

# UNIFORM CONTROLLED SUBSTANCES ACT (1994)

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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IN ALL THE STATES

at its

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MEETING IN ITS ONE-HUNDRED-AND-THIRD YEAR  
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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

## **UNIFORM CONTROLLED SUBSTANCES ACT (1994)**

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# **UNIFORM CONTROLLED SUBSTANCES ACT (1994)**

## **PREFATORY NOTE**

### **Prefatory Note for Uniform Controlled Substances Act (1990)**

The Uniform Controlled Substances Act (1990) is designed to supplant the Uniform Controlled Substances Act adopted by the National Conference of Commissioners on Uniform State Laws in 1970. The 1970 Uniform Act was designed to complement the federal Controlled Substances Act, which was enacted in 1970. Since 1970, several changes have been made to the federal act, particularly in 1984, 1986, and 1988.

This Uniform Act was drafted to maintain uniformity between the laws of the several States and those of the federal government. It has been designed to complement the federal law and provide an interlocking trellis of federal and state law to enable government at all levels to control more effectively the drug abuse problem.

The drug abuse problem has reached epidemic proportions. It encompasses almost every nationality, race, and economic level. It has moved from urban areas into suburban and rural communities, and has manifested itself in every State in the Union.

Much of this major increase in drug use and abuse is attributable to the increased mobility of our citizens and their affluence. Drugs clandestinely manufactured or illegally diverted from legitimate channels in one part of a State are easily transported for sale to another part of that State or even to another State. Nowhere is this mobility manifested with greater impact than in the legitimate pharmaceutical industry. The lines of distribution of the products of this major national industry cross in and out of a State innumerable times during the manufacturing or distribution processes. To assure the continued free movement of controlled substances between States, while at the same time securing such States against drug diversion from legitimate sources, it becomes critical to approach not only the control of illicit and legitimate traffic in these substances at the national and international levels, but also to approach this problem at the state and local level on a uniform basis.

A main objective of this Uniform Act is to continue a coordinated and codified system of drug control initiated with the federal act and the 1970 Uniform Act.

The Act sets out the prohibited activities in detail, but does not prescribe specific fines or sentences, this being left to the discretion of the individual States. It further provides law enforcement tools to improve investigative efforts and provides for education and training programs relating to the drug abuse problem.

The Uniform Act updates and improves existing state laws and ensures legislative and administrative flexibility to enable the States to cope with both present and future drug problems. Because of the emphasis on controlling drug use, members of the medical profession may hesitate to prescribe narcotic drugs where use of such drugs is warranted. This Act addresses this concern. Legitimate use of controlled substances is essential for public health and safety, and the availability of these substances must be assured. At the same time, the illegitimate manufacture, distribution, and possession of controlled substances must be curtailed and eliminated. It is recognized that law enforcement may not be the ultimate solution to the drug abuse problem. It is hoped that present research efforts will be continued and vigorously expanded, particularly as they relate to the development of rehabilitation, treatment, and educational programs for addicts, drug dependent persons, and potential drug abusers.

#### **Prefatory Note for 1994 Amendments – Asset Forfeiture**

As originally approved in 1970, the Uniform Controlled Substances Act (UCSA) authorized the seizure and forfeiture of controlled substances manufactured, distributed, dispensed or acquired in violation of the Act; raw materials, equipment and containers used in manufacturing, compounding, processing or delivering controlled substances in violation of the Act; conveyances, including aircraft, vehicles and vessels, used to transport property used in violation of the Act; and books, records and research materials used in violation of the Act.

Although asset forfeiture was originally intended to be included within the 1990 version of UCSA, because the members of the National Conference of Commissioners on Uniform State Laws were unable to arrive at agreement concerning the most appropriate manner in which to revise these provisions of the 1970 Act, the 1990 Uniform Act was approved without asset forfeiture provisions. Instead, the National Conference appointed a separate Drafting Committee charged solely with the responsibility of reviewing forfeiture issues. Based upon the recommendations of the new Drafting Committee, the National Conference amended the UCSA in 1994 to reauthorize asset forfeiture as a remedy for violations of the Uniform Act.

The 1994 amendments to the UCSA provide for either civil or criminal forfeiture, and permit civil forfeitures to proceed either *in rem* or *in personam*.

Both types of forfeiture proceedings derive from long-standing *in rem* civil forfeiture concepts. Civil forfeiture originated based upon the rationale that, when a thing is used in violation of the law, forfeiture of the thing as an instrument of wrongdoing is appropriate because the thing itself is guilty. Although this fiction seems quaint today, significant social policies, similar to those that justify other civil remedies, continue to support the forfeiture remedy. Allowing merger of this civil remedy with a criminal prosecution in an appropriate case achieves efficiencies and avoids double jeopardy problems that might arise if separate civil forfeiture and criminal prosecution were pursued based on the same activity.

The State has an obvious interest in removing contraband from circulation. Moreover, persons who engage in unlawful conduct, such as drug crimes, have no legitimate claim to the proceeds they derive from such activities, and the State has an interest in depriving such persons of the fruits of their wrongdoing. Further, individuals who engage in drug commerce impose costs on the rest of society for which they may justly be held accountable – law enforcement expenses, harm to users, and collateral violence generated by these activities. Civil and criminal forfeiture allows the State to pursue these legitimate interests.

Perhaps because civil forfeiture has ancient roots, and developed in some ways independently of the rest of our civil system, aspects of civil forfeiture have required adjustment to comport with contemporary notions of justice. For example, the innocence of the owner of property historically did not preclude forfeiture of the property; the theory was that the property itself had done wrong, and the innocence of the owner was not thought to affect that question. However, recent forfeiture statutes have incorporated defenses for owners who are innocent respecting their property's misuse. Such owners could be protected without creation of formal legal protection; one could simply rely upon prosecutorial discretion to protect innocent owners. But the wide-spread acceptance of such statutory defenses illustrates the acceptance of the more general proposition that citizens ought not to be subject to the unconstrained power of government officials, no matter how appropriately most of those officials would discharge their responsibilities. Given the extent to which commercial interests can be implicated by modern forfeitures, statutory protection of the interests of innocent owners is required because in typical commercial transactions, due diligence cannot be satisfied by reliance upon expectations regarding prosecutorial discretion.

