

CONTROLLED SUBSTANCES

<TARGET><BILL></BILL><SUBJECT>CONTROLLED
SUBSTANCES</SUBJECT><COMM></COMM></TARGET>

30-LS0742\A
Martin
3/22/17

SENATE BILL NO.
IN THE LEGISLATURE OF THE STATE OF ALASKA
THIRTIETH LEGISLATURE - FIRST SESSION

BY SENATOR MEYER

Introduced:
Referred:

A BILL
FOR AN ACT ENTITLED

1 **"An Act relating to controlled substances; and relating to the Controlled Substances**
2 **Advisory Committee."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * **Section 1.** AS 11.71.110 is amended to read:

5 **Sec. 11.71.110. Duties of committee.** The committee shall

6 (1) Advise the governor of the need to add, delete, or reschedule
7 substances in the schedules in AS 11.71.140 - 11.71.190;

8 (2) recommend regulations for adoption by the Board of Pharmacy to
9 prevent excessive prescription of controlled substances and the diversion of
10 prescription drugs into illicit channels;

11 (3) evaluate the effectiveness of programs in the state providing
12 treatment and counseling for persons who abuse controlled substances;

13 (4) recommend programs to the Alaska Court System to be instituted
14 as alternatives to the prosecution or imprisonment of offenders who have no prior

1 criminal record involving controlled substance offenses and who are charged with
2 crimes involving controlled substances;

3 (5) review and evaluate enforcement policies and practices of the
4 Department of Public Safety and the Department of Law with regard to crimes
5 involving controlled substances, and recommend modifications of those policies and
6 practices consistent with the committee's assessment of the probable danger of
7 particular controlled substances; [AND]

8 (6) review budget requests and recommend amounts for appropriations
9 to the governor and the legislature for departments and agencies responsible for

10 (A) enforcing criminal laws pertaining to controlled
11 substances;

12 (B) providing treatment and counseling of persons who abuse
13 controlled substances; and

14 (C) regulating the legitimate handling of controlled substances;

15 **and**

16 **(7) add substances in the schedules in AS 11.71.140 - 11.71.190 on**
17 **an emergency basis as provided in AS 11.71.125.**

18 * **Sec. 2.** AS 11.71 is amended by adding a new section to read:

19 **Sec. 11.71.125. Emergency controlled substance scheduling.** (a) The
20 committee may, by regulation, subject to (e) of this section, schedule a controlled
21 substance analog in schedule IA under AS 11.71.140, regardless of whether the
22 substance is substantially similar to a controlled substance in AS 11.71.140 or
23 11.71.150, if the committee finds that scheduling the substance on an emergency basis
24 is necessary to avoid an imminent hazard to public safety and the substance is not
25 included in AS 11.71.140 - 11.71.190 or an exemption or approval under 21 U.S.C.
26 355 is not in effect for the substance.

27 (b) The committee may, by regulation, subject to (e) of this section, schedule a
28 novel psychoactive substance in a schedule under AS 11.71.140 - 11.71.190 if the
29 committee finds that scheduling the substance on an emergency basis is necessary to
30 avoid an imminent hazard to public safety and the substance is not included in any
31 other schedule or an exemption or approval under 21 U.S.C. 355 is not in effect for the

1 substance.

2 (c) To determine whether to schedule a substance on an emergency basis, the
3 committee shall

4 (1) assess the degree of danger or probable danger of the substance by
5 considering

6 (A) the actual or probable abuse of the substance including the

7 (i) history and current pattern of abuse;

8 (ii) scope, duration, and significance of abuse; and

9 (iii) degree of actual or possible detriment that may
10 result from the abuse; and

11 (B) the risk to public health;

12 (2) consider whether the substance has been scheduled on a temporary
13 basis under federal law and may also consider clandestine importation, manufacture,
14 or distribution of the substance.

15 (d) The committee shall post a public notice on the Alaska Online Public
16 Notice System 30 days before the effective date of an emergency scheduling action.

17 (e) A substance that is added by the committee under this section may remain
18 on the schedule for a period not to exceed 18 months. If, at the next regular session of
19 the legislature, the legislature fails to enact a law that makes the temporary designation
20 of the added substance permanent, the addition shall expire.

21 (f) A controlled substance analog must be treated as a schedule IA substance
22 under AS 11.71.140. Within 10 days after the initiation of a prosecution with respect
23 to a controlled substance analog, the prosecuting attorney shall notify the committee of
24 information relevant to emergency scheduling. If the committee makes a final
25 determination that the controlled substance analog should not be scheduled, a
26 prosecution relating to that substance as a controlled substance analog may not be
27 commenced or continued.

28 (g) Upon notice of a prosecution under (f) of this section, the committee shall
29 initiate scheduling of the controlled substance analog on an emergency basis under
30 this section. The scheduling shall be for the same period as provided in (e) of this
31 section.

1 (h) Authority to schedule substances under this section does not extend to
2 tobacco or alcoholic beverages as defined in AS 04.21.080.

3 (i) In this section, "controlled substance analog"

4 (1) means a substance the chemical structure of which is substantially
5 similar to the chemical structure of a controlled substance included in schedule IA or
6 IIA and

7 (A) that has a stimulant, depressant, or hallucinogenic effect on
8 the central nervous system substantially similar to the stimulant, depressant, or
9 hallucinogenic effect on the central nervous system of a controlled substance
10 included in schedule IA or IIA; or

11 (B) with respect to a particular individual, that the individual
12 represents as having or intends to have a stimulant, depressant, or
13 hallucinogenic effect on the central nervous system substantially similar to the
14 stimulant, depressant, or hallucinogenic effect on the central nervous system of
15 a controlled substance included in schedule IA or IIA;

16 (2) does not include

17 (A) a controlled substance;

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

20 (C) a substance for which an exemption is in effect for
21 investigational use by certain persons under 21 U.S.C. 355, to the extent that
22 the conduct with respect to the substance is consistent with the exemption; or

23 (D) any substance to the extent that the substance is not
24 intended for human consumption before an exemption takes effect with respect
25 to the substance.

