a high value on their driver's licenses, and the threat of license revocation has proved to be an especially effective sanction for this age group.

Key Facts

- More than 43% of all deaths of 15 to 20 year olds result from motor vehicle crashes. An estimated 47% of these fatalities were in alcohol-related crashes in 1991. Estimates are that 3,105 persons in this age group died in alcohol-related crashes in 1991.
- In 1991, 20% of 15 to 20 year old drivers involved in fatal crashes were intoxicated. The alcohol involvement rate for young drivers, based on the total licensed driver population, is about twice that of the over 21 age driver.
- NHTSA estimates that 941 lives were saved in 1991 by age 21 drinking laws. Since 1982, it is estimated that almost 8,743 lives have been saved in the affected ages by these laws. However, young people under age 21 are still greatly over-represented in alcohol-related crashes and fatalities.

This "Fact Sheet", published by the National Highway Traffic Safety Administration (NHTSA), has been reformatted to be consistent with the other material in Volume III.

- Driver license revocation or suspension has proven to be an effective deterrent in reducing crashes and the reoccurrence of alcohol-related driver offenses in the general population. Some state licensing officials believe sanctions have an even greater effect on younger drivers, since they value their driver's license so highly.

States with Special Laws for Youth

Fourteen states have lower BAC limits for underage drivers: Arizona, California, Georgia, Maine, Maryland, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, Utah, Vermont and Wisconsin. These BAC limits vary from .00 to .06%. Only Arizona, Maryland, Maine, Rhode Island and Utah provide for lower limits for everyone below 21. NHTSA supports the use of age 21 as an appropriate threshold for lower BAC limits and longer suspension periods, which corresponds to age 21 alcohol purchase laws.

How The Laws Work

Typically, so-called zero tolerance laws provide that any amount of alcohol in the body of a driver under age 21 (generally measured as .02% BAC or greater) is an offense for which the driver's license may be suspended for a period varying from 10 days to three months. These laws should allow a police officer to require a breath test from any driver under the age of 21, if the officer has probable cause to believe that the individual has been drinking (and should not require that the officer have probable cause to suspect actual impairment). Refusal to take such a test should result in license suspension under implied consent or administrative license revocation (ALR) laws. In the 31 States and the District of Columbia with ALR laws, providing a sample that is positive for alcohol should result in license suspension under that law. Currently, States vary in whether the special BAC level for underage drivers is included in their ALR law.

Other states, such as Delaware, Illinois and Massachusetts, have taken the approach of extending the period of license suspension and increasing other penalties for underage youth without changing the BAC definition of an offense. Many states have extended the period of license suspension and also changed the BAC definition.

Cost Benefit Estimates

An in-progress NHTSA evaluation of the .02% law in Maryland has shown a significant decrease in the number of drivers under age 21 involved in crashes who, police report, "had been drinking." A study of the .02% BAC law in Maine based on self-reported behavior showed that drivers under age 21 claim they drive less after drinking and have been involved in fewer crashes. This was especially true among those drivers who indicated they were aware of the law.

Making any amount of alcohol in the body of an underage person an offense can make the enforcement effort easier. If the officer has any reason to suspect that the individual has been drinking, he or she can demand a breath test and take action to arrest the underage driver. Passive sensors, which can detect low BACs, permit the police to identify individuals with small amounts of alcohol in their bodies. This has the potential to reduce enforcement and adjudication time and expense, particularly if handled in an administrative process.

Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991

ISTEA provides incentive grants to states that achieve at least four of the following milestones:

- An expedited administrative procedure for suspending the license of drunk drivers;
- A law setting a .10 blood alcohol concentration as evidence of driving while intoxicated (after three years, it must drop to .08);
- A statewide sobriety checkpoint program;
- A self-sustaining drunk driving prevention program; and
- A program to prevent drivers under age 21 from obtaining alcoholic beverages.

States can also earn supplemental grants, one of which is based on **adopting the .02 blood alcohol concentration limit for drivers under age 21.**

Additional Sources of Information

A number of national organizations and reports have supported legislation of this type. Generally, the recommendation is for longer license suspension for driving with any measurable BAC for all drivers under the legal drinking age of 21. The organizations and reports are as follows:

Lower BAC Limits For Youths: Evaluation of the Maryland .02 Law. NHTSA study in-progress.