The UCSA includes statutory defenses which prevent the forfeiture of the interests of innocent owners. In determining eligibility for the innocent owner defense, the Act rejects the approach of allowing the forfeiture of assets whose owners were merely negligent respecting how their property would be used. Instead, the Act subjects an owner's interest to forfeiture only when the owner was willfully blind respecting how their property would be used. *See* Section 505. This

standard is not only compelled by notions of fairness, but also poses fewer risks to legitimate commerce than is posed by a lower standard.

More generally, the UCSA attempts to set forth in statutory form all important aspects of reasonable and consistent forfeiture practice rather than relying on prosecutorial discretion to achieve similar results. Many of these provisions are lacking from current statutory schemes, although in most jurisdictions prosecutors often have recognized the importance of these concerns through informal accommodations. Such provisions of the Act are intended to prevent forfeiture from becoming unduly disruptive of ordinary commercial activities.

Thus, for example, though the UCSA generally follows the traditional approach of requiring owners to bear the burden of proving that their interests in property are exempt from forfeiture once the State establishes that someone's interest in the property is forfeitable, a special rule is followed respecting certain interest holders who are especially likely to be innocent. Such interest holders need incur the expense of establishing their innocence only if the State has reason to believe the interest holder is not innocent and so notifies the interest holder. To facilitate the operation of commercial markets, certain of these interests may be repurchased without risk to the buyer so long as the purchase occurs before the State provide notice. *See* Section 505(f)-(i). When the State's seizure of property for possible forfeiture interferes with an innocent secured party's desire to foreclose on the property, these amendments provide a mechanism to permit the secured party to protect its interests without sacrificing the State's interest in forfeiture. *See* Sections 510 and 511.

When an owner must prove innocence, the UCSA creates a process of administrative forfeiture that often will permit the owner to establish relevant rights without suffering the expense and uncertainty of litigation. *See* Sections 512 and 513. The UCSA does not include the problematic "relation-back doctrine," under which the State's interest in property is deemed to have been created as of the wrongdoing that causes forfeiture. Instead, innocent owners' interests are protected just as fully against forfeiture as they are protected from ordinary judgment creditors of the wrongdoer. *See* Section 522. Moreover, once the State has seized property, the Uniform Act requires that the State proceed diligently with forfeiture proceedings. Innocent owners thus need not suffer the restraint of their property indefinitely, and the simple fact that the State has proceeded against property will interfere with marketability no longer than necessary. *See* Section 519; *see also* Section 505(n) (knowledge that State seized property for forfeiture does not deprive purchaser of innocent-owner defense if property had been released).

These 1994 amendments also reform other aspects of forfeiture law the primary impact of which reaches beyond the commercial context. For example,

some significant forfeiture statutes, including federal forfeiture statutes, place an exceedingly light burden of proof on the government; owners must prove their innocence once the government establishes probable cause that the property was used illegally, a showing that can be based on evidence, like hearsay, that would be inadmissible in an ordinary civil trial. The UCSA requires the State to satisfy the ordinary civil burden of proof – a preponderance of evidence admissible under the ordinary rules of evidence. *See* Section 521. The Act dispenses with the requirement that the owner post a bond to resist the State’s effort to forfeit it. *See* Sections 517 and 518. Unlike some proposals, the Act permits a party to demand trial by jury. *See* Section 517. The Act specifies how the State can place potential purchasers of property on notice of a forfeiture claim without taking physical possession of property, and requires the State to proceed in this way with respect to real property in the usual case. *See* Sections 507(c) and 509.

Traditionally, courts had no power to take account of whether a forfeiture should be limited because the value of the property involved was excessive in light of its owner’s wrongdoing. After *Austin v. United States*, 113 S. Ct. 2801 (1993), the Eighth Amendment may preclude that approach. Even before the Court’s opinion, the National Conference had concluded that courts should be empowered to limit grossly disproportionate forfeitures. *See* Section 520.

Moreover, many jurisdictions have earmarked forfeited property for law enforcement uses. The UCSA requires that money realized from forfeitures be deposited in general operating funds subject to ordinary appropriation requirements. It is unrealistic to believe that law enforcement needs, and their priority as against other compelling needs, will be closely correlated with the value of property that is forfeited within the relevant jurisdiction in any particular budget period. On the other hand, earmarking funds risks skewing enforcement and prosecutorial priorities. *See* Section 522. Finally, Section 506 provides States with three optional provisions to deal with the special difficulties that arise when the State forfeits fees that have been paid to attorneys for representation in criminal matters.

The UCSA provides greater guidance than most current federal or state laws respecting how an owner who becomes aware that its property will be improperly used can act to protect its interest. *See* Section 505(b)(2) and (k). The Act also permits an owner to obtain a prompt judicial examination of whether probable cause exists so as to permit the State to hold property during the pendency of forfeiture proceedings. Even if probable cause does exist, the owner is permitted to obtain use of property in many cases through posting a bond in its fair-market value. *See* Sections 510 and 511. As to uncontested forfeitures, the administrative process permits the State to prosecute a forfeiture action without the delay inherent in invoking formal judicial proceedings. *See* Sections 512 and 513.

Finally, the Uniform Act provides that if a State is not substantially justified in seizing property, filing a forfeiture lien, or commencing forfeiture proceedings, the court may award costs and reasonable attorney's fees to the property owner. The Act also authorizes a property owner to maintain a civil action against the State to recover damages resulting from the negligent management of property seized for forfeiture and later released to the property owner. *See* Section 524.

Additional information respecting these 1994 amendments appears in commentary to Section 419 and Article 5 of the Act. A review of these materials will show that effective law enforcement techniques need not disrupt legitimate commercial activity nor violate widely shared notions of fundamental fairness.

# UNIFORM CONTROLLED SUBSTANCES ACT (1994)

## [ARTICLE] 1 DEFINITIONS

### **SECTION 101. DEFINITIONS.** As used in this [Act]:

(1) “Administer,” unless the context otherwise requires, means to apply a controlled substance, whether by injection, inhalation, ingestion, or any other means, directly to the body of a patient or research subject by:

(i) a practitioner or, in the practitioner’s presence, by the practitioner’s authorized agent; or

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

(2) “Controlled substance” means a drug, substance, or immediate precursor included in Schedules I through V of [Article] 2.