16B Fla. Jur 2d Criminal Law—Substantive Principles/Offenses § 1359

Florida Jurisprudence, Second Edition
February 2017 Update
Criminal Law—Substantive Principles and Offenses

Elizabeth Bosek, J.D., John Bourdeau, J.D., Joy T. Cook Carmichael, J.D., Paul M. Coltoff, J.D., Edward K. Esping, J.D., Mary Therese K. Fitzgerald, J.D., Kathleen Geiger, J.D., Stephanie A. Giggetts, J.D., Christine M. Gimeno, J.D., LL.M., Tammy E. Hinshaw, J.D., Janice Holben, J.D., Beth Bates Holliday, J.D., Gary A. Hughes, J.D., Rachel M. Kane, M.A., J.D., John Kimpflen, J.D., Sonja Larsen, J.D., Stephen Lease, J.D., Judith Morris, J.D., Charles J. Nagy, J.D., Mark T. Rhook, J.D., Kimberly C. Simmons, J.D., Susan L. Thomas, J.D., Barbara J. Van Arsdale, J.D., Mary Ellen West, J.D., Judy E. Zelin, J.D. and Ann B. Vaden, J.D., Robert B. McKinney, J.D., Anne E. Melley, J.D., LL.M., Mary Babb Morris, J.D. of the staff of the National Legal Research Group, Inc.

VII. Crimes or Offenses against Public Order and Tranquility
A. Narcotics and Other Controlled Substances
1. Drug Abuse Prevention and Control
c. Classification of Controlled Substances

§ 1359. Administrative classification of new substances; “designer” drugs

Topic Summary Correlation Table References

West’s Key Number Digest

West’s Key Number Digest, Controlled Substances 9

A.L.R. Library

Construction and Application of Controlled Substances Act, 21 U.S.C.A. secs. 801 et seq.—U.S. Supreme Court Cases, 30 A.L.R. Fed. 2d 137

The Florida Legislature has recognized that new substances are being created which are not controlled under the Florida Comprehensive Drug Abuse Prevention and Control Act but which have a potential for abuse similar to or greater than that for substances already controlled.¹ These new substances are sometimes called “designer drugs” because they can be designed to produce a desired pharmacological effect and to evade the controlling statutory provisions, and are being manufactured, distributed, possessed, and used as substitutes for controlled substances.² The hazards attributable to the traffic in and use of these designer drugs are increased because their unregulated manufacture produces variations in purity and concentration.³ Moreover, many such new substances are untested, and it cannot be immediately determined whether they have useful medical or chemical purposes.⁴

As a result, the uncontrolled importation, manufacture, distribution, possession, or use of these designer drugs has a substantial and detrimental impact on the health and safety of the people of Florida.⁵ Because such substances can be created more rapidly than they can be identified and controlled by legislative action, it is necessary to delegate to an administrative agency restricted authority to identify and classify new substances that have a potential for abuse so that they can be controlled in the same manner as other substances currently controlled.⁶

Accordingly, the Drug Control Act provides that with respect to any substance not currently controlled under the Act’s schedules, the Attorney General may by rule add a substance to a schedule or transfer a substance between schedules, if he or she finds that it has a potential for abuse and makes with respect to it the other findings appropriate for classification in the particular schedule in which it is to be placed,⁷ or remove a substance previously added to a schedule if he finds that it does not meet the requirements for inclusion in that schedule.⁸ Such rules are to be adopted in accordance with the rule-making provisions of the Administrative Procedure Act.⁹

In making findings with respect to any substance proposed to be controlled or removed from control, the Attorney General is to consider the following factors:¹⁰

- (1) the substance's actual or relative potential for abuse;
- (2) scientific evidence of the substance's pharmacological effect, if known;
- (3) the state of current scientific knowledge regarding the substance;
- (4) the substance's history and current pattern of abuse;
- (5) the scope, duration, and significance of abuse;
- (6) what, if any, risk there is to the public health;
- (7) the substance's psychic or psychological dependence liability; and
- (8) whether the substance is an immediate precursor of a substance already controlled under the Drug Abuse Prevention and Control Act.

Prior to initiating proceedings to add, transfer, or remove a substance from a schedule, the Attorney General must request from the Department of Health and the Department of Law Enforcement medical and scientific evaluations of any substance under consideration and a recommendation as to the appropriate classification, if any, of such substance as a controlled substance; if both of those agencies recommend that a substance not be controlled, the Attorney General may not control it.¹¹ Abbreviated rule-making procedures are provided for if the Attorney General finds that the scheduling of a substance in Schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety.¹²

The Attorney General must exempt from the rule's application any nonnarcotic substance which may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription.¹³ Also, the Attorney General may exempt any compound, mixture, or preparation containing a substance controlled by the rule if he finds that such compound, mixture, or preparation meets certain requirements which vitiate the potential for abuse.¹⁴

The Attorney General must report to the legislature by March 1 of each year concerning new substance classification rules adopted during the previous year. Each rule so reported will expire on the following June 30, unless the legislature adopts its provisions as an amendment to the Drug Control Act.¹⁵

Practice Tip:

In construing the Drug Control Act's new substance classification provisions, due consideration and great weight must be given to interpretations of the United States Attorney General and the federal courts relating to a section of the Comprehensive Drug Abuse Prevention and Control Act of 1970,¹⁶ and the substantive rules adopted pursuant to such provisions may not be inconsistent with the rules of the United States Attorney General and the decisions of the federal courts interpreting the said federal statute.¹⁷

The adoption of a rule transferring a substance from one schedule to another or removing a substance from a schedule does not affect prosecution or punishment for any crime previously committed with respect to that substance.¹⁸

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Footnotes

- ¹ § 893.035(1)(a), Fla. Stat.
As to drug classification as determined by potential for abuse, generally, see § 1352.
- ² § 893.035(1)(a), Fla. Stat.
- ³ § 893.035(1)(b), Fla. Stat.
- ⁴ § 893.035(1)(c), Fla. Stat.
- ⁵ § 893.035(1)(d), Fla. Stat.