An Improved Driver Entry System For Young Novice Drivers. NHTSA in cooperation with the American Association of Motor Vehicle Administrators, Report No. DOT-HS-807-469, Washington, D.C. September 1989.

Preliminary Effect of Maine's 1982 .02 Laws to Reduce Teenage Driving After Drinking. R. Hingson et al, Boston, 1986.

Proceedings of the Surgeon General's Workshop On Drunk Driving. U.S. Department of Health & Human Services, Public Health Service, Washington, D.C., December 1988.

Proceedings of the Youth Forum on Traffic Safety Initiatives. NHTSA, Washington, D.C., 1990.

Youth Driving Without Impairment: Report on the Youth Impaired Driving Public Hearings. National Commission Against Drunk Driving, Report Number DOT-HS-807-347, Washington, D.C., December 1988.

Youth Legislative Compendium. Prepared by Mothers Against Drunk Driving, Irving, TX, 1990.

State Legislative Fact Sheet

Administrative License Revocation

The U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) encourages states to require prompt, mandatory suspension of drunk drivers' licenses for alcohol and/or other drug test failure and refusal. Traffic crashes are the greatest single cause of death for every age between 6 and 33, and 56 percent of those fatalities involve alcohol and/or other drugs. The suspension or revocation of a person's driver's license for driving while under the influence of alcohol or other drugs has proven to be a most successful deterrent to this behavior. Administrative license revocation (ALR) laws are based on objective tests (chemical, breath or blood), similar to "illegal per se" criminal laws against impaired driving. Administrative license revocation allows police and driver licensing authorities to revoke the driver's license swiftly, without long delays while waiting for criminal trial, and protects the offender's right to due process through an appeal process.

Key Facts

- In 1991, 41,462 persons were killed and many times that number were seriously injured in highway crashes in the U.S. Forty-eight percent of these fatalities were alcohol-related.
- As of July 1, 1992, thirty-one states and the District of Columbia have adopted some form of administrative license revocation.
- To date, all challenges in state courts have found administrative revocation laws constitutional.
- The Supreme Court has found that the right of due process is not violated if a driver's license is suspended prior to an administrative hearing, as long as provisions are made for a swift post-suspension hearing. (*Mackey v. Montrym*, 43 U.S. 1 (1979).
- An independent study found that administrative license revocation laws reduced fatal crashes approximately nine percent during high-risk (late night) periods of alcohol involvement.
- Minnesota, New Mexico, Nevada, North Carolina, Oklahoma, Oregon, West Virginia and Wisconsin have observed significant reductions in alcohol-related fatal crashes following the implementation of administrative license revocation procedures.
- Based on data obtained in an agency-sponsored study of the effects of certain types of legislation, NHTSA estimates that 347 additional lives could have been saved, in 1990, if administrative license revocation laws had been adopted in the 21 states without administrative revocation.

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- Publicity is an important factor. A NHTSA-sponsored study carried out in Nevada found a 12 percent reduction in alcohol-related crashes following implementation of a publicity campaign designed to inform the public about the administrative license revocation procedure.
- Studies have shown that very few drivers whose licenses are revoked for drinking and driving offenses actually lose their jobs because of the suspension. A study in Delaware determined that only 1.5 percent of the drivers whose licenses were revoked lost their jobs, and a number of these individuals had already been at risk of losing them due to poor performance, alcoholism, etc. Similarly, a Mississippi study showed that the short first-time DWI offenders did not have a significant impact on their income status.

What Provisions Should Be Included in an Administrative Revocation Law?

- The language of the administrative license revocation law should be consistent with the provisions of the state's administrative procedures law.
- The arresting officer should, at the time of arrest, serve the notice of revocation, take the offender's license and issue a temporary license.
- The opportunity for an administrative appeals hearing should be made available to the driver.
- The hearing request should not be allowed to delay the revocation. If the hearing request does not stay the revocation, between 24 and 30 percent of the offenders request a hearing. If the hearing request stays the revocation, nearly 100 percent of the offenders request a hearing.
- The initial revocation for test failure should be at least 90 days with full revocation for 30 days, followed by at least 60 days of restricted driving. Restricted driving licenses should be permitted only in very limited circumstances, and only after an initial "hard" suspension period. The initial revocation for a test refusal should be a full 90 days, with no restricted driving privileges. For a repeat offense within five years, the revocation should be a full revocation for one year, with no restricted driving privileges.
- The Administrative sanction is handled separately from the criminal proceeding. The outcome of this administrative action should have no bearing on the criminal proceedings, including sanctions.