(3) (i) “Controlled substance analog” means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in or added to Schedule I or II and:

(A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or II; or

(B) with respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or II; but

(ii) the term does not include:

(A) a controlled substance;

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

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

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

(4) “Deliver,” unless the context otherwise requires, means to transfer a substance, actually or constructively, from one person to another, whether or not there is an agency relationship.

(5) “Dispense” means to deliver a controlled substance to an ultimate user, patient, or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

(6) “Dispenser” means a practitioner who dispenses.

(7) “Distribute” means to deliver other than by administering or dispensing a controlled substance.

(8) “Distributor” means a person who distributes.

(9) “Drug” means (i) a substance recognized as a drug in the official United States Pharmacopoeia, National Formulary, or the official Homeopathic Pharmacopoeia of the United States, or a supplement to any of them; (ii) a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in individuals or animals; (iii) a substance, other than food, intended to affect the structure or a function of the body of individuals or animals; and (iv) a substance intended for use as a component of an article specified in this paragraph. The term does not include a device or its components, parts, or accessories.

(10) “Drug Enforcement Administration” means the Drug Enforcement Administration of the United States Department of Justice, or its successor agency.

(11) “Immediate precursor” means a substance:

(i) that the [appropriate person or agency] has found to be and by rule has designated to be the principal compound used, or produced primarily for use, in the manufacture of a controlled substance;

(ii) that is an immediate chemical intermediary used or likely to be used in the manufacture of the controlled substance; and

(iii) the control of which is necessary to prevent, curtail, or limit the manufacture of the controlled substance.

(12) “Isomer” means an optical isomer, but in Sections 101(15)(v), 204(1)(xii) and (xxxiv), 206(1)(iv), and 401(b)(2)(ii) the term includes a geometric isomer; in Sections 204(i)(viii) and (xlii), and 210(a)(3) the term includes a positional isomer; and in Sections 204(1)(xxxv) and (3), and 208(a)(1) the term includes a positional or geometric isomer.

(13) “Manufacture” means to produce, prepare, propagate, compound, convert, or process a controlled substance, directly or indirectly, by extraction from substances of natural origin, chemical synthesis, or a combination of extraction and chemical synthesis, and includes packaging or repackaging of the substance or labeling or relabeling of its container. The term does not include the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance:

(i) by a practitioner as an incident to the practitioner’s administering or dispensing of a controlled substance in the course of the practitioner’s professional practice; or

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

(14) “Marijuana” means all parts of the plant *Cannabis*, whether growing or not; its seeds; the resin extracted from any part of the plant; and every compound, salt, derivative, mixture, or preparation of the plant, or its seeds or resin. The term does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, salt, derivative, mixture, or preparation of the mature stalks, except resin extracted therefrom; fiber, oil, or cake; or the sterilized seed of the plant which is incapable of germination.

(15) “Narcotic drug” means any of the following, however manufactured:

(i) opium, opium derivative, and any derivative of either, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation, but not isoquinoline alkaloids of opium;

(ii) synthetic opiate and any derivative of synthetic opiate, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation;

(iii) poppy straw and concentrate of poppy straw;

(iv) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(v) cocaine, or any salt, isomer, or salt of isomer of cocaine;

(vi) cocaine base;

(vii) ecgonine, or any derivative, salt, isomer, or salt of isomer of ecgonine; and

(viii) compound, mixture, or preparation containing any quantity of a substance listed in this paragraph.

(16) “Opiate” means a substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. The term includes opium, opium derivatives, and synthetic opiates. The term does not include, unless specifically scheduled as a controlled substance pursuant to Section 201, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). The term includes the racemic and levorotatory forms of dextromethorphan.

(17) “Opium poppy” means the plant of the species *Papaver somniferum* L., except its seeds.

(18) “Person” means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government or governmental subdivision or agency, or any other legal or commercial entity.

(19) “Poppy straw” means all parts, except the seeds, of the opium poppy, after mowing.

(20) “Practitioner” means a physician, dentist, veterinarian, scientific investigator, pharmacist, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by this State, to distribute, dispense, conduct research with

respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

(21) “Production,” unless the context otherwise requires, includes the manufacturing of a controlled substance and the planting, cultivating, growing, or harvesting of a plant from which a controlled substance is derived.

(22) “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

(23) “Ultimate user” means an individual who lawfully possesses a controlled substance for the individual’s own use or for the use of a member of the individual’s household or for administering to an animal owned by the individual or by a member of the individual’s household.

### **Comment**

Several provisions of the Uniform Controlled Substances Act (1990) are derived from the wording of the federal Controlled Substances Act. In most instances, deviations from the wording of the federal act are intended to improve readability, with no change in substance. This Act does not include a definition for such terms as “addict,” “drug dependent person,” or “habitual user.” If a State chooses to use such a definition, the State should assure that the definition cannot be construed to include a patient using a controlled substance pursuant to the lawful order of a practitioner. In paragraph (2) “included” is used to refer to substances controlled on adoption of the Act (those substances “listed” in Sections 204, 206, 208, 210, and 212) and to substances controlled under Section 601 and administrative action. The definition of “controlled substance analog” is derived from the definition contained in the federal act, as added by the Anti-Drug Abuse Act of 1986, §§ 1201-1204 (the “Controlled Substance Analogue Enforcement Act of 1986”). “Deliver” and “delivery” apply to any substance so as to include imitation controlled substances. The definition of “drug” is derived from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 321(g)(1). The definition of “isomer” is taken from the federal Controlled Substances Act, 21 U.S.C. 802(14). “Isomer” was added to the federal act in 1984, and amended in 1986 and is further revised to reflect the use of the term in Sections 101(15)(v), 204(a)(1)(xxxiv), 208(a)(1), 210(a)(3), and 401(a)(1)(ii)(B). The definition of marijuana applies to all subtypes or species of *Cannabis*, regardless of the gross botanical characteristics of individual species, e.g., *Cannabis sativa L.*, *Cannabis americanus*, *Cannabis indica*, and *Cannabis ruderalis*.