- 6 § 893.035(1)(e), Fla. Stat.
As to classification of new substances constituting “controlled substance analogs,” see § 1360.
- 7 § 893.035(2)(a), Fla. Stat.
- 8 § 893.035(2)(b), Fla. Stat.
- 9 § 893.035(2), Fla. Stat.
- 10 § 893.035(4), Fla. Stat.
- 11 § 893.035(5), Fla. Stat.
- 12 § 893.035(7), Fla. Stat.
- 13 § 893.035(6)(a), Fla. Stat.
- 14 § 893.035(6)(b), Fla. Stat.
- 15 § 893.035(9), Fla. Stat.
- 16 21 U.S.C.A. § 811.
- 17 § 893.035(11), Fla. Stat.
- 18 § 893.035(12), Fla. Stat.



Certification Page
Regular and Emergency Rules
 Revised May 2014

Emergency Rules (After completing all of Sections 1 and 2, proceed to Section 5 below)

Regular Rules

1. General Information

a. Agency/Board Name Attorney General (in his capacity as Commissioner of Drugs and Substances Control)		
b. Agency/Board Address 2320 Capitol Avenue	c. City Cheyenne	d. Zip Code 82002
e. Name of Contact Person John Brodie	f. Contact Telephone Number (307) 777-7977	
g. Contact Email Address john.brodie@wyo.gov	h. Adoption Date August 29, 2016	
i. Program Schedule V - Controlled Substances		

2. Rule Type and Information: For each chapter listed, indicate if the rule is New, Amended, or Repealed.

If "New," provide the Enrolled Act numbers and years enacted:

c. Provide the Chapter Number, Short Title, and Rule Type of Each Chapter being Created/Amended/Repealed
 (Please use the Additional Rule Information form for more than 10 chapters, and attach it to this certification)

Chapter Number:	Chapter Name:	<input checked="" type="checkbox"/> New	<input checked="" type="checkbox"/> Amended	<input type="checkbox"/> Repealed
1	Additional Controlled Substances	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Chapter Number:	Chapter Name:	<input type="checkbox"/> New	<input type="checkbox"/> Amended	<input type="checkbox"/> Repealed
Chapter Number:	Chapter Name:	<input type="checkbox"/> New	<input type="checkbox"/> Amended	<input type="checkbox"/> Repealed
Chapter Number:	Chapter Name:	<input type="checkbox"/> New	<input type="checkbox"/> Amended	<input type="checkbox"/> Repealed
Chapter Number:	Chapter Name:	<input type="checkbox"/> New	<input type="checkbox"/> Amended	<input type="checkbox"/> Repealed
Chapter Number:	Chapter Name:	<input type="checkbox"/> New	<input type="checkbox"/> Amended	<input type="checkbox"/> Repealed
Chapter Number:	Chapter Name:	<input type="checkbox"/> New	<input type="checkbox"/> Amended	<input type="checkbox"/> Repealed
Chapter Number:	Chapter Name:	<input type="checkbox"/> New	<input type="checkbox"/> Amended	<input type="checkbox"/> Repealed
Chapter Number:	Chapter Name:	<input type="checkbox"/> New	<input type="checkbox"/> Amended	<input type="checkbox"/> Repealed
Chapter Number:	Chapter Name:	<input type="checkbox"/> New	<input type="checkbox"/> Amended	<input type="checkbox"/> Repealed

d. The Statement of Reasons is attached to this certification.

e. If applicable, describe the emergency which requires promulgation of these rules without providing notice or an opportunity for a public hearing:
 On May 12, 2016, the U.S. Drug Enforcement Administration published a final order placing Brivaracetam into Schedule V of the Controlled Substances Act. By statute, the Wyoming Attorney General is required to similarly control such substances. Wyo. Stat. 35-7-1011(d).

3. State Government Notice of Intended Rulemaking

a. Date on which the Notice of Intent containing all of the information required by W.S. 16-3-103(a) was filed with the Secretary of State:

b. Date on which the Notice of Intent and proposed rules in strike and underscore format and a clean copy were provided to the Legislative Service Office:

c. Date on which the Notice of Intent and proposed rules in strike and underscore format and a clean copy were provided to the Attorney General:

4. Public Notice of Intended Rulemaking

a. Notice was mailed 45 days in advance to all persons who made a timely request for advance notice. Yes No N/A

b. A public hearing was held on the proposed rules. Yes No

If "Yes:"	Date:	Time:	City:	Location:

5. Final Filing of Rules

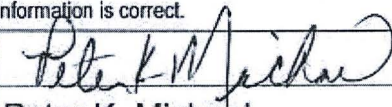
a. Date on which the Certification Page with original signatures and final rules were sent to the Attorney General's Office for the Governor's signature: August 29, 2016

b. Date on which final rules were sent to the Legislative Service Office: August 29, 2016

c. Date on which a PDF of the final rules was electronically sent to the Secretary of State: August 29, 2016

6. Agency/Board Certification

The undersigned certifies that the foregoing information is correct.

Signature of Authorized Individual <small>(Sign in ink as per Rules on Rules, Section 7)</small>	
Printed Name of Signatory	Peter K. Michael
Signatory Title	Commissioner of Drugs and Substances Control
Date of Signature	August 29, 2016

7. Governor's Certification

I have reviewed these rules and determined that they:

1. Are within the scope of the statutory authority delegated to the adopting agency;
2. Appear to be within the scope of the legislative purpose of the statutory authority; and, if emergency rules,
3. Are necessary and that I concur in the finding that they are an emergency.

Therefore, I approve the same.

Governor's Signature	
Date of Signature	

Attorney General: 1. Statement of Reasons; 2. Original Certification Page; 3. Summary of Comments (regular rules); 4. Hard copy of rules: clean and strike/underscore; and 5. Memo to Governor documenting emergency (for emergency rules only).

LSO: 1. Statement of Reasons; 2. Copy of Certification Page; 3. Summary of Comments (regular rules); 4. Hard copy of rules: clean and strike/underscore; 5. Electronic copy of rules (PDFs) emailed to Criss.Carlson@wyoleg.gov: clean and strike/underscore; and 6. Memo to Governor documenting emergency (for emergency rules only).

SOS: 1. PDF of clean copy of rules; and 2. Hard copy of Certification Page as delivered by the AG.



