

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL



Synthetic Drugs: An Assessment Report



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JUNE 7, 2013

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Section 1. Introduction.

Different states and cities have taken different approaches to address particular aspects of the synthetic drug problem. Some federal, state, county, and city agencies emphasize drug treatment programs. Some rely on criminal prosecution. Some states and cities emphasize regulatory involvement by administrative agencies. Some cities accomplish regulation through zoning laws, drug paraphernalia laws, synthetic drug ordinances, and enforcement of civil and criminal nuisance laws. Various state and local governments have assigned resources and jurisdiction to different agencies to address the issue.

The frustration over synthetic drugs throughout the country in part is due to the proliferation of precursor drug compounds manufactured in China and third world countries, the expansive market created by the Internet, and a patchwork of proposals to change civil laws, criminal laws, and regulatory laws. Too many times policymakers claim to have stopped the sale of synthetic drugs, only thereafter to see a greater proliferation of the problem.

In Illinois, policymakers in 2012 claimed that their model laws would halt synthetic drugs. Yet, in May, 2013 the Illinois Poison Control Center claimed a dramatic rise in overdoses due to synthetic drugs called 2CE, 2CI, and 25I-NB0M3.¹

In Florida, policymakers in 2012 proclaimed headway when 100 synthetic drugs were listed as Schedule I controlled substances. In May, 2013, Florida law enforcement officials stated that the marketing of synthetic drugs had widened and the drugs were now being packaged as cotton candy, bubble gum, and pop rocks and being sold to children at gas stations.²

In Indiana, the legislature enacted the most far-reaching law in the country, which essentially bans any product that looks like or is sold like a controlled substance. In May of 2013, a federal lawsuit was filed in Indiana to challenge the law as being unconstitutionally vague.³

One thing is certain: the current patchwork system of laws is creating confusion and has not stopped the sale or use of synthetic drugs.

In Minnesota, the Legislature assigned resources and jurisdiction to the Minnesota Department of Human Services to create an Alcohol and Other Drug Abuse Division. Pursuant to Minn. Stat. § 254A.03, this Authority has broad powers. Each state agency that administers state or federal funds relating to drug abuse must submit its plans and budgets to the Authority. The Authority is then empowered to certify whether the proposed services comply with the comprehensive state plan required by the statute.

The Authority conducted strategy meetings with agencies at different levels of government, including eight state agencies, and in September of 2012, released the "*Minnesota State Substance Abuse Strategy*." The Strategy announced by the Authority is laudable.

The following is a summary concerning synthetic drugs, followed by a status update on current laws that relate to the distribution of synthetic drugs.

Section 2. Synthetic Drug Abuse is Deadly.

According to the *Star Tribune*, more than 20 deaths have been linked nationwide to consumption of synthetic drugs.⁴ Over the past two years, at least two deaths from synthetic drugs were reported in Minnesota, including Trevor Robinson, a 19-year-old from Blaine,⁵ and Alex Winterhalter, a 21-year-old from Maple Grove.⁶ Two other young men died in North Dakota, including Elija Stai, a 17-year-old from Park Rapids,⁷ and Christan Bjerk, an 18-year-old from Grand Forks.⁸ Many of the drugs were bought on the Internet, and some were made by a self-described “hobby chemist” who bought synthetic compounds online from China, the United Kingdom, Austria, Poland, Greece, Spain, and Canada.⁹ The “hobby chemist” sold the drugs to approximately a dozen people, who in turn distributed them to friends. According to federal authorities, several individuals who consumed the substances ended up in intensive care units.

According to the U.S. Poison Control Center, more than 6,000 calls relating to synthetic marijuana were received in 2011. A similar amount, or over 6,000 calls, were also reported relating to other synthetic drugs.

Synthetic drugs—originally called “designer drugs”—are chemically-produced in laboratories. Their chemical structure is similar to naturally-occurring drugs, and they are designed to mimic or enhance the effects of natural drugs. In many cases, synthetic drugs are produced in clandestine laboratories with little regard for the safety of those who consume them.

The public dialogue concerning “designer” and synthetic drugs began in the early 1980s, when chemically-created drugs—along with other modified synthetic drugs—began being manufactured and distributed in the United States. While much of the focus has been on methamphetamine, the spotlight over the past few years has begun to shift to other synthetic compounds, including synthetic cannabinoids and synthetic cathinones.

The harmful effects of these substances range from drug-induced psychosis to death. Because of the unpredictable nature of synthetic drugs and the clandestine environment in which they are manufactured, the full effect of these drugs has not been completely analyzed. Many states and the federal government have responded to the developing epidemic by, among other things, enacting laws that ban certain synthetic cannabinoids and stimulants.

Section 3. Illicit Drug Consumption: Statistics and Trends.

Section 3.1. United Nations Report on Illicit Drug Consumption. The 2011 United Nations Annual Drug Report states that while global markets for cocaine, heroin, and cannabis remain stable, the production and abuse of prescription opioid drugs and synthetic drugs appear to have increased.¹⁰ The report estimates that 210 million people—or about five percent of the global population between ages 15 and 64—used illicit substances at least once in the prior year.

Cannabis is by far the most widely used illicit drug, with consumption estimates varying between 125 and 203 million people worldwide in 2009. An increase in cannabis use was reported in the Americas, Africa, and Asia, with a decrease reported in Western Europe.

Amphetamine-type stimulants are the next largest illicit drug used behind cannabis. Amphetamine stimulant use was reported to have remained largely stable through 2010. Amphetamine-type stimulants are generally divided into two main categories: amphetamines and MDMA (Ecstasy). Estimated amphetamine group use was reported to vary between 14 and 57 million people. The Ecstasy group was reported to include an estimated 11 to 28 million users. Africa, the Americas, and Asia were the main consumption area for amphetamines, while Ecstasy was reportedly dominant in Europe. In North America, the two groups were reported to be nearly on par.

A decrease in heroin and cocaine use was reported. Between 12 and 21 million people were reported to use opiates worldwide, with about three-quarters of them using heroin. In 2009, cocaine use was estimated to involve between .3 percent and .5 percent of the world population. Despite a decline in recent years, the largest cocaine market appears to be the United States, which reportedly accounts for about one-third of global consumption.

Non-medical use of prescription drugs was reported to be a growing problem in a number of countries.

Behind the non-medical use of prescription drugs, several new synthetic compounds are reported to have emerged in established illicit drug markets. Demand for synthetic cannabinoids was similarly reported to have increased.

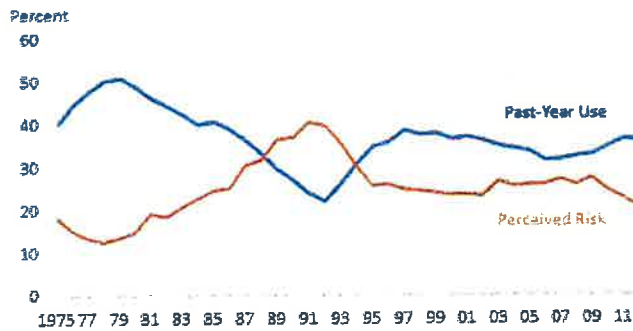
Section 3.2. The Center for Substance Abuse Research. The Center for Substance Abuse Research (“CSAR”) is sponsored by the University of Maryland. CSAR places synthetic marijuana second behind organic marijuana as the illicit drug of choice of high school seniors in the United States. Of 14,000 high school seniors surveyed in 2011, 36 percent reported using organic marijuana and 11.4 percent reported using synthetic marijuana.¹¹

In 2013, CSAR reported that synthetic marijuana was the third most used substance among high school students in the U.S., with 57 percent reporting illegal use of alcohol, 29 percent reporting the illegal use of marijuana, and 12 percent reporting the illegal use of synthetic marijuana.¹²

Section 3.3. The National Institute on Drug Abuse. The National Institute on Drug Abuse (“NIDA”) tracks trends in illicit drug consumption by monitoring emergency room visits, arrests, and through frequent surveys. In 2012, NIDA included synthetic marijuana in its annual survey.

The 2012 NIDA survey found that marijuana use declined from the late 1990s to the mid-to-late 2000s, but has increased since then. The number of students who have used marijuana in the last year was reported to have slightly increased to a rate of approximately 36 percent of the population:

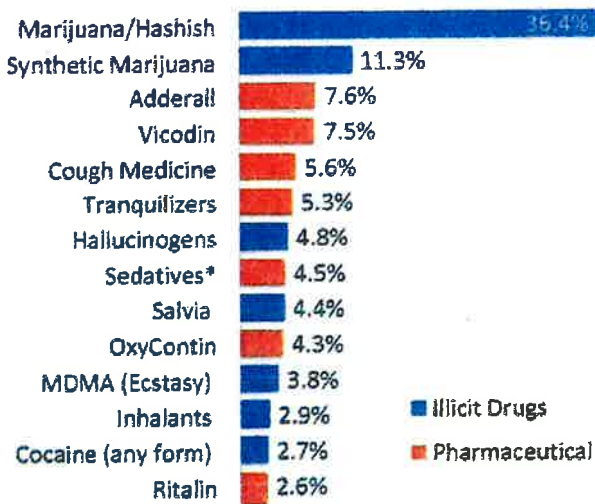
Marijuana Past-Year Use vs. Perceived Risk among 12th Graders