[ARTICLE] 2  
STANDARDS AND SCHEDULES

**SECTION 201. AUTHORITY TO CONTROL.**

(a) The [appropriate person or agency] shall administer this [Act] and may add substances to or delete or reschedule substances listed in Section 204, 206, 208, 210, or 212 pursuant to the [insert appropriate state administrative procedures code section].

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

- (1) the actual or relative potential for abuse;
- (2) the scientific evidence of its pharmacological effect, if known;
- (3) the state of current scientific knowledge regarding the substance;
- (4) the history and current pattern of abuse;
- (5) the scope, duration, and significance of abuse;
- (6) the risk to the public health;
- (7) the potential of the substance to produce psychic or physiological dependence liability; and
- (8) whether the substance is an immediate precursor of a controlled substance.

(c) The [appropriate person or agency] may consider findings of the federal Food and Drug Administration or the Drug Enforcement Administration as prima facie evidence relating to one or more of the determinative factors.

(d) After considering the factors enumerated in subsection (b), the [appropriate person or agency] shall make findings with respect to them and adopt and publish a rule controlling the substance upon finding the substance has a potential for abuse.

(e) The [appropriate person or agency], without regard to the findings required by subsection (d) or Sections 203, 205, 207, 209, and 211 or the

procedures prescribed by subsections (a) through (d), may add an immediate precursor to the same schedule in which the controlled substance of which it is an immediate precursor is placed or to any other schedule. If the [appropriate person or agency] designates a substance as an immediate precursor, substances that are precursors of the controlled precursor are not subject to control solely because they are precursors of the controlled precursor.

(f) If a substance is designated, rescheduled, or deleted as a controlled substance under federal law, the [appropriate person or agency] shall similarly treat the substance under this [Act] after the expiration of 30 days from the date of publication in the Federal Register of a final order designating the substance as a controlled substance or rescheduling or deleting the substance or from the date of issuance of an order of temporary scheduling under Section 508 of the federal Dangerous Drug Diversion Control Act of 1984 [21 U.S.C. 811(h)], unless within the 30-day period, the [appropriate person or agency] or an interested party objects to the treatment of the substance. If no objection is made, the [appropriate person or agency] shall adopt and publish, without making the determinations or findings required by subsections (a) through (d) or Section 203, 205, 207, 209, or 211, a final rule treating the substance. If an objection is made, the [appropriate person or agency] shall make a determination with respect to the treatment of the substance as provided by subsections (a) through (d). Upon receipt of an objection to the treatment by the [appropriate person or agency], the [appropriate person or agency] shall publish notice of the receipt of the objection, and action by the [appropriate person or agency] under this [Act] is stayed until the [appropriate person or agency] adopts a rule as provided by subsection (d).

(g) The [appropriate person or agency], by rule and without regard to the requirements of subsections (a) through (c), may schedule a substance in Schedule I, whether or not the substance is substantially similar to a controlled substance included in Schedule I or II, if the [appropriate person or agency] finds that scheduling of the substance on an emergency basis is necessary to avoid an imminent hazard to the public safety and the substance is not in any other schedule or no exemption or approval is in effect for the substance under Section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355]. Upon receipt of notice under Section 214, the [appropriate person or agency] shall initiate scheduling of the controlled substance analog on an emergency basis pursuant to this subsection. The scheduling of a substance under this subsection expires one year after the adoption of the scheduling rule. With respect to the finding of an imminent hazard to the public safety, the [appropriate person or agency] shall consider whether the substance has been scheduled on a temporary basis under federal law or factors set forth in subsections (b)(4), (5), and (6), and may also consider clandestine importation, manufacture, or distribution, and, if available, information concerning the other factors set forth in subsection (b). A rule may not be adopted under this

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

(h) Authority of the [appropriate person or agency] to control under this section does not extend to distilled spirits, wine, malt beverages, or tobacco.

### **Comment**

The Act vests the authority to administer its provisions in the appropriate person or agency within the State. The “appropriate” person or agency should have expertise in law enforcement, pharmacology, and chemistry. The appropriate person or agency may be one or more persons, or one or more agencies, or a combination. The enacting State should designate that person or agency that has the means to implement, enforce, and regulate the provisions of the Act. For example, authority could be vested in the Office of the Attorney General, a Department of Health, a Division of Public Safety, or such other agency within the State responsible for regulating and enforcing the drug laws. An alternative might be a division of authority whereby one agency might be responsible for controlling drugs under this article, another agency might be designated to regulate the legitimate industry under Article 3, and still another agency might be charged with enforcement. In any event, the ultimate authority for determining the appropriate person or agency is vested in the enacting State.

This section sets out the factors to be considered for the control and classification of drugs into five schedules. This classification achieves one of the main objectives of the Act, which is to create a coordinated, codified system of drug control and regulation. The Act follows the federal Controlled Substances Act and lists all of the controlled substances in five schedules that are identical with the federal law. Throughout the Act “listed” is used to refer to the controlled substances listed in the Act, while “included” is used to refer to substances controlled under authority of the Act but not necessarily “listed” in the Act. The Act is not intended to prevent a State from adding or removing substances from the schedules, or from reclassifying substances from one schedule to another, provided the procedures specified in this section are followed.

The overall intent of this section is to create reasonable flexibility within the Act so that, as new substances are discovered or found to have an abuse potential, they can speedily be brought under control without constant resort to the legislature. This flexibility allows the laws to keep in step with new trends in drug abuse and new scientific information. States should consider establishing a Scientific

Advisory Committee consisting of leading medical and pharmaceutical professionals to advise the appropriate person or agency on control of substances.

Subsection (a) allows federal findings with respect to the substance to be the evidence of consideration of the relevant factors enumerated in subsection (a).