Office of the Attorney General

Governor
Matthew H. Mead


Criminal Division
123 State Capitol
Cheyenne, Wyoming 82002
307-777-7977 Telephone
307-777-5034 Fax

Chief Deputy Attorney General
John G. Knepper

Attorney General
Peter K. Michael

Division Deputy
David L. Delicath

MEMORANDUM

DATE: August 29, 2016
TO: Interested Parties
FROM: Peter K. Michael, Wyoming Attorney General 
SUBJECT: Statement of Principal Reasons for Emergency Rules Adoption

The Commissioner of Drugs and Substance Control is adding two new substances to Schedule I (Wyo. Stat. Ann. § 35-7-1014) and one substance to Schedule V (Wyo. Stat. Ann. § 35-7-1022) of the Wyoming Controlled Substances Act of 1971. This action is being taken in response to two final orders issued by the U.S. Drug Enforcement Administration. The first order temporarily lists Butyryl Fentanyl and Beta-Hydroxythiofentanyl into Schedule I, and the second permanently lists BRV (Brivaracetam) into Schedule V, of the Controlled Substances Act. 21 U.S.C. § 801 *et seq.* By statute, the Wyoming Attorney General is required to similarly control such substances. Wyo. Stat. Ann § 35-7-1011(d).

The substances being placed into Schedule I are synthetic opioids that have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. The substance being placed on Schedule V is a recently approved add-on treatment to other medications to treat partial onset seizures in patients age 16 years and older with epilepsy. It has an abuse potential similar to other Schedule V substances.

Chapter 1

Additional Controlled Substances

EMERGENCY RULES ARE NO LONGER IN EFFECT 120 DAYS AFTER FILING WITH THE SECRETARY OF STATE.

Section 1. **Purpose.** The purpose of these rules is to add, delete, and reschedule controlled substances in the Wyoming Controlled Substances Act of 1971. Some changes will be made to similarly control a substance in response to the publication of a final order in the Federal Register designating that substance as a controlled substance under federal law. Other changes will be made at the discretion of the Wyoming Attorney General, in his capacity as the Commissioner of Drugs and Substances Control, with the advice of the Advisory Board on Drugs and Substances Control.

Section 2. **Authority.** The Commissioner of Drugs and Substances Control's rulemaking authority is found at Wyoming Statute § 35-7-1011(a) and (d), which allow the Commissioner to add, delete, and reschedule substances to the control schedules pursuant to the Wyoming Administrative Procedure Act.

Section 3. **Additional Controlled Substances.** The Commissioner of Drugs and Substances Control adds the following substances to Schedule I:

(a) Synthetic opioids:

(i) N-(1-phenethylpiperidin-4-yl)-Nphenylbutyramide, also known as N-(1-phenethylpiperidin-4-yl)-Nphenylbutanamide, (commonly known as butyryl fentanyl);

(ii) N-[1-[2-hydroxy-2-(thiophen-2-yl)ethyl]piperidin-4-yl]-Nphenylpropionamide, also known as N-[1-[2-hydroxy-2-(2-thienyl)ethyl]-4-piperidinyl]-N-phenylpropanamide, (commonly known as eta-hydroxythiofentanyl).

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Section 2. Authority. The Commissioner of Drugs and Substances Control's rulemaking authority is found at Wyoming Statute § 35-7-1011(a) and (d), which allow the Commissioner to add, delete, and reschedule substances to the control schedules pursuant to the Wyoming Administrative Procedure Act.

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Section 3. **Additional Controlled Substances.** The Commissioner of Drugs and Substances Control adds the following substances to Schedule V:

- (a) Anti-epileptics:
 - (i) ((2S)-2-[(4R)-2-oxo-4-propylpyrrolidin-1-yl] butanamide)
(commonly known as brivaracetam; also referred to as BRV; UCB-34714; Briviact)

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LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 22, 2017

SUBJECT: Scheduling controlled substances (Work Order No. 30-LS0742\A)

TO: Senator Kevin Meyer
Attn: Christine Marasigan

FROM: Hilary V. Martin 
Legislative Counsel

Attached is the amendment you requested which authorizes the Controlled Substances Advisory Committee (Committee) to schedule controlled substance analogues and novel psychoactive substances by regulation on an emergency basis.¹

Drafting Notes

In this draft, I made the Committee the entity that can add substances by regulation. It could also be the Attorney General or the Department of Law who has that power. Under AS 11.71.120, the Committee advises the governor on the need to add to, delete from, or reschedule a controlled substance, and then the governor is to introduce a bill in accordance with the recommendation. The Committee now would also have the power to schedule controlled substance analogues and novel psychoactive substances on an emergency basis.

The section regarding prosecution for a new substance is problematic. This would allow a prosecutor to charge someone for a new drug that has not been scheduled by the legislature and has also not been emergency scheduled as provided in this bill. It is unclear how a person could be charged if the substance was not scheduled. Additionally, the prosecutor would have to wait until the Committee makes a decision before proceeding with the prosecution.

I added a definition for "controlled substance analog" based on the Washington definition. Please review it carefully.

You should be aware that the Alaska controlled substance schedules do not match the federal schedules. For example, marijuana is a Schedule I controlled substance under

¹ The materials you provided indicate that the language is based on Hawaii, Kansas, and Washington statutes. While these states have some of the language proposed, I was unable to find language authorizing scheduling of novel psychoactive substances.

federal law, while it is a Schedule VIA controlled substance under state law.² Also, a number of hallucinogens, such as LSD, PCP, and peyote, are Schedule IIA in Alaska, while they are Schedule I under federal law. Similarly a number of opiates are Schedule IA in Alaska and Schedule II under federal law. There are other differences. Requiring the Committee to follow federal scheduling could lead to inconsistencies with the current Alaska schedules.

Notice

The emergency scheduling procedures require that the Committee post notice of the scheduling on the Alaska Online Public Notice System. However, as the emergency scheduling does not happen through the normal regulatory procedures, the emergency scheduled substances would not be listed in statute. Therefore, a person may not have constitutionally sufficient notice as to which controlled substances are legal, and which are illegal.