Source: University of Michigan, 2012 Monitoring the Future Study

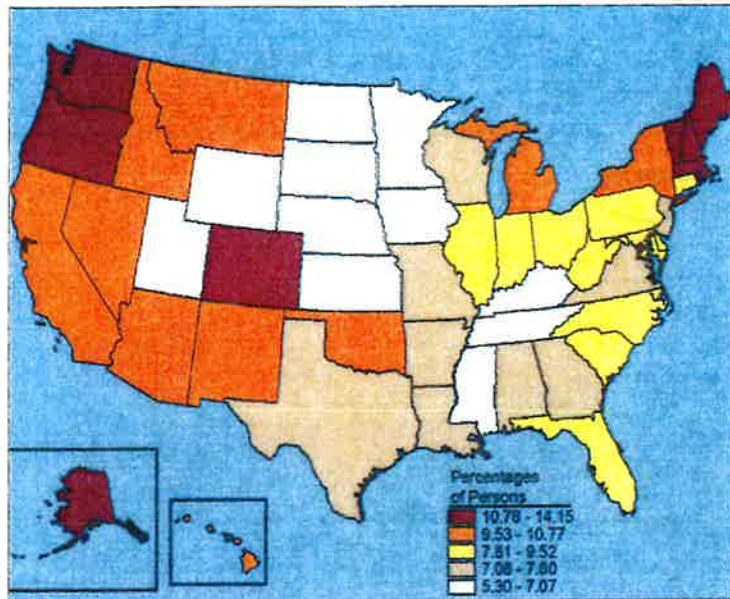
Synthetic marijuana—known commercially as “Spice” or “K2”—refers to herbal mixtures laced with synthetic cannabinoids that have an effect on the brain similar to tetrahydrocannabinol (THC), the main ingredient in marijuana. The illicit use of synthetic marijuana was reported to be growing, although substantially less than the illicit consumption of prescription drug medications when added together:

Past-Year Use of Illicit Drugs and Pharmaceuticals among 12th Graders

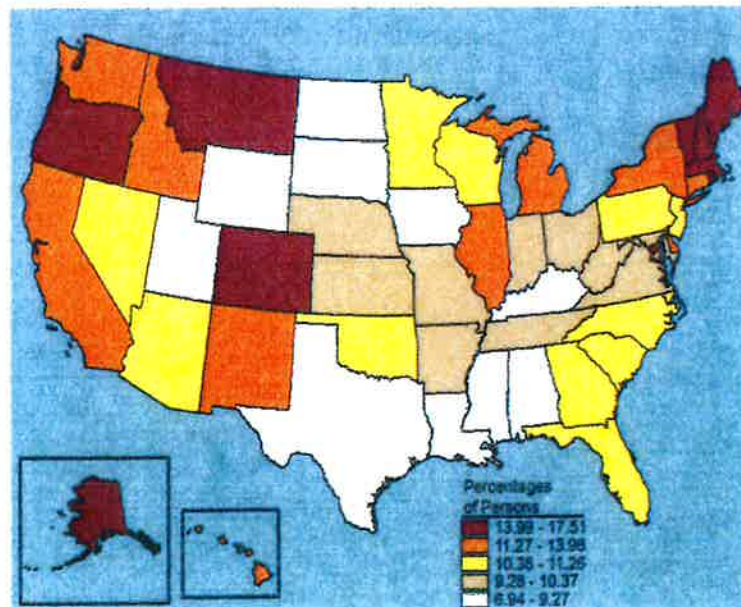


SOURCE: University of Michigan, 2012 Monitoring the Future Study

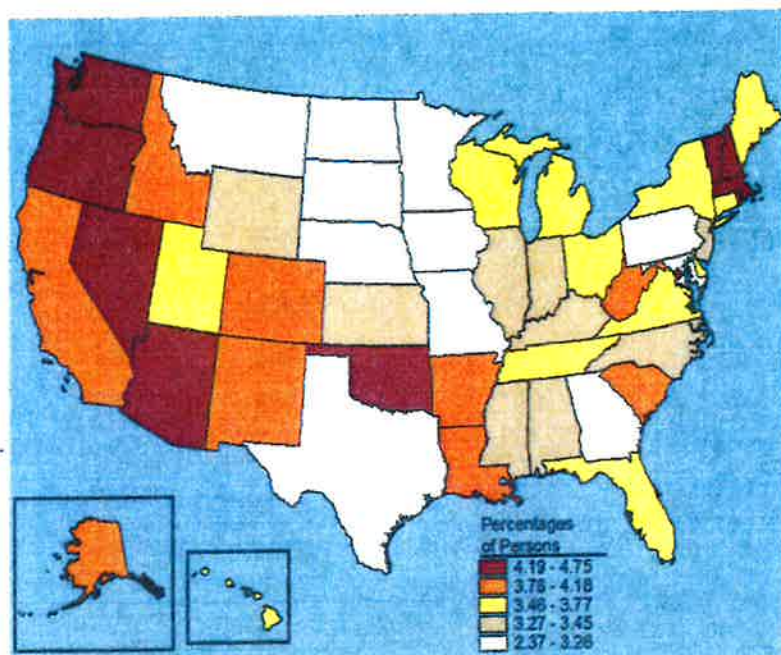
Section 3.4. The National Survey on Drug Use and Health. The National Survey on Drug Use and Health (“NSDUH”) obtains data compiled through surveys to determine illicit drug use. According to its 2009 and 2010 survey, the following maps describe the ratio of users in each state who consume particular illicit drugs.¹³ For example, the following map shows illicit drug use during the month previous to the survey among people aged 12 or older, by state:



The following map shows illicit drug use in the month previous to the 2009 and 2010 surveys as it relates to marijuana use among people aged 12 and older:



The following map shows illicit drug use other than marijuana in the month previous to the 2009 and 2010 surveys among people aged 12 and older, by each state:



Section 3.5. The Drug Abuse Warning Network. The Drug Abuse Warning Network (“DAWN”) is operated by the Substance Abuse and Mental Health Services Administration (“SAMSA”) to monitor drug-related emergency department visits. DAWN reports that in 2011 there were 5.1 million drug-related emergency department visits, with about one-half related to adverse drug reactions and one-half related to drug misuse. DAWN reports that emergency room visits involving the ingestion of illicit drugs was relatively stable from 2004 to 2009, but increased from 2009 to 2011, with the bulk of the increase due to narcotic pain relievers and anti-anxiety medications.

Selected Substances Involved in Drug-Related Emergency Department (ED) Visits for Misuse or Abuse of Drugs: 2004, 2009, and 2011

Substances	Number of ED Visits in 2011*	Rate of ED Visits per 100,000 Population in 2011	Percent Change, 2004 to 2011**	Percent Change, 2009 to 2011**
Total ED Visits	2,462,948	790.4	52%	19%
Illicit Drugs	1,252,500	402.0	NC	27%
Cocaine	505,224	162.1	NC	NC
Marijuana	455,668	146.2	52%	19%
Heroin	258,482	83.0	NC	NC
Illicit Stimulants	159,840	51.3	NC	68%
Other Illicit Drugs	131,178	42.1	86%	60%

Selected Substances Involved in Drug-Related Emergency Department (ED) Visits for Misuse or Abuse of Drugs: 2004, 2009, and 2011

Substances	Number of ED Visits in 2011*	Rate of ED Visits per 100,000 Population in 2011	Percent Change, 2004 to 2011**	Percent Change, 2009 to 2011**
Pharmaceuticals	1,428,145	458.3	114%	13%
Anti-anxiety and Insomnia Medications	501,207	160.9	124%	14%
Alprazolam	154,016	49.4	155%	NC
Clonazepam	76,557	24.6	122%	NC
Lorazepam	50,399	16.2	127%	NC
Zolpidem	37,225	11.9	152%	NC
Narcotic Pain Relievers	420,040	134.8	153%	NC
Oxycodone Products	175,229	56.2	220%	NC
Hydrocodone Products	97,183	31.2	96%	NC
Methadone	75,693	24.3	74%	NC
Morphine Products	38,416	12.3	144%	NC
Antidepressants	108,388	34.8	NC	NC
Antipsychotics	76,197	24.5	71%	NC
Cardiovascular Medications	55,543	17.8	63%	NC
Anticonvulsants	53,142	17.1	51%	NC
Muscle Relaxants	52,830	17.0	71%	NC
Respiratory Medications	46,819	15.0	76%	NC
Central Nervous System Stimulants	45,158	14.5	292%	78%

NC = no significant change.

* Because multiple drugs may be involved in each visit, estimates of visits by drug may add to more than the total.

** Percent change is measured as the difference in the rates of visits per 100,000 population between years. Reported changes are significant at the .05 level.

Source: 2011 SAMHSA Drug Abuse Warning Network (DAWN).

Section 4. Synthetic Cannabinoids.

Synthetic cannabinoids are chemically-produced substances designed to mimic tetrahydrocannabinol (THC), the active ingredient in marijuana. Many of the chemicals were originally designed in the 1990s to be used as medication to treat vomiting and enhancement of appetite, primarily for patients with HIV/AIDS.

Variations of the synthetic compound were then manufactured, sprayed onto dried herbs, and then consumed through smoking, snorting, or other ingestion. They produced effects similar to those of marijuana. Beginning in 2004, herbal mixtures called "Spice" became available in European countries, including Germany, Switzerland, and Great Britain. First-generation "Spice" products were marketed as "incense" or "herbal blends" and carried names like "Spice Silver," "Spice Gold," "Spice Diamond," "Yucatan Fire," and "Smoke."¹⁴ The products are often packaged in colorful and professionally-designed packets without any mention of synthetic additives.

Initially, these products could only be purchased through the Internet. With increasing frequency, however, the products became available through so-called "head shops," which mainly sell paraphernalia for smoking cannabis. Some local tobacco shops then entered the market. Some vendors sold "Spice" without age restriction, while some claimed only to sell to people above age 18. In an attempt to evade confiscation, the manufacturers printed warnings on the packages claiming that the products were not meant for human consumption.

By early 2009, several laboratories identified the synthetic additives in "Spice" as being part of the aminoalkylindole family. Several countries then classified the compounds of the aminoalkylindole family as a narcotic. The classification of "Spice" as a narcotic led to a "Whac-a-Mole" exchange between law enforcement authorities and drug manufacturers, with successive generations of synthetic cannabinoids being manufactured in molecular recombinations in attempts to skirt and evade laws that prohibited by name earlier generations of synthetic cannabinoids. Brand names for these substances include "Spice," "K2," "Blaze," "Fire N. Ice3," "G-Force," "Solar Fire," "Genie," "Yucatan Fire," "Smoke," "Skunk," "G-13," "Dank," "Mr. Happy," "Mr. Nice Guy," and "Zohai."¹⁵

Synthetic cannabinoids can have a different impact on people than organic cannabis. The chemical structure of synthetic cannabinoids binds to cannabinoid receptors in human cells. The cannabinoid receptors in human cells are of two types: CB1, located in the brain, the nervous system, the lungs, the liver and the kidneys, and CB2, in the immune system.