Subsection (d) provides a process of action without resorting to normal administrative procedure. The subsection provides that a rule is required to be adopted and published to similarly control a substance without objection and that the decision of the administering agency is final with respect to administrative action but is subject to judicial review as provided by Section 606. The procedure also applies to federal, temporary scheduling of a controlled substance. States that would have a delegation of legislative authority problem may want to replace subsection (d) with a sentence to this effect: “If a substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to the [appropriate person or agency], the [appropriate person or agency] shall initiate proceedings to control the substance under this [Act] pursuant to the procedures of [insert appropriate state administrative procedures code section].” Changes to the schedules should be published so as to afford notice, and this is encouraged by the requirement in subsections (b) and (d) that the agency is to cause the rules to be published.

Subsection (e) is intended to allow emergency scheduling and is based on similar temporary scheduling authority in the federal act, added in 1984 and contained in 21 U.S.C. 811(h). The reference to the scheduling on a temporary basis under federal law is intended to allow use of scheduling under the equivalent federal provision, 21 U.S.C. 811(h), as a factor in lieu of the three referenced factors in subsection (a). Although the emergency rulemaking procedure may be initiated without regard to a regular rulemaking proceeding, the initiation of a regular rulemaking proceeding is a condition precedent to the adoption of an emergency rule. States may want to consider whether to allow a hearing under subsection (e) upon the request of an interested party, similar to that provided by subsection (d).

**SECTION 202. NOMENCLATURE.** The controlled substances listed in or added to the schedules in Sections 204, 206, 208, 210, and 212 are listed or added by any official, common, usual, chemical, or trade name used.

### **SECTION 203. SCHEDULE I TESTS.**

(a) The [appropriate person or agency] shall add a substance to Schedule I upon finding that the substance:

(1) has high potential for abuse;

(2) has no currently accepted medical use in treatment in the United States; and

(3) lacks accepted safety for use under medical supervision.

(b) The [appropriate person or agency] may add a substance to Schedule I without making the findings required by subsection (a) if the substance is controlled under Schedule I of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

#### **Comment**

With extreme reluctance the requirements for placing substances in the various schedules are being retained in substantially the form contained in the 1970 Uniform Act and the federal Controlled Substances Act. The primary reason for the retention is that requirements for scheduling particular substances should parallel one another at the state and federal levels. The primary reason for the reluctance to retain the requirements is the fact that substances have been placed on schedules without complying fully with the criteria ordinarily governing scheduling decisions. See *Grinspoon v. Drug Enforcement Administration*, 828 F.2d 881 (1st Cir. 1987); and *National Organization for the Reform of Marijuana Laws (NORML) v. Drug Enforcement Administration*, 559 F.2d 735 (D.C. Cir. 1977). Subsection (b) allows placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970 the federal act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application of the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

**SECTION 204. SCHEDULE I.** Unless specifically excepted by state or federal law or state or federal regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule I:

(1) any of the following synthetic opiates, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation:

- (i) acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4-piperidinyl]-N-phenylacetamide);
- (ii) acetylmethadol;
- (iii) allylprodine;
- (iv) alphacetylmethadol (except levo-alphacetylmethadol, also known as levo-alpha-acetylmethadol, levomethadyl acetate or LAAM);
- (v) alphameprodine;
- (vi) alphamethadol;
- (vii) alpha-methylfentanyl (N-[1-(alpha-methyl-beta-phenyl)ethyl-4-piperidyl] propionanilide; 1-(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine);
- (viii) alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide);
- (ix) benzethidine;
- (x) betacetylmethadol;
- (xi) beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenylpropanamide);
- (xii) beta-hydroxy-3-methylfentanyl (other name: N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide);
- (xiii) betameprodine;
- (xiv) betamethadol;
- (xv) betaprodine;
- (xvi) clonitazene;

- (xvii) dextromoramide;
- (xviii) diampromide;
- (xix) diethylthiambutene;
- (xx) difenoxin;
- (xxi) dimenoxadol;
- (xxii) dimepheptanol;
- (xxiii) dimethylthiambutene;
- (xxiv) dioxaphetyl butyrate;
- (xxv) dipipanone;
- (xxvi) ethylmethylthiambutene;
- (xxvii) etonitazene;
- (xxviii) etoxeridine;
- (xxix) furethidine;
- (xxx) hydroxypethidine;
- (xxxi) ketobemidone;
- (xxxii) levomoramide;
- (xxxiii) levophenacymorphan;
- (xxxiv) 3-methylfentanyl (N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N-phenylpropanamide);
- (xxxv) 3-methylthiofentanyl (N-[3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide);
- (xxxvi) morpheridine;
- (xxxvii) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);

- (xxxviii) noracymethadol;
- (xxxix) norlevorphanol;
- (xl) normethadone;
- (xli) norpipanone;
- (xlii) para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl]-propanamide);
- (xliii) PEPAP(1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine);
- (xliv) phenadoxone;
- (xlv) phenampromide;
- (xlvi) phenomorphan;
- (xlvii) phenoperidine;
- (xlviii) piritramide;
- (xlix) proheptazine;
- (l) properidine;
- (li) propiram;
- (lii) racemoramide;
- (liii) thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide);
- (liv) tilidine; and
- (lv) trimeperidine.

(2) any of the following opium derivatives, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

- (i) acetorphine;

- (ii) acetyldihydrocodeine;
- (iii) benzylmorphine;
- (iv) codeine methylbromide;
- (v) codeine-N-Oxide;
- (vi) cyprenorphine;
- (vii) desomorphine;
- (viii) dihydromorphine;
- (ix) drotebanol;
- (x) etorphine, except hydrochloride salt;
- (xi) heroin;
- (xii) hydromorphanol;
- (xiii) methyldesorphine;
- (xiv) methyldihydromorphine;
- (xv) morphine methylbromide;
- (xvi) morphine methylsulfonate;
- (xvii) morphine-N-oxide;
- (xviii) myrophine;
- (xix) nicocodeine;
- (xx) nicomorphine;
- (xxi) normorphine;
- (xxii) pholcodine; and
- (xxiii) thebacon.

