

RESEARCH ON THE PROBLEMS WITH THE FEDERAL ANALOGUE STATUTE

Under Arizona's statutory scheme, drugs are handled in two areas-health and the criminal code. Congress enacted the Analogue Act to prevent underground chemists from altering illegal drugs in order to create new drugs that are similar to their precursors in effect but are not subject to the restrictions imposed on controlled substances. *See United States v. Hodge*, 321 F.3d 429, 432 (3d Cir.2003).

The Act defines a "controlled substance analogue" as a substance-

- (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
 - (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
 - (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.
- 21 U.S.C.A. § 802(32)(A).

The Act further provides that "[a]controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C.A. § 813.

Controlled vs. Analogue Substances

The Controlled Substances Analogue Enforcement Act of 1986 treats controlled substance analogues as Schedule I controlled substances under the CSA. However, this only applies to analogues that are intended for human consumption. One possible barrier to prosecuting individuals for violations relating to synthetic substances such as "bath salts" that are marketed as "not intended for human consumption" may be proving that despite this labeling, these substances are indeed intended for consumption.

In addition, the Analogue Enforcement Act requires that a substance must be chemically similar to a controlled substance in order to be considered an analogue. The DEA has noted that the chemical structure of a substance can be manipulated such that it is not chemically similar to a controlled substance but still produces effects that are pharmacologically similar to a Schedule I or Schedule II controlled substance.

These manipulations can continuously occur to stay ahead of researchers and law enforcement.

The DEA has also pointed out several prosecutorial challenges for using the Analogue Enforcement Act to prevent drug use and abuse. These challenges include the following:

- Each case requires additional investigation to determine whether the substance in question was “intended for human consumption” and can therefore be considered an analogue.
- A forensic chemist can testify to laboratory analysis that would identify a controlled substance in a case. However, to establish that a substance is an analogue, additional testimony from experts in other disciplines is needed.
- In cases involving potential analogue substances, experts must establish that the substance has a substantially similar chemical structure (and pharmacological effect) to a Schedule I controlled substance. The threshold for “substantially similar” is subjective and may differ from expert to expert.
- Establishing a substance as an analogue in one case does not carry over to other cases. Each case involving the potential analogue substance must separately establish that the substance is indeed an analogue.

While some may argue that the Analogue Enforcement Act is insufficient or too cumbersome to investigate and prosecute cases involving the wide range of potential analogues, others may disagree. On the one hand, scheduling each analogue substance under the CSA could allow more efficient prosecution of cases involving that particular substance. On the other hand, as the DEA and others have noted, the chemical structure of substances can be continuously manipulated, thus constantly creating new analogue substances that are not scheduled under the CSA.

Policymakers may deliberate whether the pace of scientific research, drug scheduling by the Attorney General in consultation with the Secretary of HHS, and legislative scheduling by Congress is sufficient in response to the current synthetic drug problem. Congress may also consider whether the rapid creation of new analogues could outpace such scheduling, leaving the Analogue Enforcement Act as a more efficient method of prosecution.

Source: Statement for the record of Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, before the U.S. Congress, United States Senate Caucus on International Narcotics Control, The Dangers of Synthetic Cannabinoids and Stimulants, 112th Cong., 1st sess., April 6, 2011, [http://drugcaucus.senate.gov/hearing-4-6-11/DEA%20Rannazzisi %20testimony.pdf](http://drugcaucus.senate.gov/hearing-4-6-11/DEA%20Rannazzisi%20testimony.pdf).

Email correspondence with Dr. John W. Huffman, Professor Emeritus of Chemistry at Clemson University, October 12, 2011.

David Zucchino, “Scientist’s Research Produces a Dangerous High,” Los Angeles Times, September 28, 2011, <http://www.latimes.com/news/nationworld/nation/la-na-killer-weed-20110928,0,2646834.story?page=1>.

21 CFR §1301.18. Synthetic Drugs: Overview and Issues for Congress Congressional Research Service 14