THC, the cannabinoid in organic marijuana, partly attaches to and blocks the CB1 nerve receptors in the brain and central nervous system, causing the physiological and psychotropic disorientation of cannabis. Newer generations of synthetic cannabinoids use a compound which in many cases fully blocks the CB1 receptor. In addition, synthetic cannabinoids have a four-fold increased capacity to attach to the receptors.¹⁶ Patients who have had CB receptors fully blocked from synthetic cannabinoids may sustain permanent spleen damage or kidney failure. In December of 2012, the Center for Disease Control ("CDC") stated that health officials in six states reported acute kidney failure in 16 cases involving synthetic marijuana. These states

included Kansas, Oklahoma, Oregon, New York, Rhode Island, and Wyoming.¹⁷ Many of these patients required dialysis due to kidney failure. Thereafter, CSAR reported four additional cases of acute kidney injury associated with synthetic marijuana in Alabama.¹⁸ Other forms of toxicity were reported to include low blood pressure, sleeplessness, tachycardia, diaphoresis, increased agitation, muscle spasms, nausea, high blood pressure, fast heartbeats, panic attacks, and suicide. A 16-year-old boy in Fayetteville, Georgia drowned in his family's hot tub in March, 2013 after smoking synthetic marijuana.¹⁹ In 2010, an Iowa teen smoked K2 with some friends, and then reportedly told them he was "going to hell," went home, and shot and killed himself.²⁰ In another case, a 19-year-old in Illinois died when his car jumped a retaining wall at an estimated 100 mph, crashing into a house. About 90 minutes before the crash, he reportedly told his brother he had been smoking "legal potpourri." In both the Iowa and Illinois cases, the victims reportedly purchased the synthetic cannabinoids at a local shopping mall.²¹

Some patients who used herbal mixtures such as "Lava RED" and "OMG" are reported to suffer loss of consciousness, requiring the use of artificial ventilation. Several reports have been made concerning death due to suicide and death due to coronary ischemic events.²²

The Center for Substance Abuse Research reported an estimated 11,406 emergency department ("ED") visits in 2010 involving synthetic cannabinoids. In 60 percent of the visits, no other controlled substance was involved. This is in contrast with organic marijuana, where ED visits by such users most often involved the use of other controlled substances or alcohol.²³ Ten states reportedly accounted for over 50 percent of ED visits involving synthetic cannabinoids in 2010 and 2011. In order of frequency, they were Texas, Florida, North Carolina, Indiana, Virginia, Louisiana, Arizona, Missouri, Illinois, and Georgia.

Retired Professor John Huffman of Clemson University was one of the first chemists to synthesize cannabinoids in the 1990s, primarily looking for a pharmaceutical product to aid in the research of multiple sclerosis, AIDS, and chemotherapy side-effects. Dr. Huffman indicated that the effects of some synthetic compounds are ten times stronger than those of THC and warned that:

"Anybody who uses them is playing Russian Roulette. They have profound psychological effects. We never intended them for such human consumption."²⁴

In many countries, the purchaser must be licensed and pay a price much too high for use in synthetic cannabinoid preparations. Some manufacturers—many located in China—offer these compounds for cheaper prices. The quality of those compounds is substandard, and they are often contaminated with synthetic byproducts and derivatives originating from an inefficient synthetic processes. The toxicity of synthetic cannabinoids varies with the concentration of the synthetic chemical and the amount being consumed by the user. This is a major concern with synthetic cannabis. Several samples of "Spice Gold" were reportedly tested and determined not to have any synthetic cannabinoids, while others had lethal levels.

The DAWN survey conducted a statistical comparison of ED visits by marijuana users with synthetic cannabinoid users. There were approximately 461,000 marijuana-related visits, compared to 11,000 visits for synthetic cannabinoids. The average patient age for marijuana-

related visits was 30 years of age, while the average patient age for synthetic cannabinoid visits was 24. The higher proportion of ED visits in younger groups, especially in patients ages 12 to 17, combined with results from a national survey of high school seniors stating that 11 percent reported using synthetic marijuana in 2011 is a major concern.

Synthetic cannabinoid products appear to be popular among users who have to undergo regular urine drug screenings, because some screening methods do not always detect synthetic cannabinoids.

Section 5. Synthetic Stimulants.

There is considerable anecdotal evidence concerning the lethal nature of synthetic stimulants, which are commonly referred to as “bath salts.” In September of 2010, two 15-year-old boys in California fell violently ill and developed small holes in their lungs after consuming mephedrone. They suffered permanent lung damage.²⁵ A 21-year-old in New Orleans ingested bath salts and was not so fortunate. He reportedly became so paranoid that he looked out the kitchen window and told his father there were 25 police cars outside. The father told him there were no police cars, and the confused son reportedly grabbed a knife and slit his own throat. The father, a physician, was able to stabilize the boy and remained by his side for the next two days as the boy continued to hallucinate. When the father fell asleep, the boy crept away from his embrace, found a shotgun, and blew his own head off.²⁶ A Mississippi man sliced his face and stomach with a skinning knife because of hallucinations secondary to use of synthetic drugs.²⁷ A 22-year-old St. Louis man injured his hand while slamming it into the wall. After a six day binge, he thought there were people inside the wall watching him.²⁸

In 2011, the State of Michigan mandated that hospitals report all cases of possible bath-salt intoxication. It identified 35 patients who visited a Michigan ED during a six-month period between November of 2010 and March of 2011. Of the 35 patients, the survey identified two-thirds as having a previous history of drug abuse and almost one-half as having a history of mental illness.²⁹ Thirty-two of the patients had neurologic symptoms, 27 had cardiovascular symptoms, and 17 had a psychotic episode.³⁰ One patient died, and 17 were hospitalized.³¹

A major problem with bath salts is the lack of consistency of what is in the packages. The *Star Tribune* acquired 30 different synthetic drugs over the Internet and had them analyzed for chemical composition. The results indicated that the substances were dangerously unpredictable, with such wide variations in potency that there was a greatly increased chance of accidental overdose.³² Some packages of bath salts have been tested and found to contain 17 milligrams of MDPV, while other packages have been found to have 2,000 milligrams of the chemical. This may explain why one user will have a mild reaction to the drug, while another might end up in a psych ward or worse, even dead. Indeed, small “mistakes” in a manufacturer’s lab can make a huge difference in how the drug reacts upon consumption. A synthetic stimulant made in one northern California underground lab reportedly caused a group of users to develop permanent symptoms identical to advanced Parkinson’s Disease.

Section 5.1. Methamphetamine. Synthetic stimulants are chemically-produced substances that affect the central nervous system. They include drugs such as amphetamines (including methamphetamine), cocaine, and Ecstasy. Synthetic stimulants can be administered through oral ingestion, inhalation, or injection.

The Drug Enforcement Agency (“DEA”) has called methamphetamine the “most widely abused domestically-produced synthetic drug in the United States.”³³ According to a 2010 national survey on drug use and health, there were approximately 353,000 users of methamphetamine age 12 or over, similar to the results of the annual surveys conducted each year from 2007 to 2009.³⁴ The National Drug Intelligence Center (“NDIC”) has predicted that domestic availability of methamphetamine may rise because of the increased availability of Mexican-produced methamphetamine. The DEA has noted that the landscape for methamphetamine production is changing, largely because of small-scale, one-pot methamphetamine labs which combine commonly-available chemicals to synthesize the difficult-to-obtain anhydrous ammonia needed for methamphetamine production.³⁵ Through this method, methamphetamine can apparently be created in about 30 minutes in almost any location.

The focus of federal law enforcement efforts as it relates to methamphetamine has included stringent regulation of precursor chemicals, including the regulation of pseudoephedrine. In addition, the penalties for distributing methamphetamine have been greatly increased.³⁶

Section 5.2. Synthetic Cathinones. Natural cathinone stimulants are produced by the khat plant. Synthetic cathinones are much stronger and react differently with the brain and nervous system, with the result being that users can become extremely aggressive, sometimes with psychotic behavior.

Synthetic cathinones—often labeled as “bath salts”—are sold in powder form. They are marketed under brand names such as “Bliss,” “Blizzard,” “Charge+,” “Ivory Snow,” “Ivory Wave,” “Ocean Burst,” “Pure Ivory,” “Snow Leopard,” “Star Dust,” “White Knight,” “White Rush,” “White Lightning,” “Purple Wave,” “Red Dove,” “Blue Silk,” “Zoom,” “Bloom,” “Cloud Nine,” “Vanilla Sky,” and “Hurricane Charly,” among others.³⁷ Synthetic cathinones have sometimes been marketed as supposed plant fertilizers, vacuum fresheners, pond cleaners, and insect repellent.³⁸

Synthetic cathinones are inhaled, injected, or snorted by the user to experience toxicity similar to organic amphetamines. Some abusers dissolve the drugs in water and inhale them through an atomizer. Others spray the drugs into their mucus membrane in their eyes or nose.³⁹

Synthetic cathinones often contain amphetamine-like chemicals such as 4-methyl-N-methylcathinone (mephedrone), 3,4-methylenedioxy-N-methylcathinone (methyldone), and 3,4-methylenedioxypropylvalerone (MDPV). A comparison of these chemicals with other amphetamines underscores the hazard of consuming synthetic cathinones.