(3) material, compound, mixture, or preparation containing any quantity of the following hallucinogenic substances, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

- (i) alpha-ethyltryptamine (AET);
- (ii) 4-bromo-2,5-dimethoxy-amphetamine (other names: 4-bromo-2,5-dimethoxy-alpha-methylphenethylamine; 4-bromo-2,5-DMA);
- (iii) 2,5-dimethoxyamphetamine (other names: 2,5-dimethoxy-alpha-methylphenethylamine; 2,5-DMA);
- (iv) 2,5-dimethoxy-4-ethylamphet-amine (other name: DOET);
- (v) 4-methoxyamphetamine (other names: 4-methoxy-alpha-methylphenethylamine; paramethoxyamphetamine, PMA);
- (vi) 5-methoxy-3,4-methylenedioxy amphetamine;
- (vii) 4-methyl-2,5-dimethoxy-amphetamine (other names: 4-methyl-2,5-dimethoxy-alpha-methylphenethylamine; DOM; and STP);
- (viii) 3,4-methylenedioxy amphetamine;
- (ix) 3,4-methylenedioxymethamphetamine (MDMA);
- (x) methylenedioxy-N-ethylamphetamine (also known as N-ethyl-alpha-methyl-3,4 (methylenedioxy) phenethylamine, N-ethyl MDA, MDE, MDEA);
- (xi) N-hydroxy-3,4-methylenedioxy amphetamine (also known as N-hydroxy-alpha-methyl-3,4(methylenedioxy) phenethylamine, and N-hydroxy MDA);
- (xii) 3,4,5-trimethoxy amphetamine;
- (xiii) bufotenine (other names: 3-(beta-Dimethylaminoethyl)-5-hydroxyindole; 3-(2-dimethylaminoethyl)-5-indolol; N, N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappine);
- (xiv) diethyltryptamine (other names: N,N-Diethyltryptamine; DET);
- (xv) dimethyltryptamine (other names: DMT);

(xvi) ibogaine (other names: (7-Ethyl-6,6B,7,8,9,10,12,13-octahydro-2-methoxy-6,9-methano-5H-pyrido [1', 2':1,2] azepino [5,4-b] indole; tabernanthe iboga);

(xvii) lysergic acid diethylamide;

(xviii) marijuana;

(xix) mescaline;

(xx) parahexyl (other names: 3-Hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-6H-dibenzo[b,d]pyran; synhexyl);

(xxi) peyote (all parts of the plant classified botanically as *Lophophora williamsii* Lemaire, whether growing or not, its seeds, any extract from any part of the plant, and every compound, salts, derivative, mixture, or preparation of the plant, or its seeds or extracts);

(xxii) N-ethyl-3-piperidyl benzilate;

(xxiii) N-methyl-3-piperidyl benzilate;

(xxiv) psilocybin;

(xxv) psilocyn;

(xxvi) tetrahydrocannabinols; synthetic equivalents of the substances contained in the plant, or in the resinous extractives of cannabis, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:

(A)  $\Delta^1$  - cis or trans tetrahydrocannabinol, and their isomers;

(B)  $\Delta^6$  - cis or trans tetrahydrocannabinol, and their isomers; and

(C)  $\Delta^3,4$  - cis or trans tetrahydrocannabinol, and its isomers (since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical desynatime of atomic positions covered);

(xxvii) ethylamine analog of phencyclidine (other names: N-ethyl-1-phenylcyclohexylamine; (1-phenylcyclohexyl)ethylamine, N-(1-phenylcyclohexyl)ethylamine; cyclohexamine; PCE);

(xxviii) pyrrolidine analog of phencyclidine (other names: 1-(1-phenylcyclohexyl)-pyrrolidine; PCPy; PHP);

(xxix) thiophene analog of phencyclidine (other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienylanalog of phencyclidine; TPCP; TCP); and

(xxx) TCPy.

(4) material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) mecloqualone; and

(ii) methaqualone.

(5) material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

(i) aminorex;

(ii) cathinone (other names: 2-amino-1-phenyl-1-propanone; alpha-aminopropiophenone; 2-aminopropiophenone; and morephedrone);

(iii) fenethylamine;

(iv) methcathinone (some other names: 2-(methylamino)-propylphenone; 2-(methylamino)-1-phenylpropan-1-one; alpha-N-methylaminopropiophenone; monoethylpropion; ephedrone; N-methylcathinone; methylcathinone; AL-464; AL-422; AL-463; and UR 1432), its salts, optical isomers and salts of optical isomers;

(v) N-ethylamphetamine;

(vi) (±) Cis-4-methylaminorex ((±) cis-4,5-dihydro-4-methyl-5-phenyl-2-oxazoline); and

(vii) N,N-dimethylamphetamine (also known as N,N-alpha-trimethylbenzeneethanamine; N-N-alpha-trimethylphenethylamine).

## Comment

Schedule I reflects the substances controlled under Schedule I of the federal act, as published in 21 CFR 1308.11 (April 1, 1987), and updated through the February 22, 1988, issue of the Federal Register. States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator, or to delete this section and rely on the state administrator to schedule a substance.

Although peyote is listed as a Schedule I controlled substance in this Act and under Schedule I of the federal act, a separate federal regulation (21 CFR 1307.31 (April 1, 1989)) exempts the nondrug use of peyote in bona fide religious ceremonies of the Native American Church. In light of *Employment Division v. Smith*, 494 U.S. 872, 108 L.Ed. 2d 876, 110 S.Ct. 1595 (1990), States should consider including in Schedule I an exception similar to that found in 21 CFR 1307.31.

### **SECTION 205. SCHEDULE II TESTS.**

(a) The [appropriate person or agency] shall add a substance to Schedule II upon finding that:

(1) the substance has high potential for abuse;

(2) the substance has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions; and

(3) the abuse of the substance may lead to severe psychological or physical dependence.