Improper Delegation

Giving the authority to the Committee to add controlled substances by regulation is likely an improper delegation of legislative power. This delegation gives the Committee the power to, by regulation, amend statutes and specific provisions of statutes. Art. II, sec. 1, Constitution of the State of Alaska, vests the legislative power in the legislature. Allowing the Committee by regulation to add a new substance to the schedules set by the legislature by statute is, as a matter of constitutional law, extremely suspect, at best. This amendment gives the Committee the authority to add to statutes enacted by the legislature which seems to be a clear violation of separation of powers in Alaska. The Committee is in essence making law as opposed to the role of the executive branch to carry out the laws enacted by the legislature.

This delegation is particularly stark given the penalties for the controlled substance crimes. Misconduct involving a controlled substance in the first degree is an unclassified felony.³ That statute states:

- (a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the first degree if the person
 - (1) delivers any amount of a schedule IA controlled substance to a person under 19 years of age who is at least three years younger than the person delivering the substance;
 - (2) delivers any amount of a schedule IIA or IIIA controlled substance to a person under 19 years of age who is at least three years younger than the

² The federal schedules can be found at 21 CFR 1308.11 - 1308.15. The Alaska schedules are found at AS 11.71.140 - 11.71.190.

³ AS 11.71.010.

person delivering the substance; or
(3) engages in a continuing criminal enterprise.

A person could therefore receive an unclassified felony for a substance that is not listed in the schedules in statute, but is instead scheduled by regulation by the Committee.⁴

The bill also requires controlled substance analogues to schedule IA, regardless of the similarity to an existing controlled substance. This means that an analogue of a substance could be punished greater than the substance.

In *State v. Gallion*, the Utah Supreme Court found unconstitutional a provision that allowed the Utah attorney general to add, delete, or reschedule substances on the controlled substance schedules.⁵ The Court stated: "In the Controlled Substances Act, the administrator not only determines that a substance should be controlled, he further schedules the substance, which in effect, declares the magnitude of the penalty and fixes the punishment. The administrator is exercising an essential legislative function which cannot be transferred to him."⁶ The Court cited to a similar Mississippi case in which the delegation to the Mississippi State Board of Health to add, delete, or reschedule substances was found unconstitutional. The Mississippi Supreme Court stated:

The practical effect of moving a substance from one schedule and placing it in another is to increase or diminish the criminal penalty for violation of the act. It is likewise true that, if substances are added to or deleted from any of the schedules such action makes acts pertaining to the substances so added a crime, and as to substances deleted, abolishes a crime. The result is that the State Board of Health is given the authority to define a crime, and ordain its punishment. The exclusive authority of the legislature to define crimes and fix the punishment therefor is without question.^[7]

The Utah Supreme Court further noted that the delegation to the attorney general would complicate trials:

Criminal trials would be unduly complicated, for the defendant would have the right to challenge the administrative procedure and the findings where a substance has been scheduled or rescheduled. A similar determination by the legislature could not be challenged. . . . A

⁴ The sentencing range for misconduct involving a controlled substance in the first degree is five years to 99 years. AS 12.55.125(b).

⁵ 572 P.2d 683 (Utah 1977).

⁶ *Id.* at 689.

⁷ *Id.* (quoting *Howell v. State*, 300 So.2d 774, 779 - 780 (Miss. 1974)).

Senator Kevin Meyer
March 22, 2017
Page 4

determination of the elements of a crime and the appropriate punishment therefor are, under our Constitutional system, judgments, which must be made exclusively by the legislature.⁸

I believe that the Alaska Supreme Court, if faced with a similar challenge, would also find that delegation to the Committee to add controlled substances, even on an emergency basis, is an excessive delegation of legislative power.

If I may be of further assistance, please advise.

HVM:boo
17-294.boo

Attachment

⁸ *Id.* at 689 - 690.

CONCEPTUAL OUTLINE: SCHEDULING OF CONTROLLED SUBSTANCES

Bill Description Authorize the Attorney General to identify in regulation a controlled substance. The regulations would be adopted by the Attorney General after recommendation from the Controlled Substances Advisory Committee. A controlled substance designated in regulation could be put into the statutory designation for controlled substances, but would not need to be.

Authority for Attorney General

- Amend AS 44.23, Department of Law, to provide the Attorney General with authority to, by regulation, schedule a controlled substance.
- Amend AS 11.71 controlled substance advisory committee, to remove current authority to advise the governor to add a controlled substance and add as a duty to advise the Attorney General to make a finding that a substance should be added to the controlled substance regulation schedule. This will require changes to the duties and authority of the committee.
- Amend AS 11.71.140 – 200 to account for regulations that may also add substances to the schedules, clarify any restrictions on substances the Attorney General could schedule in regulation.

Regulations

- Amend AS 44.62 as needed to account for any special rules on scheduling controlled substance by regulation.
- Amend AS 44.62.250 and 44.62.260 to provide for any special rules in scheduling controlled substances by regulation, most importantly, provide a longer period (240 days instead of 120) for an emergency regulation to be made permanent.

Legislature

- The legislature may wish to have authority to ratify the Attorney General's scheduling action. Alternately, if the legislature nullifies a controlled substance regulation, it would not need special authority but could pass legislation under its current authority. *See, Manual of Legislative Drafting*, pg. 40.
- Provide clarity that if a regulation is repealed, convictions made under that regulation are not affected.



Controlled Substances: Scheduling Authorities, Acts, and Schedules

Research current through November 18, 2014.