Synthetic cathinones affect the balance of dopamine, serotonin, and norepinephrine in the connecting cells of the brain and central nervous system. Dopamine is a natural neuro-

transmitter involved in pleasure. Pleasurable experiences produce a rush of dopamine from nerve cells to the brain's reward center, or nucleus accumbens. Dopamine molecules emanate from nerve cells in the brain to send a wave of signals to other nerve cells, before retreating back into the cell in a process called "reuptake." The constant release and retreat of this chemical causes feelings of pleasure, exhilaration, and well-being.

Dopamine has profound effects on memory, learning, motivation, and motor control. When the dopamine balance is upset, it can wreak havoc on the brain.

Similarly, serotonergic neurons are located in the gastro-intestinal and central nervous systems. Serotonin regulates mood, appetite, and sleep and affects memory and cognitive learning.⁴⁰ It is believed to contribute to feelings of well-being and happiness.

Norepinephrine is a neurotransmitter and hormone that affects the heart, brain, and central nervous system. A stress hormone, it can greatly increase the heart rate, the oxygen supply to the brain, and the "flight or fight" instinct of the brain.⁴¹

Methamphetamine, amphetamines, and cocaine all produce excessive dopamine, serotonin and norepinephrine levels but through different mechanisms. Both amphetamine and methamphetamine cause an abnormal amount of the three neurotransmitters and hormones to generate from the nerve cells, shifting the brain's reward pathways into overdrive. Cocaine, on the other hand, is a "reuptake inhibitor." This means it blocks the retreat, or reuptake, of the neurotransmitters back into the cell. The excessive production of dopamine, serotonin, and norepinephrine stimulates the next neuron, causing a dizzying rush of energy and a fierce, sometimes euphoric, high. The delay in the reuptake of these chemicals into the originating cell continues the rush as other dopamine, serotonin and norepinephrine is released into the nerve system. Experts believe that synthetic cathinones are 13 times more potent than cocaine in inhibiting the uptake of dopamine and norepinephrine.⁴²

MDPV, methedrone, and methylone are among the most widely substituted cathinones. While each has a similar structural composition to amphetamine, they not only stimulate like an amphetamine by producing more chemicals, they act like cocaine in inhibiting the reuptake of them.⁴³ These substances are therefore similar to taking amphetamine and cocaine at the same time, except that experts opine that synthetic cathinones are as much as ten times stronger than cocaine.⁴⁴

Synthetic cathinones present a high risk for abuse and addiction. In addition to psychosis, the clinical effects of synthetic cathinone intoxication have been reported to include chest pain, high blood pressure, high heart rate, agitation, panic attacks, hallucinations, paranoia, delusions, sleep-deprived psychosis, and even death. Patients have been reported to experience an exhilarating feeling of superhuman strength, where they may tear off their clothes or even body parts. Patients also report palpitations, paranoia, headaches, tremors, and insomnia. Multiple deaths relating to bath salt exposure have been reported internationally and in medical literature, sometimes due to cardiac arrest or renal failure.

Poison control centers across the United States received about 6,000 calls in 2011 relating to bath salts. The ten states which accounted for nearly 60 percent of the poison control calls for synthetic cathinones reportedly were, in order of frequency, Ohio, North Carolina, Indiana, West Virginia, Louisiana, Missouri, Texas, Tennessee, Illinois, and Pennsylvania.

Like synthetic cannabinoids, synthetic cathinones are often labeled as “unfit for human consumption.”⁴⁵ At the same time, however, retailers, web sites and chat rooms make it clear that the product is to be ingested. Synthetic cathinones are marketed on the Internet, and in some are marketed through smoke rooms, head shops, and retail stores. The method of ingestion varies, with the most common being inhalation. Synthetic cathinones are also taken intravenously and orally.

Some types of urine drug screening for amphetamines do not detect synthetic cathinones, although they may cause a false-positive for methamphetamine screens. Synthetic cathinones are mostly excreted from the urine, but can be measured in the blood, hair, urine, and stomach contents of users.

Section 6. Federal Initiatives Relating to Synthetic Drugs.

Section 6.1. The Federal Controlled Substances Act. The Controlled Substances Act (“CSA”) was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513). It regulates the manufacture, possession, use, importation, and distribution of certain drugs, substances, and precursor chemicals. Under the CSA, substances may be classified under one of five schedules—with Schedule I being the most restrictive.

There are designated procedures under which the scheduling of substances typically occurs. Specifically, the United States Attorney General—through the Drug Enforcement Agency, and in consultation with the Secretary of the U.S. Department of Health and Human Services—may place a drug or substance on Schedule I if it meets the following criteria:

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.⁴⁶

Section 6.2. The Controlled Substances Analogue Enforcement Act of 1986. The Federal Controlled Substance Analogue Enforcement Act of 1986 (“Analogue Enforcement Act”) was enacted as Subtitle E of the Anti-Drug Abuse Act of 1986 (P.L. 99-570). This law amended the Controlled Substances Act to treat a controlled substance analogue intended for human consumption as a controlled substance under Schedule I. Under this law, a controlled substance analogue is defined as such a substance if:

- (i) The chemical structure is substantially similar to the chemical structure of a controlled substance in schedule I or II;
- (ii) The stimulant, depressant, or hallucinogenic effect on the central nervous system 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, the substance is represented or intended 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.⁴⁷

Section 6.3. The U.S. Drug Enforcement Agency. In March of 2011, the DEA classified five synthetic cannabinoids as Schedule I substances.⁴⁸ It followed this up in October of 2011 to include three synthetic cathinones as Schedule I controlled substances.⁴⁹ In February of 2012, the DEA extended the classification of five synthetic cannabinoids as Schedule I controlled substances. The banned products include the salts, isomers, and salts of isomers of such synthetic cannabinoids.⁵⁰ In May of 2013, the DEA added three more synthetic cannabinoids UR-144, XLR11, and AKB48, as Schedule I drugs under the CSA.⁵¹ These cannabinoids are often seen in so-called “fake pot” products that are falsely marketed and sold as “herbal incense” or “potpourri” products on the Internet or by retail stores.

Section 6.4. The Federal Synthetic Drug Abuse Prevention Act of 2012. This legislation listed 28 specific chemicals commonly found in synthetic marijuana (“K2” or “Spice”), synthetic stimulants (“bath salts”), and hallucinogens under Schedule I of the Controlled Substances Act.

After passage of the Federal Synthetic Drug Abuse Prevention Act of 2012, the DEA published rules to identify drug codes for 26 substances listed as Schedule I controlled substances in the law.⁵² The 26 substances include 15 cannabinoids, 9 phenethylamines, and 2 cathinones.

Section 6.5. Tribal Law and Order Act of 2010. The Tribal Law and Order Act (“TLOA”), 25 U.S.C. § 3651, was enacted to address complaints that prosecution of criminal cases on tribal lands are too often not undertaken, with the result being a dramatic increase in gang-related activity, often fueled by drugs. TLOA provides felony jurisdiction for tribal courts and requires federal authorities to identify and report on the number of investigations or prosecutions on tribal lands that are declined. It provides additional training for prosecutors, and assistance in the design and establishment of incarceration facilities on tribal land.

Section 6.6. Operation Log Jam. In July of 2012, members of the DEA, along with local authorities, initiated “Operation Log Jam” and raided a number of suppliers, manufacturers and vendors, with the end result being 90 arrests and \$36 million in cash confiscated.⁵³ As a

result of that operation, a 54-count felony indictment was filed against the proprietor of a retail establishment in Duluth. *United States v. James Carlson, et. al*, Court file No. 12-305 DSD/LIB.

Section 7. State Initiatives Relating to Synthetic Drugs.

Section 7.1. The Minnesota State Substance Abuse Strategy. The Minnesota Legislature created the Alcohol and Other Drug Abuse Division within the Minnesota Department of Human Services pursuant to Minn. Stat. § 254A.03. The Authority is charged with the establishment of a state plan that sets forth the priorities and goals of the State of Minnesota as it relates to drug dependency and abuse. The enabling legislation requires each state agency that administers state or federal funds relating to drug abuse to submit its plans and budgets to this Division, which is empowered to certify whether the proposed services comply with the comprehensive state plan.

In September of 2012, the Minnesota Department of Human Services established the “Minnesota State Substance Abuse Strategy,” a program developed with the participation of the following agencies:

- The Minnesota Department of Education;
- The Minnesota Department of Health;
- The Minnesota Department of Public Safety;
- The State Judicial Branch;
- The Minnesota Department of Corrections;
- The Minnesota Department of Military Affairs;
- The Minnesota National Guard; and
- The Minnesota Board of Pharmacy

The report states that the Alcohol and Other Drug Abuse Division, in concert with the above agencies, is implementing a strategy to address illicit drug abuse, emphasizing the following areas of concentration:

- Strengthen drug prevention efforts;
- Promote early intervention;
- Integrate the identification of substance abuse;
- Expand support for recovery programs;
- Interrupt the cycle of substance abuse;
- Reduce drug trafficking; and
- Evaluate and compare various intervention techniques.

The Report contains a section on synthetic drugs and references emergency room admissions.