(b) The [appropriate person or agency] may add a substance to Schedule II without making the findings required by subsection (a) if the substance is controlled under Schedule II of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

## Comment

Subsection (b) allows placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970 the federal act contained

such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

**SECTION 206. SCHEDULE II.** Unless specifically excepted by state or federal law or state or federal regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule II:

(1) any of the following substances, however manufactured:

(i) Opium and opium derivative, and any salt, compound, derivative, or preparation of opium or opium derivative, excluding apomorphine, thebaine-derived butorphanol, dextrophan, nalbuphine, butorphanol, nalmefene, naloxone, and naltrexone, but including:

- (A) raw opium;
- (B) opium extracts;
- (C) opium fluid;
- (D) powdered opium;
- (E) granulated opium;
- (F) tincture of opium;
- (G) codeine;
- (H) ethylmorphine;
- (I) etorphine hydrochloride;
- (J) hydrocodone;
- (K) hydromorphone;
- (L) metopon;
- (M) morphine;
- (N) oxycodone;

(O) oxymorphone; and

(P) thebaine;

(ii) A salt, compound, derivative, or preparation that is chemically equivalent or identical with any of the substances listed in subparagraph (i), but not isoquinoline alkaloids of opium;

(iii) Opium poppy and poppy straw;

(iv) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, including cocaine and ecgonine and their salts, isomers, derivatives, and salts of isomers and derivatives, and any salt, compound, derivative, or preparation that is chemically equivalent or identical with any of the substances listed in this subparagraph, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine; and

(v) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid, or powder form which contains the phenanthrene alkaloids of the opium poppy);

(2) any of the following synthetic opiates, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of them that are theoretically possible within the specific chemical designation, dextiorphan and levopropoxyphene excepted:

(i) alfentanil;

(ii) alphaprodine;

(iii) anileridine;

(iv) bezitramide;

(v) carfentanil;

(vi) bulk dextropropoxyphene (non-dosage forms);

(vii) dihydrocodeine;

(viii) diphenoxylate;

(ix) fentanyl;

- (x) isomethadone;
- (xi) levo-alphaacetylmethadol;
- (xii) levomethorphan;
- (xiii) levorphanol;
- (xiv) metazocine;
- (xv) methadone;
- (xvi) methadone - Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane;
- (xvii) moramide - Intermediate, 2-methyl-3-morpholino-1,1-diphenylpropane-carboxylic acid;
- (xviii) pethidine (meperidine);
- (xix) pethidine - Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;
- (xx) pethidine - Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;
- (xxi) pethidine - Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;
- (xxii) phenazocine;
- (xxiii) piminodine;
- (xxiv) racemethorphan;
- (xxv) racemorphan; and
- (xxvi) sufentanil;

(3) material, compound, mixture, or preparation containing any quantity of the following substances, their salts, isomers, or salts of isomers, having a stimulant effect on the central nervous system:

- (i) amphetamine;

(ii) methamphetamine;

(iii) phenmetrazine; and

(iv) methylphenidate;

(4) material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) amobarbital;

(ii) glutethimide;

(iii) pentobarbital;

(iv) phencyclidine; and

(v) secobarbital;

(5) (i) dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal Food and Drug Administration approved drug product ((other names for dronabinol: (6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo [b,d]pyran-1-o1; (-)-delta-9-(trans)-tetrahydrocannabinol));

(ii) nabilone ((another name for nabilone: (±)-trans-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9Hdibenzo[b,d]pyran-9-one)); and

(6) material, compound, mixture, or preparation containing any quantity of the following substances:

(i) Immediate precursor to amphetamine and methamphetamine: phenylacetone (other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone);

(ii) Immediate precursors to phencyclidine (PCP):

(A) 1-phenylcyclohexylamine; and

(B) 1-piperidinocyclohexanecarbonitrile (PCC).

## **Comment**

Schedule II reflects the substances controlled under Schedule II of the federal act, as published in 21 CFR 1308.12 (April 1, 1987), and updated through the April 15, 1987, issue of the Federal Register. States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator, or to delete this section and rely on the state administrator to schedule a substance.

### **SECTION 207. SCHEDULE III TESTS.**

(a) The [appropriate person or agency] shall add a substance to Schedule III upon finding that:

(1) the substance has a potential for abuse less than the substances included in Schedules I and II;

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

(b) The [appropriate person or agency] may add a substance to Schedule III without making the findings required by subsection (a) if the substance is controlled under Schedule III of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

## **Comment**

Subsection (b) allows placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970 the federal act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

## SECTION 208. SCHEDULE III.

(a) Unless specifically excepted by state or federal law or regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule III:

(1) a material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) a compound, mixture, or preparation in dosage unit form containing any stimulant substance included in Schedule II and which was listed as an excepted compound on August 25, 1971, pursuant to the federal Controlled Substances Act, and any other drug of the quantitative composition shown in that list for those drugs or which is the same except for containing a lesser quantity of controlled substances;

(ii) benzphetamine;

(iii) chlorphentermine;

(iv) clortermine; and

(v) phendimetrazine;

(2) a material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system:

(i) a compound, mixture, or preparation containing any of the following drugs or their salts and one or more other active medicinal ingredients not included in any schedule:

(A) amobarbital;

(B) secobarbital; and

(C) pentobarbital;

(ii) any of the following drugs, or their salts, in suppository dosage form, approved by the federal Food and Drug Administration for marketing only as a suppository:

(A) amobarbital;

(B) secobarbital; and

(C) pentobarbital;

(iii) a substance containing any quantity of a derivative of barbituric acid or any salt of a derivative of barbituric acid;

(iv) chlorhexadol;

(v) glutethimide;

(vi) lysergic acid;

(vii) lysergic acid amide;

(viii) methyprylon;

(ix) sulfondiethylmethane;

(x) sulfonethylmethane;

(xi) sulfonmethane; and

(xii) tiletamine and zolazepam or any of their salts (other names for a tiletamine-zolazepam combination product: Telazol; other names for tiletamine: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone; other names for zolazepam: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethylpyrazolo-[3,4-e][1,4]-diazepin-7(1H)-one; flupyrazapon);

(3) nalorphine; and

(4) a material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(i) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(ii) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(iii) not more than 300 milligrams of dihydrocodeinone (hydrocodone) per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(iv) not more than 300 milligrams of dihydrocodeinone (hydrocodone) per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(v) not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(vi) not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(vii) not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(viii) not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts; and

(ix) anabolic steroids. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any quantity of the following substances, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(A) anabolic steroids.