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State	Scheduling Body or Bodies	Statutory Authority	<u>Controlled Substance Act and Schedule Locations</u>
Alabama	State Board of Health	Ala.Code § 20-2-20	Ala. Code. § 20-2-1, et seq. (Act) Ala. Code §§ 20-2-20 to 2-32 (schedules; last updated 3.18.2014) Ala. Admin. Code r. Ch. 420-7-2, App. (schedules; last updated 7.25.2014)
Alaska	Governor with advice from the Controlled Substance Advisory Committee	AS § 11.71.120 AS § 11.71.100 (make-up of Advisory Committee)	AS § 17.30.20 et seq. (manufacture, distribution, prescription, dispensing) AS §11.71.010, et seq. (criminal offenses, schedules)
Arizona	Legislature and State Board of Pharmacy	Not directly specified by statute, but A.R.S. § 36-2521 provides that the Board of Pharmacy “may promulgate necessary and reasonable rules relating to the registration and control of the manufacture, distribution and dispensing of controlled substances.”	A.R.S. § 36-2501, et seq. (Act) A.R.S. §§ 36-2511 to 2516 (schedules)
Arkansas	Director of the Department of Health	A.C.A. § 5-64-201	A.C.A § 5-64-101, et seq. (Act; schedules within are out-of-date) AR ADC 007.07.2 (schedules; updated 7.23.2014)

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California	Legislature and State Board of Pharmacy	Not directly specified by statute, but Cal.Bus. & Prof.Code § 4011 provides that Board of Pharmacy “shall administer and enforce” the Uniform Controlled Substances Act.	Cal. Health & Safety §11000, et seq. (Act) Cal. Health & Safety §§ 11053-58 (schedules)
Colorado	Board of Pharmacy and General Assembly	C.R.S.A. § 18-18-201	C.R.S.A. § 18-18-101, et seq. (Act) C.R.S.A. §§ 18-18-201 to 18-207 (schedules)
Connecticut	Commissioner of Consumer Protection with advice from the Commissioner of Pharmacy	C.G.S.A. § 21a-243	C.G.S.A. §§ 21a-240 to 315 (dependency producing drugs) C.G.S.A. §§ 21a-316 to 334 (controlled substance registration) Regs. Conn. State Agencies §§ 21a-243-7 to 243-11 (schedules)
Delaware	Secretary of the Department of State	16 Del.C. § 4711	16 Del.C. § 4701, et seq. (Act) 16 Del.C. §§ 4711-23 (schedules)
District of Columbia	Mayor of D.C. with provision for public notice and comment	DC ST § 48-902.01	DC ST § 48-901.01, et seq. (Act) DC ST §§ 48-902.01 to 902.14 (schedules)

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<u>State</u>	<u>Scheduling Body or Bodies</u>	<u>Statutory Authority</u>	<u>Controlled Substance Act and Schedule Locations</u>
Florida	Attorney General with medical and scientific evaluations from the Departments of Health and Law Enforcement, as well as recommendations as to the classification of the substance	F.S.A. §§ 893.035, 893.0355	F.S.A. § 893.01, et seq. (Act) F.S.A. § 893.03 (schedules)
Georgia	State Board of Pharmacy	Ga. Code Ann. § 16-13-22	Ga. Code Ann. § 16-13-1, et seq. (Act) Ga. Code Ann. §§ 16-13-22 to 13-29.2 (schedules)
Hawaii	Legislature with recommendations from the Department of Public Safety; Administrator of the narcotics enforcement division of the Dept. of Public Safety on emergency basis	HRS § 329-11	HRS § 329-1, et seq. (Act) HRS §§ 329-11 to 23 (schedules)
Idaho	Board of Pharmacy	I.C. § 37-2702	I.C. § 37-2701, et seq. (Act) I.C. §§ 37-2702 to 2714 (schedules)
Illinois	Department of Human Services	720 ILCS § 570/201	720 ILCS § 570/100, et seq. (Act) 720 ILCS §§ 570/201-219 (schedules)

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State	Scheduling Body or Bodies	Statutory Authority	<u>Controlled Substance Act and Schedule Locations</u>
Indiana	General Assembly with recommendations from the Board of Pharmacy; Board may reclassify a substance by rule, and shall recommend the same reclassification to the General Assembly	IC §§ 35-48-2-1 & 35-48-2-14	IC § 35-48-1-2, et seq. (Act) IC §§ 35-48-2-1 to 2-14 (schedules)
Iowa	General Assembly with recommendations from the Board of Pharmacy	I.C.A. § 124.201	I.C.A. § 124.101, et seq. (Act) I.C.A. §§ 124.201-213 (schedules)
Kansas	Legislature, with recommendations from Board of Pharmacy; Board by rule on an emergency basis	K.S.A. § 65-4102	K.S.A. § 65-4101, et seq. (Act) K.S.A. §§ 65-4105 to 4113 (schedules)
Kentucky	Cabinet for Health and Family Services	KRS § 218A.020	KRS § 218A.005, et seq. (Act) KRS §§ 218A.030-130 (schedules)
Louisiana	Secretary of the Department of Health and Hospitals	LSA-R.S. § 40:962	LSA-R.S. § 40:961, et seq. (Act) LSA-R.S. §§ 40:963-964 (schedules)

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Maine	Legislature Board of Pharmacy (with respect to Schedule Z drugs)	Not directly specified by statute, but 1975 Comment to 17-A M.R.S.A. § 1102 indicates that Legislature established categories. 17-A M.R.S.A. § 1102(4) provides that Schedule Z includes all non-prescription drugs (other than those in schedules W, X, or Y) “as the Maine Board of Pharmacy shall duly designate.”	17-A M.R.S.A. § 1101, et seq. (Act) 17-A M.R.S.A. § 1102 (schedules)
Maryland	Department of Health and Mental Hygiene	MD Code, Criminal Law, § 5-202	MD Code, Criminal Law, § 5-101, et seq. (Act) MD Code, Criminal Law, §§ 5-401 to 406 (schedules)
Massachusetts	Commissioner of Public Health	M.G.L.A. 94C § 2	M.G.L.A. 94C § 1, et seq. (Act) M.G.L.A. 94C § 31 (schedules)
Michigan	Board of Pharmacy with recommendations from a scientific advisory commission	M.C.L.A. §§ 333.7201 & 333.7206	M.C.L.A. § 333.7101, et seq. (Act) M.C.L.A. §§ 333.7210-7231 (schedules)

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Minnesota	Board of Pharmacy	M.S.A. § 152.02	M.S.A. § 152.01, et seq. (Act) M.S.A. § 152.02 (schedules; codified) Minnesota Rules, part 6800.4210 to 4250 (schedules developed by Board of Pharmacy)
Mississippi	Legislature with recommendations from the State Board of Health	Miss. Code Ann. § 41-29-111	Miss. Code Ann. § 41-29-101, et seq. (Act) Miss. Code Ann. §§ 41-29-113 to 29-123 (schedules)
Missouri	Department of Health and Senior Services	V.A.M.S. § 195.015	V.A.M.S. § 195.010, et seq. (Act) V.A.M.S. § 195.017 (schedules)
Montana	Board of Pharmacy	MCA § 50-32-103	MCA § 50-32-101, et seq. (Act) MCA §§ 50-32-209 to 32-233 (schedules; last updated 10.1.2013) Mont.Admin.R. 24.174.1420-1424 (schedules; last updated in 2012)