Section 7.2. Minnesota Felony Laws Relating to Analog Drugs. In 2011, the Minnesota Legislature enacted legislation that makes it a felony to sell synthetic drugs which: (1) have a chemical structure similar to a Schedule I or II controlled substance, and (2) have a similar stimulant, depressant or hallucinogenic effect on the central nervous system.⁵⁴ This law

is similar to the federal analogue law. The Minnesota law is similar to legislation enacted in other states to ban synthetic cannabinoids and synthetic cathinones:

State Legislation to Ban Synthetic Drugs:

STATE	SYNTHETIC CANNABINOIDS	SUBSTITUTED CATHINONES	STATE	SYNTHETIC CANNABINOIDS	SUBSTITUTED CATHINONES
Alabama	X	X	Montana	X	
Alaska	X	X	Nebraska	X	
Arizona	X	X	Nevada		X
Arkansas	X	X	New Hampshire		
California	X		New Jersey		X
Colorado	X	X	New Mexico	X	X
Connecticut	X	X	New York		X
Delaware	X	X	North Carolina	X	X
Florida	X	X	North Dakota	X	X
Georgia	X	X	Ohio	X	X
Hawaii	X	X	Oklahoma	X	X
Idaho	X	X	Oregon		
Illinois	X	X	Pennsylvania	X	X
Indiana	X	X	Rhode Island	X	X
Iowa	X	X	South Carolina	X	X
Kansas	X	X	South Dakota	X	X
Kentucky	X	X	Tennessee	X	X
Louisiana	X	X	Texas	X	X

STATE	SYNTHETIC CANNABINOIDS	SUBSTITUTED CATHINONES	STATE	SYNTHETIC CANNABINOIDS	SUBSTITUTED CATHINONES
Maine	X	X	Utah	X	X
Maryland		X	Vermont		
Massachusetts		X	Virginia	X	X
Michigan	X	X	Washington		
Minnesota	X	X	West Virginia	X	X
Mississippi	X	X	Wisconsin	X	X
Missouri	X	X	Wyoming	X	X
			Puerto Rico	X	X

Section 7.3. Minnesota Board of Pharmacy and Regulated Drugs. The Minnesota Legislature passed legislation that grants to the Board of Pharmacy expedited rulemaking authority for the purpose of classifying additional drugs as a Schedule I controlled substance.⁵⁵ The Board of Pharmacy may classify a substance as such if it finds that the substance has a high potential for abuse, no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, known adverse health effects, and is currently available for use within the state.⁵⁶ The classification of substances so identified must, during the next legislative session, be ratified by the Legislature. The expedited rulemaking authority granted under the law expires in 2014.⁵⁷

The statute also directs the Board to classify any substance as a Schedule I controlled substance if it has been so classified by the federal government.⁵⁸

The statute also provides that any synthetic cannabinoid is automatically classified as a Schedule I controlled substance, regardless of any action taken by the Board.⁵⁹ Similarly, the statute identifies several synthetic cathinones as Schedule I controlled substances.⁶⁰

Section 7.4. Minnesota Prohibition on Distribution of Drug Paraphernalia. Minnesota statutes prohibit the use, possession, and delivery of drug paraphernalia.⁶¹ The statutes also prohibit the advertisement of such products.⁶² The statutes define “drug paraphernalia” as equipment which is primarily used: (1) in the manufacture of a controlled substance, (2) to introduce a controlled substance into the human body, (3) to evaluate the characteristics of a controlled substance, or (4) to enhance the effect of a controlled substance.⁶³ While violation of the statute is currently a misdemeanor, other states have proposed regulatory measures which enhance the consequences of such a violation. The League of Minnesota Cities has criticized the state law as being inadequate on the basis that the statute may not specifically ban the sale of certain drug paraphernalia. While a strong argument can be made that “use,

possession and delivery” terminology includes the “sale” of the product, the statute should be updated to itemize specific paraphernalia that is subject to the ban (which is done in other states) as well as to set forth guidelines of specific products to be encompassed in the term “drug paraphernalia.”

Section 7.5. Indiana General Business Licensure. Under Indiana law, a retail merchant may not conduct business unless the merchant has a “retail merchant’s certificate.”⁶⁴ Indiana recently enacted legislation that empowers its Department of Revenue to revoke a retail merchant’s certificate if it is convicted of a criminal charge or has a civil judgment involving the sale or solicitation of a sale of a synthetic drug or a “synthetic drug lookalike substance.”⁶⁵ If the Revenue Department determines after a hearing that the merchant has such a conviction or judgment, it may suspend the merchant’s license to do business for either one year (conviction) or six months (judgment) and withhold the issuance of a new license for same amount of time.⁶⁶

To date, we have not located any reported cases where the State of Indiana has suspended a retail merchant’s license.

Section 7.6. General Seizure Laws. The Indiana law provides for the forfeiture of vehicles and real estate of a person who sells synthetic drugs.⁶⁷ The property may be seized by a law enforcement officer pursuant to an arrest, or after a court has made a determination that there is probable cause to believe the property is subject to forfeiture. The property is not forfeited, however, until there is a conviction.⁶⁸ This law is similar to that in Minnesota.

In Minnesota, the Board of Pharmacy may destroy a drug and charge the merchant for all costs and other expenses of the case if it finds that: (1) a synthetic drug on the shelf is a “drug,” (2) notice has been provided (generally by tagging the product on the shelf) that the Board believes the tagged item is a misbranded drug, and (3) a court has made a determination that the drug is misbranded.⁶⁹

In Illinois, the distribution of a synthetic drug is considered a violation of the Illinois Controlled Substance Act. A violation of the Act subjects a defendant to forfeiture provisions under both the Controlled Substances Act and the Illinois Food, Drug, and Cosmetic Act.⁷⁰ The contraband may be seized by a police officer or the Director of Public Health.

Section 7.7. Illinois Department of Health Regulation. While there has been some commentary stating that the Illinois law is the same as the Indiana law, the statutory scheme in Illinois appears to be different. In Illinois, it does not appear that a retail merchant is required to obtain a general license. Accordingly, there does not appear to be a regulatory mechanism through which an Illinois general retail merchant could lose its license if it engages in the sale of synthetic drugs or drug paraphernalia. Under the Illinois law, however, if certain merchants that sell products covered by the state drug and cosmetic law are otherwise required to obtain a permit, and one of these businesses sold synthetic drugs in violation of the law, it could presumably have its permit to do business revoked.⁷¹ A bootstrap argument can be made that, simply by selling a synthetic drug, the merchant has brought itself into the ambit of regulation (and required licensure) by the Department and therefore may have its authority to do business suspended.

While the legislation has promise, the Illinois Poison Control Center reports that one year after the law was enacted that synthetic drug incidents have increased.⁷²

Section 7.8. North Dakota Attorney General Cease and Desist Authority. The Attorney General in North Dakota has authority to issue a Cease and Desist Order if a person has engaged in a practice deemed unlawful under the law, including chapters 50-22 (charitable organizations), 51-12 (consumer code), 51-13 (interest rates), 51-14 (credit card laws), 51-16.1 (pyramid schemes), or 51-18 (telemarketing sales), or “other provisions of law.”⁷³ Pursuant to this authority, the North Dakota Attorney General issued cease and desist orders against two “head shops,” “Hemp Horizonz” in Minot, North Dakota and a store called “Big Willies.”⁷⁴ While the cease and desist orders removed certain products named in the orders, they did not affect other products sold by the stores. Telephone calls to the stores in the last week of May, 2013 indicate they are still open.

The North Dakota law regulating synthetic drugs is similar to, but different from Minnesota law. First, the Minnesota law delegates the authority to enforce the misbranded drug law to the Board of Pharmacy, while the North Dakota law delegates this authority to the Attorney General. Second, the North Dakota Attorney General has the authority to issue cease and desist orders. In contrast, neither the Minnesota Attorney General nor the Minnesota Board of Pharmacy has authority to issue cease and desist orders as it relates to a general merchant selling synthetic drugs. Third, prior to going to court to ask for an injunction, the Board of Pharmacy must: (1) make a determination that a specific product on the shelf is a synthetic drug,⁷⁵ (2) tag the drug with a notice to consumers that the product may be adulterated or misbranded,⁷⁶ and (3) file an application for a preliminary injunction in Minnesota district court. Only after these steps are taken can the drug be confiscated.

Section 7.9. Florida Attorney General Authority to Order an Emergency Classification of a Synthetic Drug. Certain states, such as Florida, empower the Attorney General with authority to declare a substance to be a controlled substance under Schedule I or Schedule II if it has “a potential for abuse.” A substance has a “potential for abuse” if it:

has properties as a central nervous system stimulant or depressant or a hallucinogen that create a substantial likelihood of its being: (1) used in amounts that create a hazard to the user’s health or the safety of the community; (2) diverted from legal channels and distributed through illegal channels; or (3) taken on the user’s own initiative rather than on the basis of professional medical advice.⁷⁷

In making the necessary findings, after a hearing, to support such “potential for abuse,” the Florida Attorney General must consider the substance’s potential for abuse, scientific evidence of its pharmacological effect, current scientific knowledge regarding the drug or other substance, the substance’s history and current pattern of abuse, the scope, duration, and significance of abuse, the public health risk, the substance’s psychic or physiological dependence liability, and whether the substance is an immediate precursor of a substance already controlled under state law.⁷⁸ Before adding a chemical compound to the state’s controlled substance

schedules, the Attorney General must request a medical and scientific evaluation of the substance and a classification recommendation from the Department of Health and the Department of Law Enforcement.⁷⁹ The Attorney General may temporarily bypass the above procedures if there is an imminent hazard to public safety, at which time an emergency rule can be issued. The Attorney General must follow up on the emergency declaration, however, with the above hearings to determine if in fact the substance should be considered a controlled substance.⁸⁰

Law enforcement authorities in Florida have identified more than 100 synthetic drugs as Schedule I controlled substances. Florida law enforcement authorities last week announced that the synthetic drug market has widened, with synthetic drugs being packaged as bubble gum, pop rocks, and cotton candy and being sold at gas stations.⁸¹

Section 7.10. Attorneys General and Authority to Enforce Criminal Laws. Approximately 32 states grant the state Attorney General the authority to prosecute criminal matters. Approximately 18 states, including Minnesota, do not empower the Attorney General's Office with direct jurisdiction to prosecute criminal matters. While the Office has not been granted jurisdiction to prosecute criminal matters, it does provide legal assistance to rural county attorneys who request assistance in murder trials and complex appellate cases. At one point, the Office was appropriated federal Byrne Grant funds to provide legal assistance to local prosecutors in complex drug cases. The federal Byrne Grant program, however, subsequently has been reduced, and the appropriation came to an end.

In 1999, the Office sought jurisdiction to prosecute illicit gang activity, including illicit drug distribution, which was believed to be fueling the growth of gang activity. The Minnesota Legislature decidedly rejected the proposal, on a bi-partisan basis, favoring the continuation of local control over criminal matters.