How Much Does This Type of Program Cost?

A 1991 NHTSA-sponsored study looked at the cost and benefits associated with administrative license revocation laws in Illinois, Mississippi and Nevada. The study found that start-up and operating costs were more than covered by reinstatement fees assessed to offenders. In addition, the annual savings in costs of night-time crashes ranged from $37 million in Nevada to $104 million in Mississippi.

How Can This Type Program Be Financed?

The offenders, rather than taxpayers, should pay for these programs. Some states have significantly increased the reinstatement fee for those whose licenses are revoked for driving while intox-

icated (DWI), some have raised all reinstatement fees, and others have increased all license application and renewal fees. Other fines, fees and taxes that can be considered include alcoholic beverage taxes that can be earmarked for alcohol program expenses.

Who Supports Administrative License Revocation?

The following organizations have publicly supported administrative license revocation:

- Advocates for Highway and Auto Safety
- Allstate Insurance
- American Alliance for Rights and Responsibilities
- American Association of Motor Vehicle Administrators
- American Automobile Association
- American Coalition for Traffic Safety
- American Trucking Association
- The Century Council
- Federal Highway Administration
- GEICO
- General Federation of Women's Clubs
- Highway Users Federation for Safety and Mobility
- Insurance Information Institute
- Insurance Institute for Highway Safety
- International Association of Chiefs of Police
- Kemper Insurance Group
- Mothers Against Drunk Driving (MADD)
- Motor Vehicle Manufacturers Association
- National Association of Governors' Highway Safety Representatives
- National Association of Independent Insurers
- National Association of State Alcohol and Drug Abuse Directors
- National Association of State Emergency Medical Service Directors
- National Coalition to Prevent Intoxicated Driving
- National Commission Against Drunk Driving
- National Highway Traffic Safety Administration

- Operation Lifesaver
- National Safety Council
- National Transportation Safety Board
- Nationwide Insurance
- Office of Substance Abuse Prevention
- Police Executive Research Forum
- Remove Intoxicated Drivers (RID)
- Students Against Driving Drunk (SADD)
- Traffic Safety Now
- U.S. Department of Justice
- USAA Insurance

The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991

ISTEA provides incentive grants to States that achieve at least four of the following milestones:

- An expedited administrative procedure for suspending the license of drunk drivers;
- A law setting a .10 blood alcohol concentration as evidence of driving while intoxicated (after three years, it must drop to .08);
- A statewide sobriety checkpoint program;
- A self-sustaining drunk driving prevention program; and
- A program to prevent drivers under age 21 from obtaining alcoholic beverages.

States can earn more grant funds by meeting additional goals.

Research Studies:

An Assessment of the Effects of Publicizing Administrative License Revocation for DWI in Nevada. John Lacey, et al, University of North Carolina Highway Safety Research Center, DOT-HS-807-600, March 1990.

Changes in Alcohol-Involved Fatal Crashes Associated with Tougher State Alcohol Legislation. Sigmastat, Inc. for NHTSA, July 1989.

Cost-Benefit Analysis of Administrative License Suspension. John Lacey, et al, Mid-America Research, DOT-HS-807-689, January 1991.

Fatal Crash Involvement and Laws Against Alcohol-Impaired Driving. Paul L. Zador, et al, Insurance Institute for Highway Safety, February 1989.

Impact of Driver's License Suspension on Employment Stability of Drunken Drivers. Elisabeth Wells-Parker and Pamela Cosby, Mississippi Alcohol Safety Education Program, Social Science Research Center, Mississippi State University, June 1987.

Sample State Administrative Driver License Suspension Forms, DOT-HS-807-547, March 1990.

Additional Sources of Information:

"Questions Most Frequently Asked About Administrative License Revocation"

"Reducing Crashes Through Administrative License Revocation"

"Administrative License Revocation Cost and Benefits"

"Court Cases Upholding Administrative Revocation Laws"

"Administrative License Revocation: Resource Manual"

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