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State	Scheduling Body or Bodies	Statutory Authority	<u>Controlled Substance Act and Schedule Locations</u>
Nebraska	Legislature	Not specified in statute	Neb.Rev.St. § 28-401, et seq. (Act) Neb.Rev.St. § 28-405 (schedules)
Nevada	Board of Pharmacy	N.R.S. §§ 453.166, 453.176, 453.186, 453.196, & 453.206	N.R.S. § 453.005, et seq. (Act) NAC §§ 453.510-550 (schedules)
New Hampshire	Commissioner of the Department of Health and Human Services	N.H. Rev. Stat. § 318-B:1-a	N.H. Rev. Stat. § 318-B:1, et seq. (Act) N.H. Code Admin. R. He-C 501.05 (location of schedules, but no schedules separate from federal are published)
New Jersey	Director of the Division of Consumer Affairs in the Department of Law and Public Safety	N.J.S.A. § 24:21-3	N.J.S.A. § 24:21-1, et seq. (Act) N.J.S.A. §§ 24:21-4 to 21-8.1 (schedules)
New Mexico	Board of Pharmacy	N. M. S. A. 1978, § 30-31-5	N. M. S. A. 1978, § 30-31-1, et seq. (Act) N. M. S. A. 1978, §§ 30-31-5 to 31-10 (schedules) N.M. Admin. Code 16.19.20 (schedules)

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New York	Legislature and Commissioner of the Department of Health	Public Health Law § 3308	Public Health Law § 3300, et seq. (Act) Public Health Law § 3306 (schedules)
North Carolina	Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services	N.C.G.S.A. § 90-88	N.C.G.S.A. § 90-86, et seq. (Act) N.C.G.S.A. §§ 90-89 to 94 (schedules)
North Dakota	Board of Pharmacy	NDCC, § 19-03.1-02	NDCC, § 19-03.1-01, et seq. (Act) NDCC, §§ 19-03.1-04 to 03.1-14 (schedules)
Ohio	Board of Pharmacy	R.C. § 3719.44	R.C. § 3719.01, et seq. (Act) R.C. § 3719.41 (schedules)
Oklahoma	Legislature with recommendations from Board of Pharmacy; Board of Pharmacy may classify new products after notice/hearing.	63 Okl.St. Ann. § 2-201	63 Okl.St. Ann. § 2-101, et seq. (Act) 63 Okl.St. Ann. §§ 2-202 to 2-212 (schedules)
Oregon	Board of Pharmacy	O.R.S. § 475.035	O.R.S. § 475.005, et seq. (Act) OAR §§ 855-080-0020 to 28 (schedules)

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Pennsylvania	Secretary of Health	35 P.S. § 780-103	35 P.S. § 780-101, et seq. (Act) 35 P.S. § 780-104 (schedules; updated 7.2.2013) 28 Pa. Code § 25.72 (schedules; last updated in 2006)
Rhode Island	Director of Health	Gen.Laws 1956, § 21-28-2.01	Gen.Laws 1956, § 21-28-1.01, et seq. (Act) Gen.Laws 1956, §§ 21-28-2.02 to 2.10 (schedules)
South Carolina	General Assembly with recommendations from the Department of Health and Environmental Control; Department of Health when General Assembly not in session	Code 1976 § 44-53-160	Code 1976 § 44-53-110, et seq. (narcotics and controlled substances) Code 1976 § 44-53-610, et seq. (controlled substances therapeutic research) Code 1976 §§ 44-53-170 to 270 (schedules)
South Dakota	Legislature with recommendations from Department of Health	SDCL § 34-20B-27	SDCL § 34-20B-1, et seq. (Act) SDCL §§ 34-20B-10 to 26 (schedules)

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Tennessee	Commissioner of Mental Health and Substance Abuse Services with agreement of the Commissioner of Health	T. C. A. § 39-17-403	T. C. A. § 39-17-401, et seq. (Act) T. C. A. §§ 39-17-405 to 416 (schedules)
Texas	Commissioner of Public Health with approval of the Board of Health	V.T.C.A., Health & Safety Code § 481.034	V.T.C.A., Health & Safety Code § 481.001, et seq. (Act) V.T.C.A., Health & Safety Code § 481.032 (schedules)
Utah	Legislature	Not specified in statute	U.C.A. 1953 § 58-37-1, et seq. (Act) U.C.A. 1953 §§ 58-37-4 to 37-4.2 (schedules)
Vermont	Board of Health; emergency rules may be adopted without notice by the Commissioner of Health	18 V.S.A. § 4202	18 V.S.A. § 4201, et seq. (regulated drugs) Vt. Admin. Code § 12-5-23:I to VIII (schedules)
Virginia	Board of Pharmacy	VA Code Ann. § 54.1-3443	VA Code Ann. § 54.1-3400, et seq. (Act) VA Code Ann. §§ 54.1-3445 to 3456 (schedules)

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State	Scheduling Body or Bodies	Statutory Authority	Controlled Substance Act and Schedule Locations
Washington	Pharmacy Quality Assurance Commission	RCWA § 69.50.201 RCWA § 18.64.001 (makeup of commission)	RCWA 69.50.101, et seq. (Act) RCWA §§ 69.50.203-213 (schedules)
West Virginia	Legislature with recommendations from the Board of Pharmacy; Board may schedule on an emergency basis between regular legislative sessions	W. Va. Code, § 60A-2-201	W. Va. Code, § 60A-1-101, et seq. (Act) W. Va. Code, §§ 60A-2-203 to 2-213 (schedules)
Wisconsin	Controlled Substances Board	W.S.A. § 961.11	W.S.A. § 961.001, et seq. (Act) W.S.A. § 961.12-23 (schedules)
Wyoming	Attorney General as Commissioner of Drugs and Substances Control with advice from advisory board on drugs and substances control	W.S.1977 §§ 35-7-1003, 35-7-1005, & 35-7-1011	W.S.1977 § 35-7-1001, et seq. (Act) W.S.1977 § 35-7-1011 to 7-1022 (schedules)

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March 20, 2017

Observations and Concerns about Tramadol Abuse in Alaska

Alaska State Trooper Statewide Drug Enforcement Unit (SDEU) Investigators are aware Tramadol is being abused in ever increasing amounts within the State. Law enforcement personnel have observed significant increases in shipments and internationally shipped package seizures by Federal law enforcement authorities of this pain medication. Presently Tramadol is not scheduled as a controlled substance in Alaska; accordingly, state and local jurisdictions cannot seize the drug for prosecution without a federal justice's approval. This lack of local authority impairs the ability of Alaska law enforcement to deter trafficking and abuse of Tramadol.