It is noteworthy that county attorneys and city attorneys have initiated many cases in Minnesota relating to synthetic drugs. Minnesota county attorneys, including the St. Louis County Attorney, have strong reputations for the effective prosecution of crime.

Section 7.11. State Nuisance Laws.

A. Civil Penalty for Public Nuisance

There are several types of activities that constitute a "public nuisance" under Minnesota law. A "public nuisance" is different than a "private nuisance," which may affect an individual's use of his or her property but not necessarily that of the community as a whole. One example of a "public nuisance" is conduct that "unreasonably annoys, injures or endangers the safety, health, morals, comfort or repose of any considerable number of members of the public" in violation of the criminal nuisance statute.⁸² Another example is a commercial business's violation of a local nuisance ordinance.⁸³ Another example is the unlawful sale, possession, storage, delivery, giving, manufacture, cultivation, or use of controlled substances within a building.⁸⁴ Depending on the specific activity, either one or two behavior incidents within a 12-month period is required to prove a public nuisance.

Prior to filing an action, a city is required to provide written notice to the building owner and, if applicable, the tenant that: (1) describes the nuisance; (2) summarizes the city's evidence; (3) informs the owner and/or tenant that failure to resolve the issue may result in the owner's use of the building being enjoined for one year or the tenant's lease being cancelled; and (4) informs the owner of his or her right to cancel the tenant's lease.⁸⁵

When the city has cause to believe that a nuisance exists and has not been abated pursuant to the abatement notice, the city may file a verified petition in district court and seek a temporary injunction.⁸⁶ The city attorney must serve the owner and/or tenant with a notice to show cause and the owner and/or tenant must have the opportunity to present their case at a hearing.⁸⁷ The court may issue a temporary injunction if the city attorney proves the existence of a nuisance.⁸⁸

At the conclusion of the case, if the city attorney prevails, the court may enter a permanent injunction and order of abatement.⁸⁹ The order of abatement must require the building (or part of the building) to be closed for one year.⁹⁰ The abatement order may also require the sale of movable property used in maintaining the nuisance.⁹¹ Prior to enforcement of the abatement order, the city attorney must: (1) serve the building owner with a copy of the abatement order and notice of the owner's right to file a bond under Minn. Stat. § 617.85, and (2) post the abatement order in a conspicuous place on the building.⁹²

The court may release the building from the abatement order if the judge is satisfied that the owner is acting in good faith, and the owner pays the costs of the action and files a bond in an amount to be determined by the court.⁹³ The owner will forfeit \$1,000 per day for engaging in any activity that was the subject of the abatement order.⁹⁴ The court's release of the abatement order does not affect the injunction, which remains in place.⁹⁵ The person who is the subject of an abatement order may also enter into an abatement plan with the city (Minn. Stat. § 617.82), and a landlord may move to cancel a tenant's lease (Minn. Stat. § 617.85).

B. Criminal Penalty for Public Nuisance.

A person who engages in a public nuisance may be charged with a misdemeanor pursuant to Minn. Stat. § 609.74 if that person:

(1) maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public; or

(2) interferes with, obstructs, or renders dangerous for passage, any public highway or right-of-way, or waters used by the public; or

(3) is guilty of any other act or omission declared by law to be a public nuisance and for which no sentence is specifically provided.

In prosecuting a charge of criminal nuisance, the prosecution has the burden to prove the defendant's guilt beyond a reasonable doubt.

Section 7.12. Indiana “Look Alike” Law.

In order to avoid the “Whac-a-Mole” approach of banning specific substances, which the drug manufacturers alter slightly to avoid the prohibitive law, Indiana law recently enacted legislation to ban “synthetic drug lookalike substances.” A synthetic drug look alike substance is a product other than a synthetic drug, that (1) a person knows or should know is intended to be consumed, and (2) the consumption of which a person knows or should know is intended to cause intoxication.⁹⁶ The statute has a number of exemptions for products like alcohol, tobacco, etc. Rather than focusing on proof that a substance contains a specifically banned ingredient, the Indiana law lists six practical factors that would lead a reasonable person to conclude that a substance is a synthetic drug. Those factors are:

(1) the overall appearance of a dosage unit of the substance, including its shape, color, size, markings or lack of markings, taste, consistency, and any other identifying physical characteristics;

(2) how the substance is packaged for sale or distribution, including the shape, color, size, markings or lack of markings, and any other indentifying physical characteristics of the packaging;

(3) any statement made by the owner or person in control of the substance concerning the substance’s nature, use, or effect;

(4) any statement made to the buyer or recipient of the substance suggesting or implying that the substance is a synthetic drug;

(5) any statement made to the buyer or recipient of the substance suggesting or implying that the substance may be resold for a profit; and

(6) the overall circumstances under which the substance is distributed, including whether the substance was sold at a price substantially greater than the retail value of the substance the seller claims the substance to be.⁹⁷

On May 30, 2013, a lawsuit was filed in United States District Court in Indiana challenging the Indiana law as being vague, overbroad, and unconstitutional.⁹⁸

Section 8. Municipal Initiatives.

Section 8.1. Ordinances That Prohibit Synthetic Drug Sales. There are approximately 746 statutory cities and 107 home-rule cities in Minnesota. Statutory cities derive their authority from a statutory city code found in Chapter 412 of Minnesota Statutes. In contrast, home rule cities obtain their powers from a home-rule charter. Regardless of classification, statutory and home-rule cities have authority to enact ordinances that define and regulate nuisances and define, promote and protect the “general welfare” of its citizens.⁹⁹ The Duluth home-rule charter incorporates the Minnesota Supreme Court decision of *City of Duluth v. Cerveny*, 16 N.W.2d 779 (Minn. 1944). In *Cerveny*, the Court recognized that Duluth’s home

rule charter “all powers” provision includes “all those powers which are generally recognized as powers which may properly be given to and be exercised by municipal corporations.”¹⁰⁰

According to the National Alliance for Model State Drug Laws, over 100 municipalities have adopted ordinances to ban synthetic drugs.¹⁰¹

The city of Dekalb, Illinois adopted an ordinance to suspend the license of any business that is apprehended in the distribution of a synthetic drug.¹⁰²

On August 30, 2010, the City of Duluth adopted an ordinance which prohibited the sale of certain types of synthetic marijuana.¹⁰³ Thereafter, on October 4, 2010, a retail establishment in Duluth filed a lawsuit to declare that the ordinance violated the federal constitution.¹⁰⁴ After the ordinance was adopted and the lawsuit was filed, the Minnesota Legislature enacted legislation which made it a criminal offense to distribute certain synthetic marijuana products.¹⁰⁵ In the meantime the DEA adopted regulations to classify the synthetic drugs identified in the ordinance as Schedule I controlled substances.

Accordingly, the retail establishment that initiated the proceeding agreed to dismiss the case.¹⁰⁶ The City of Duluth then repealed its ordinance.¹⁰⁷

As discussed below, a city ordinance prohibiting the sale of synthetic drugs, even when such drugs are already prohibited by state or federal statute, serves a public purpose.

Section 8.2. Ordinances That Ban Drug Paraphernalia. As noted above, Minnesota statutes prohibit the distribution of drug paraphernalia.¹⁰⁸ The statutes also authorize a municipality to adopt an ordinance to prohibit or regulate the delivery or advertisement of drug paraphernalia.¹⁰⁹ Many municipalities in Minnesota have adopted and enforced such ordinances, and several Minnesota courts have upheld the ordinances.

A. City of Moorhead. The City of Moorhead adopted a drug paraphernalia ordinance that took effect on January 11, 2012. The drug paraphernalia ordinance prohibited the distribution of drug paraphernalia equipment for the purpose of producing a controlled substance or introducing one into the human body. The ordinance defined drug paraphernalia to be any equipment designed or intended for such purposes. It identified certain products as drug paraphernalia, including ceramic pipes, water pipes, smoking masks, “roach” clips, miniature spoons, electric pipes, bongs, and ice pipes. The ordinance described certain guidelines to be used in determining whether a product constitutes proscribed “drug paraphernalia.” The criteria include representations by the distributor as to its use, prior convictions of the distributor, the distributor’s instructions (written or oral) on the use of the product, and the manner in which it is displayed for use.

Prior to the effective date of the ordinance, representatives of the police department met with the owners of Disc & Tape, Inc., which owned a retail store

called “Discontent.” The officers identified items that they considered to be drug paraphernalia under the ordinance.

On January 23, 2012, Disc & Tape, Inc. filed a lawsuit in federal court to enjoin enforcement of the ordinance. It alleged, among other things, that the ordinance violated the retailer’s constitutional rights because it: (1) allowed prosecution based solely on the physical characteristics of the objects without considering the subjective intent of the seller or the purchaser, and (2) presumed that the distributor would know whether a product constituted proscribed paraphernalia.

After denying the retailer’s motion for an injunction, the Court dismissed the lawsuit, finding that the municipality had complied with the Constitution.¹¹⁰ The Court pointed out that the United States Supreme Court upheld a similar law in *Posters N’ Things, Ltd. v. United States*, 511 U.S. 513 (1994). The Court noted that in both cases, the law identified a list of products that were proscribed and identified specific guidelines or criteria to determine if other products constituted “drug paraphernalia.” The Court found that the objectivity of both laws minimized the possibility of arbitrary enforcement.

B. City of Hastings. The City of Hastings adopted a drug paraphernalia ordinance similar to that adopted by the City of Moorhead. On August 17, 2010, the city police department executed a search warrant on Hastings Tobacco, alleging that it distributed products proscribed for distribution as “drug paraphernalia.” The items seized included “bubble” pipes, marijuana “dugouts,” marijuana “one hitter” pipes, “roach” clips, seed grinders and other paraphernalia. The defendant was charged with misdemeanors and made a motion to dismiss the criminal charges, arguing that the ordinances were too vague and did not give the defendant sufficient notice as to what products were proscribed under the law.

On June 30, 2011, the Court denied the defendant’s motion to dismiss, finding that the ordinance met the standards of the U.S. Constitution.¹¹¹ Specifically, the Court found that the ordinance was neither overbroad nor vague. Accordingly, the litigation continued through to final sentencing of the defendant on December 12, 2011.

C. City of Red Wing. The City of Red Wing adopted a drug paraphernalia ordinance on April 21, 2012. On May 15, 2012, at the request of the owner of the RW Tobacco shop, investigators representing the City of Red Wing visited the establishment and discussed which products constituted proscribed drug paraphernalia. The owner removed the items that were believed to be drug paraphernalia and then initiated a lawsuit to enjoin the city from enforcing the ordinance.¹¹² A hearing on the motion was held on May 21, 2012. The court denied the motion of the defendant, and subsequently dismissed the lawsuit, finding the ordinance to be constitutional.

D. *Posters N' Things, Ltd. v. United States*, 511 U.S. 513 (1994). The U.S. Supreme Court weighed in on the constitutionality of drug paraphernalia statutes in 1994, when it reviewed a variety of constitutional challenges to the Mail Order Drug Paraphernalia Act, 21 U.S.C. § 857(a)(1). In short, the court found that the definition of "drug paraphernalia," which was any equipment "primarily intended or designed for use" with illegal drugs, was not vague and did not expose the accused to a subjective intent requirement. With regard to the criminal standard of requiring "scienter" or knowledge of criminality, the Court stated that the government was required to show that the defendant knew that the product was going into interstate commerce and knew that it was likely to be used with illegal drugs. The Court held that the government did not have to prove that the defendant knew that the product was proscribed under the statute.

E. City of Duluth. On January 29, 1996, the City of Duluth appears to have adopted an ordinance to proscribe certain types of drug paraphernalia. The ordinance appears to have expired on September 14, 1997. It is not known if the City has ever re-adopted such an ordinance.

F. City of Westfield, Massachusetts. The city of Westfield, Massachusetts adopted an ordinance that prohibits the display of any appliance designed for use in the application or administration of drugs which are controlled substances.¹¹³ The ordinance also requires a retail establishment to have a license to sell such appliances.¹¹⁴

Section 8.3. Zoning Ordinances That Restrict Certain Retailers. Minnesota municipalities derive authority to regulate land use under the Minnesota Municipal Planning Act.¹¹⁵ Cities regulate land use planning through three basic methods: (1) comprehensive plan; (2) the subdivision ordinance, and (3) the zoning ordinance.¹¹⁶

A zoning ordinance is the usual method through which a municipality regulates a business selling products that offend or threaten the general welfare of the city's citizens. Such ordinances, enacted to protect the public safety and general welfare of a community, have been upheld in restricting to certain zones the sale of liquor, tobacco, fireworks, automobiles, sexually explicit products, and even medical marijuana in California. A city is permitted to enact zoning ordinances to control the development of land (i.e. the type of structure built, the quality of installation, the density, etc.) and segregate different uses for land (residential, commercial, industrial, etc.) in order to "best use the land for the health and welfare of the city's residents."¹¹⁷ The Minnesota Municipal Planning Act states in pertinent part:

For the purpose of promoting the public health, safety, morals and general welfare, a municipality may by ordinance regulate on the earth's surface, in the air space above the surface, and in the subsurface area...the uses of buildings and structures for trade, industry, residence, recreation, public activities or other purposes.¹¹⁸

Under the Act, a city can provide for the elimination or termination of a land use. The termination is not effective, however, as it applies to a land use that was lawful at the time of the inception of the land's activity, except for "adults-only bookstores, adults only theatres, or similar adults-only business, as defined by ordinance."¹¹⁹ The Minnesota Supreme Court has held:

[A] residential zoning ordinance may constitutionally prohibit the *creation* of uses which are nonconforming, but *existing* nonconforming uses must either be permitted to remain or be eliminated by use of eminent domain.¹²⁰

While a city cannot eliminate a pre-existing lawful land use, a city can prohibit a legal non-conformity from being expanded.¹²¹

It may seem redundant for a municipality to enact a zoning ordinance that confines an activity that is already illegal under state statutes to a particular area of the city. It also may seem ineffective to adopt a zoning ordinance that cannot restrict the activities of an ongoing business that was in compliance with zoning requirements prior to adoption of the ordinance. Having said that, such an ordinance may stop the expansion of a non-conforming use in a restricted zone and, as important, prohibit the start-up of a look-alike business or prohibit the establishment of other, similar retail establishments if an existing retailer should happen to close. Indeed, many zoning ordinances will provide that, if a regulated use ceases or discontinues operation for a continuous period of more than one year, the regulated use may not resume or be replaced by any other regulated use unless it complies with the regulated use requirements of the ordinance.

Examples of different municipal zoning ordinances include the following:

A. Oceanside, California. In Oceanside, California, tobacco and drug establishments are regulated uses and require a permit.¹²² Regulated uses must be at least 1,000 feet away from other regulated uses and at least 500 feet from any residential district, school, park, church, beach or daycare.¹²³ A "Tobacco and Drug Paraphernalia Establishment" is defined as "any premises where tobacco and drug paraphernalia is displayed for sale, offered for sale, or sold, and which devotes more than a two foot by four foot section of shelf space for tobacco and drug paraphernalia."¹²⁴ "Tobacco and drug paraphernalia" is defined as devices designed primarily for the smoking or ingestion of tobacco, marijuana, hashish, hashish oil, cocaine or any other controlled substance under state law. A device is designed primarily for smoking or ingestion if it has been created for that purpose and is peculiarly adapted to that purpose, "notwithstanding that it might also be possible to use the device for some other purpose." The ordinance then lists specific items that meet the definition.¹²⁵ The ordinance states that nothing in the definition is intended to, nor shall be interpreted as legalizing otherwise prohibited acts by state or federal law.¹²⁶

B. Union City, California. The zoning ordinance is similar to Oceanside's, except that it defines "retail tobacco store" and "smoke shop" as retail stores that devote more than 15 percent of total floor area to the sale of

tobacco or smoking products.¹²⁷ It also prohibits the issuance of a permit to any store located within 1,000 feet of another such store.¹²⁸

C. Philadelphia, Pennsylvania. “Drug Paraphernalia” stores are regulated uses in Philadelphia, and restricted to industrial areas.¹²⁹ They are prohibited from use in residential, commercial, and special purpose districts.¹³⁰ Other uses restricted to industrial districts include adult-oriented merchandise, gun shops, detention and correctional facilities, personal credit establishments, and body art services.¹³¹ None of the regulated use shops may be located within 1,000 feet of any other regulated use.¹³²

Section 8.4. Nuisance Ordinances. Many cities have nuisance ordinances. As noted above, under state law, a municipality may enforce public nuisance ordinances and eliminate uses determined to be a public nuisance.¹³³ Under Minnesota case law, cities generally have broad authority to declare a condition to be a nuisance so long as such declarations conform to statutory standards and court precedent.¹³⁴

Examples of business activities that Minnesota case law has recognized to be nuisances include industrial plants transferring dust to adjacent residential property; a limestone quarry giving off noise, fumes, and odors; wastewater treatment plant odors; poultry and hog farm odors; and water and sewage runoff.¹³⁵

Section 8.5. Board of Health. Local governments can also use their boards of public health to regulate businesses that affect the public health. A county or city board of health could be empowered by a city council or county board to review applications for licensure and issue licenses to businesses which sell products or services that affect the health or welfare of the citizens. The city can also exempt certain businesses that are otherwise already licensed by other regulators, such as the Minnesota Department of Health, the Minnesota Department of Human Services, the Minnesota Board of Pharmacy, etc. The municipal board of health could be empowered to revoke or suspend the license of a business which sells products which endanger the health of the public.

In addition, a local board of public health¹³⁶ is empowered under current law to remove and abate public health nuisances. In undertaking this duty, a board of public health may order the owner or occupant of property that is either a “public health nuisance, source of filth, or cause of sickness” to remove or abate the threat within a time established by the board. Notice must be served on the owner, occupant, or agent of the property before the board may take further action.¹³⁷ If the owner, occupant, or agent of the property does not comply with the board’s order, the board (or its own agent) is required to remove or abate the public health threat.¹³⁸

The board may seek an injunction in court against any nuisance or other activity that adversely affects the public health. An individual who deliberately hinders a member of a board of public health (or its agent) from the performance of the board’s duties is guilty of a misdemeanor offense.¹³⁹ Similarly, any member or agent of a board of public health that refuses or neglects to perform a duty imposed by statute or ordinance is guilty of a misdemeanor.¹⁴⁰

Section 9. Discussion Points.

1. Department of Revenue Licensure. In Indiana, retail merchants must have a “retailers merchant certificate” from the Indiana Department of Revenue in order to operate a business.¹⁴¹ Indiana law empowers the Revenue Department to suspend a merchant’s certificate to do business for up to one year if a civil or criminal judgment is entered against it finding that the merchant sold synthetic drugs.¹⁴² While retail merchants are not required to be licensed in Minnesota, a merchant in Minnesota must obtain a sales tax permit from the Minnesota Department of Revenue if it sells taxable products.¹⁴³

The Minnesota Legislature could consider requiring certain types of merchants to obtain a general merchant’s license similar to that of Indiana, which could then be suspended or revoked if the merchant violated synthetic drug laws. It should be noted that while such a law would provide an additional tool to be utilized against a “head shop” that flaunts the synthetic drug laws, if the definition of the merchants to be regulated by the law were overly broad, it would result in increased costs to and regulation of law-abiding businesses.

Alternatively, the Legislature should grant the Minnesota Department of Revenue the power to revoke or suspend a sales tax permit if the merchant is found by a court of law to have sold synthetic drugs. Such a law, if actively enforced by the Department, could address the “Whac-a-Mole” problem as it relates to merchants that stop the sale of one synthetic drug only to start up sales of “look-alike” drugs.