Tramadol pills, also called "Trams," are selling for approximately 5-10 dollars per pill depending on where in Alaska the pills are being sold. As word of mouth increases the demand for the drug and its price go up. However, it is readily available on the internet and is relatively inexpensive, which also contributes to the pain medication's increased popularity. Abuse of this drug takes place despite warnings about the side effects, which includes extreme drowsiness, cold and clammy skin, shallow or labored breathing, slow heartbeat, extreme weakness, feeling light-headed, fainting, seizures, cardiac arrest or coma.

School aged children are common abusers of the drug, with ease of acquisition and low cost factoring into this choice. However, at least one SDEU Investigator believes the age range of the Tramadol abuser runs anywhere from 16 to 70 years of age. It is also his experience that Tramadol is frequently abused in conjunction with other substances due to its capacity to increase the effects of alcohol, marijuana, and other drugs. Tramadol is also taken in larger than recommended doses by itself when people can't get anything else to mix it with.

Anecdotal information derived from law enforcement Interdictions in general and those conducted by the Alaska State Troopers Statewide Drug Enforcement Unit:

An Interdiction Officer from the North Slope Borough PD relayed information about an adult female and her brother having Tramadol shipped in to the village of Point Hope. Federal officers have intercepted two parcels each containing 1000 Tramadol pills in January and March of 2016.

The DEA Diversion group has seized Tramadol bound for this same person. A Point Hope contact advised Tramadol called "Trams" sell for \$5-10 a pill, based on supply and demand. The "trams" are an opioid substitute with less potency and a lower price than other black-market prescription narcotics. Trams are often

taken in larger dose quantities to achieve the desired physiological effect despite the detrimental side effects. Tramadol is inexpensive and readily available making it a gateway drug for the youth in the outlying villages. The same NSBP Interdiction Officer received information passed on by a resident of the village of Wainwright. The resident advised that Tramadol is showing up in the village from time to time, but the resident did not say who was dealing and had no further details other than "Trams" sell for \$5-10 a pill.

In February of 2017, 48 internationally shipped packages headed for Alaska and containing Tramadol were seized by federal officers.

Results for a simple search in GOOGLE using the words "purchase tramadol" resulted in the following 7 top searches with pictures: for the investment of 62.99 plus shipping a person can gross \$500.00 to \$1000.00 dollars from selling Tramadol in the villages at the average price of \$5.00 to \$10.00.

The screenshot shows a Google search for "purchase tramadol". The search results include several links to websites selling Tramadol without a prescription. A sponsored advertisement for "Tramadol 50 mg 100 Ct by AMNEAL Pharmaceuticals" is prominently displayed on the right side of the results. The ad features a product image of a bottle of Tramadol Hydrochloride Tablets, USP, and a single pill. The ad text includes the price "\$62.99 - 1-800-PetMeds", a "Shop now" button, and a "Free shipping, no tax" offer. Below the ad, there are sections for "Similar products" and "View all sellers and prices".

In addition to the availability over the internet, locally obtained prescriptions can also be diverted.

More anecdotal information from SDEU Interdiction:

In the Kotzebue area, packages from India have contained over 1000 pills of Tramadol have been intercepted within the last six months. These packages were going to known dealers of other controlled substances residing in the area. An SDEU investigator has been told by village elders and other concerned people that the abuse of pills is on the rise, and that Tramadol is primary among those pills being abused. This investigator has observed that the price of Tramadol has been as low as a dollar per pill when there is an established source in the area.

A concerned citizen in the village of Noorvik reported to the SDEU investigator that she had been contacted (unsolicited) to purchase Tramadol and Gabapentin by a person in the State of Virginia. The drug investigator made covert contact with one of the telephone solicitors. The Investigator was informed by the individual that he could send as many of these pills as he could afford to purchase.

In the Nome area another SDEU investigator has experienced the trans-shipment of Tramadol when he has been assisting US postal investigations. That amount interdicted was approximately 200 pills.

Last month in the Nome area three residents were destined to receive packages of Tramadol that contained about 1000 individual pills. These packages were not from legitimate pharmacies. These shipments were seized by Federal Officers and not prosecuted.

Last month in the Bethel area six residents were destined to receive packages of Tramadol that contained 4200 individual pills. These packages were not from legitimate pharmacies. These shipments were seized by Federal officers, but the quantity did not merit prosecution due to lack of resources.

In the Bethel area Tramadol is being sold and abused in most, if not all, of the surrounding villages in the YK Delta. This has been a problem for at least the last 3 – 4 years, with Tramadol being shipped to the villages in a number of ways. The street price is \$10.00 per pill in this area.

Last month a person from the village of Kipnuk ordered approximately 5000 Tramadol pills. He had them shipped to his mother's residence in Palmer / Wasilla. The federal investigator contacted in this case said a person can currently order as much Tramadol as they want online, and the pills are sent in a package to the ordering address directly from China or India.

In February 2017, Alaska State Troopers have been made aware a significant increase in international package seizures by Federal law enforcement authorities containing large amounts of the prescription pain medication Tramadol. In all cases, these packages were destined for rural Alaska locations – centered mostly in the northwest and southwest regions of Alaska. The individual seize packages contained an average of 500 pills, and a collective amount of seized pills numbering in the thousands. In most every case, the origin of the illicit pill packages was India.