2. Department of Health Licensure. The Minnesota Legislature could consider a modification of the Illinois and Indiana laws and empower the Minnesota Department of Health to license certain retailers that sell products that may be consumed by individuals and are harmful to the public health. Such a law, which could provide exemptions for businesses that are already otherwise licensed elsewhere, could empower the Department to suspend the license of any retailer that sells products that do not fully disclose their contents.

3. Rulemaking Authority of Board of Pharmacy. Under current law, the Minnesota Board of Pharmacy has rulemaking authority, including expedited rulemaking authority, to classify products as controlled substances.¹⁴⁴ The Board’s expedited rulemaking authority expires in 2014, however, and any rule adopted under this procedure is only valid until the end of the next legislative session. The Legislature should extend the expedited rulemaking authority of the Board of Pharmacy beyond 2014. As important, the Legislature should extend the duration of the Board’s decision to classify a substance as a controlled substance.

4. State Level Cease and Desist Authority. North Dakota law allows the state administrative agency (in that case, the North Dakota Attorney General’s Office) to issue a cease and desist order—which is a directive to a business not to engage in an enumerated act—prior to a judicial hearing being conducted. Shortly after issuing a cease and desist order, however, the administrative agency must be prepared to conduct an administrative hearing to prove the allegations. In Minnesota, certain regulatory authority regarding synthetic drugs has been delegated to the Minnesota Board of Pharmacy, which has the expertise to determine whether a

drug meets the synthetic drug requirements. The Board of Pharmacy does not have cease and desist authority, however, under current Minnesota law.

The Legislature should consider granting the Minnesota Board of Pharmacy the authority to issue cease and desist orders as it relates to synthetic drugs that it has found to be analogs to existing Schedule I or Schedule II controlled substances. Having said that, it should be noted that the experience in North Dakota has been that while such cease and desist authority may stop the sale of a particular substance, it does not shut down a store.

5. Indiana Definition of “Synthetic Drug Lookalike Substance.” As noted in Section 7.12, Indiana recently enacted a law to ban synthetic drug “lookalike” substances. The Minnesota Legislature should consider expanding the definition of banned substances under state law. The Legislature should monitor the outcome of the federal lawsuit in Indiana, as it is likely that preliminary court rulings will be issued in that lawsuit prior to the start of the next legislative session in Minnesota.

6. Definition of Drug Paraphernalia. Violations of Minnesota’s drug paraphernalia law may be prosecuted by a city attorney. The Minnesota statute that prohibits the distribution of drug paraphernalia should be updated to clarify that “distribution” specifically includes the sale of drug paraphernalia products. It should also be updated to identify certain specific proscribed products and include guidelines so that law enforcement can address other types of drug paraphernalia. Several Minnesota cities have adopted local ordinances which provide models for updating state law.

7. Provide Attorney General with Jurisdiction to Prosecute Criminal Activity. Approximately 32 states provide the state Attorney General with jurisdiction to prosecute criminal matters. For example, the New York Attorney General has wide criminal jurisdiction under the Martin Act and other laws to prosecute crime. Minnesota is one of about 18 states that does not vest such authority in the Attorney General. Rather, Minnesota county attorneys currently enforce the felony laws in Minnesota. In Minnesota, the Legislature has preferred that criminal prosecutions be subject to local control. In 1999, law enforcement agencies opposed granting the Attorney General’s with criminal authority, and the proposal was defeated on a bipartisan basis. The Minnesota Legislature should consider granting criminal jurisdiction to the Attorney General and providing the Office with resources to hire attorneys to undertake such efforts. Having said that, it should be noted that Minnesota county attorneys, including the St. Louis County Attorney, have strong reputations for effective prosecution of crimes.

8. The City of Duluth Should Adopt an Ordinance To Ban Synthetic Drug Sales. Over 100 cities throughout the United States have adopted ordinances to ban the sale of synthetic drugs. Duluth adopted such an ordinance in 2010 but later repealed it. The City of Duluth should adopt an ordinance to ban the sale of synthetic drugs. While state and federal law already contain such a ban, a local ordinance gives the community additional tools to address the problem of synthetic drug sales. Most important, a city ordinance can be modified by a city council which, unlike the state legislature, meets regularly throughout the year. Further, a city council can be substantially more agile than a legislative body in addressing the “Whac-A-Mole” difficulties with synthetic drug regulation.

9. The City of Duluth Should Adopt a Drug Paraphernalia Ordinance. Minnesota state law expressly grants cities the authority to adopt drug paraphernalia ordinances. A number of Minnesota cities have recently adopted drug paraphernalia ordinances, which have been found to be constitutional. Local police have used those ordinances to curb the sale of unlawful products. The City of Duluth had a drug paraphernalia ordinance which lapsed in 1997. The City should adopt a drug paraphernalia ordinance like those ordinances recently adopted in other Minnesota cities, which have been upheld by the courts as constitutional. Once again, a city ordinance can be modified to address the continuous change in the synthetic drug market.

10. The City of Duluth Should Consider the Prospective Use Of Zoning Ordinances. One way that cities traditionally deal with nuisance businesses is through zoning laws, which may, for example, restrict a business to certain industrial zones or place minimum space restrictions between businesses. As noted above, some cities have adopted zoning ordinances to place limits on the location of head or smoke shops. The City should review whether updates are needed to its zoning laws. While a new zoning ordinance will not apply to an existing business, it will apply to a new business or a business that restarts after being shut down for a period of time. In considering the use of zoning ordinances, the City should take care not to imply that a product which is already illegal under local, state, or federal law is somehow legal (e.g., by defining a merchant subject to zoning as one who sells already illegal products).

11. The City of Duluth Should Coordinate With the Local Board of Public Health. Under the Minnesota Local Public Health Act, Minn. Stat. § 145A.01 *et seq.*, local cities and counties in Minnesota must work together to form a local board of health. Minn. Stat. § 145A.03. As Indiana has done at the state level with a general permit law, the city should consider the creation of a Board of Health that licenses and regulates certain products that are sold and that may endanger the public health through their consumption. The local board of health can remove and abate public health nuisances (Minn. Stat. § 145A.04, subd. 8), which are defined as “any activity or failure to act that adversely affects the public health.” To the extent that the sale and subsequent use of synthetic drugs in Duluth is adversely affecting the public health, the City and health professionals should work closely with the local board of public health to document the adverse affects and pursue any appropriate remedial action.

12. The City of Duluth Should Coordinate With the Minnesota State Substance Abuse Strategy. As noted above, the Minnesota Legislature created the Division of Alcohol and Drug Abuse Division with the Minnesota Department of Human Services to coordinate and review all activities and programs of the various state departments as it relates to drug abuse problems and to establish a state plan to set forth goals and priorities for a comprehensive drug abuse program in Minnesota. Minn. Stat. § 254A.03. Pursuant to this statutory directive, the Authority developed the “Minnesota State Substance Abuse Strategy” in 2012. The Strategy includes:

- Strengthen prevention efforts
- Create opportunities for intervention in health care
- Integrate treatment of substance abuse in health care reform
- Expand support for recovery

- Interrupt the cycle of substance abuse, crime and incarceration
- Reduce trafficking, production, and sale of illegal drugs in Minnesota
- Evaluate the results of various interventions.

The City should work closely with the Authority to share its experience with synthetic drugs so that the City's recommendations and experience can be incorporated into the goals of the Authority.

Section 10. Conclusion.

This status report identifies actions taken by other communities and makes suggestions as to actions that may be considered by policymakers at the municipal and state level. As they carry out their work, it is important that public policy makers work within the framework of the laws and constitution.

This status report is not competitive with the Minnesota State Substance Abuse Strategy adopted in 2012. Rather, it is supportive of it. City officials in Duluth are encouraged to work with the Authority to propose a comprehensive system of reform to the current statutory and regulatory structure.

It is important to emphasize that the regulation of synthetic drugs is very new across the country. At least three separate court cases are currently pending as it relates to such activity in Duluth. One action is being undertaken by St. Louis County Attorney Mark Rubin, who has a very strong reputation as an effective prosecutor. Another action is being taken by the U.S. Attorney's Office, which also has a very strong reputation as a prosecutorial agency. It is important to allow these cases to proceed in the customary course and according to due process of law.

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² Jana Eshback, *Attorney General Reports Spice Synthetic Drugs Take On New Shape*, CBS NEWS, May 15, 2013.

³ Little Arm, Inc. et al. v. Adams County Prosecutor et al., Court File No. 3CV00862 (S.D. Ind. May 28, 2013).

⁴ Paul Walsh, *Second Death in Minnesota is Tied to Synthetic Drugs*, STARTRIBUNE, Sept. 12, 2011, <http://www.startribune.com/local/west/129502953.html?refer=y>.

⁵ David Chanen, *Blaine Man Who Supplied Synthetic Drug Charged with Murder*, STARTRIBUNE, Mar. 22, 2011, <http://www.startribune.com/local/north/118397999.html?refer=y>.

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- ¹⁶ Susan Cheng et al., *Bath Salts & Synthetic Cannabinoids: A Review*, MEDSCAPE, Mar. 1, 2012, <http://www.medscape.com/viewarticle/765892>.
- ¹⁷ Centers for Disease Control and Prevention, *Acute Kidney Injury Associated with Synthetic Cannabinoid Use—Multiple States, 2012*, 62 MORBIDITY AND MORTALITY WEEKLY REPORT 93-98 (2012), available at <http://www.cdc.gov/mmwr/pdf/wk/mm6206.pdf>.
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- ¹⁹ Paul Purpura, *Synthetic Marijuana Ring Linked to Georgia Teen's Death*, NEW ORLEANS TIMES-PICAYUNE, Mar. 21, 2013.
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⁵⁷ *Id.*, subd. 8b(c).

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¹¹⁷ *Id.*

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¹²⁹ Philadelphia, Pa., Code §§ 14-602, 14-603(13).

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