(b) The [appropriate person or agency] may exempt by rule a compound, mixture, or preparation containing a stimulant or depressant substance listed in subsections (a)(1) and (2) from the application of all or part of this [Act], if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system and the admixtures are in combinations, quantity, proportion, or

concentration that vitiates the potential for abuse of the substances having a stimulant or depressant effect on the central nervous system.

### **Comment**

Schedule III reflects the substances controlled under Schedule III of the federal act, as published in 21 CFR 1308.13 (April 1, 1987). States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the State administrator, or to delete this section and rely on the state administrator to schedule a substance.

### **SECTION 209. SCHEDULE IV TESTS.**

(a) The [appropriate person or agency] shall add a substance to Schedule IV upon finding that:

(1) the substance has a low potential for abuse relative to substances included in Schedule III;

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to substances included in Schedule III.

(b) The [appropriate person or agency] may add a substance to Schedule IV without making the findings required by subsection (a) if the substance is controlled under Schedule IV of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

### **Comment**

Subsection (b) allows placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970, the federal act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

## SECTION 210. SCHEDULE IV.

(a) Unless specifically excepted by state or federal law or state or federal regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule IV:

(1) a material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(i) not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit;

(ii) dextropropoxyphene (dosage forms); and

(iii) dextropropoxyphene (alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-propionoxybutane);

(2) a material, compound, mixture, or preparation containing any quantity of the following substances having a depressant effect on the central nervous system, including any salts, isomers, and salts of isomers of them that are theoretically possible within the specific chemical designation:

(i) alprazolam;

(ii) barbital;

(iii) bromazepam;

(iv) camazepam;

(v) chloral betaine;

(vi) chloral hydrate;

(vii) chlordiazepoxide;

(viii) clobazam;

(ix) clonazepam;

(x) clorazepate;

- (xi) clotiazepam;
- (xii) cloxazolam;
- (xiii) delorazepam;
- (xiv) diazepam;
- (xv) estazolam;
- (xvi) ethchlorvynol;
- (xvii) ethinamate;
- (xviii) ethyl loflazepate;
- (xix) fludiazepam;
- (xx) flunitrazepam;
- (xxi) flurazepam;
- (xxii) halazepam;
- (xxiii) haloxazolam;
- (xxiv) ketazolam;
- (xxv) lopraxolam;
- (xxvi) lorazepam;
- (xxvii) lormetazepam;
- (xxviii) mebutamate;
- (xxix) medazepam;
- (xxx) meprobamate;
- (xxxi) methohexital;
- (xxxii) methylphenobarbital (mephobarbital);

- (xxxiii) midazolam;
- (xxxiv) nimetazepam;
- (xxxv) nitrazepam;
- (xxxvi) nordiazepam;
- (xxxvii) oxazepam;
- (xxxviii) oxazolam;
- (xxxix) paraldehyde;
- (xl) petrichloral;
- (xli) phenobarbital;
- (xlii) pinazepam;
- (xliii) prazepam;
- (xliv) quazepam;
- (xlv) temazepam;
- (xlvi) tetrazepam;
- (xlvii) triazolam; and
- (xlviii) zolpidem;

(3) a material, compound, mixture, or preparation containing any quantity of the following substance, including any salts, isomers, and salts of isomers of it that are theoretically possible: fenfluramine;

(4) a material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

- (i) cathine ((+)-norseudoephedrine);
- (ii) diethylpropion;

- (iii) fencamfamin;
- (iv) fenproporex;
- (v) mazindol;
- (vi) mefenorex;
- (vii) pemoline (including organometallic complexes and chelates thereof);
- (viii) phentermine;
- (ix) pipradrol; and
- (x) SPA ((-)-1-dimethylamino-1,2-diphenylethane);

(5) a material, compound, mixture, or preparation containing any quantity of the following substance, including its salts: pentazocine.

(b) The [appropriate person or agency] may exempt by rule any compound, mixture, or preparation containing a depressant substance listed in subsection (a)(2) from the application of all or part of this [Act], if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant effect on the central nervous system and the admixtures are in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances having a depressant effect on the central nervous system.

### **Comment**

Schedule IV reflects the substances controlled under Schedule IV of the federal act, as published in 21 CFR 1308.14 (April 1, 1987). States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator, or to delete this section and rely on the state administrator to schedule a substance.

### **SECTION 211. SCHEDULE V TESTS.**

(a) The [appropriate person or agency] shall add a substance to Schedule V upon finding that:

(1) the substance has a low potential for abuse relative to substances included in Schedule IV;

(2) the substance has currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances included in Schedule IV.

(b) The [appropriate person or agency] may add a substance to Schedule V without being required to make the findings required by subsection (a) if the substance is controlled under Schedule V of the federal Controlled Substances Act by a federal agency as the result of an international treaty, convention, or protocol.

### **Comment**

Subsection (b) allows placement of a substance on the schedule without the necessity of the findings required by subsection (a), if it is placed by a federal agency on the corresponding federal schedule pursuant to an international agreement. See 21 U.S.C. 811(d). As enacted in 1970 the federal act contained such a provision, 21 U.S.C. 811(d)(1), which was expanded in 1978 with respect to application to the Convention on Psychotropic Substances, 21 U.S.C. 811(d)(2).

**SECTION 212. SCHEDULE V.** Unless specifically excepted by state or federal law or state or federal regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule V:

(1) a material, compound, mixture, or preparation containing any of the following narcotic drug and its salts: buprenorphine;

(2) a compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below, which also contains one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation, valuable medicinal qualities other than those possessed by the narcotic drug alone:

(i) not more than 200 milligrams of codeine per 100 milliliters or per 100 grams;

(ii) not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams;

(iii) not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams;

(iv) not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(v) not more than 100 milligrams of opium per 100 milliliters or per 100 grams; and

(vi) not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit; and

(3) a material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

(i) pyrovalerone.

#### **Comment**

Schedule V reflects the substances controlled under Schedule V of the federal act, as published in 21 CFR 1308.15 (April 1, 1987) and updated through the April 4, 1988, issue of the Federal Register. States that would not have a delegation of legislative authority problem may want to replace the specific listing of substances with an adoption of the federal schedules by reference, with any deletions or additions determined appropriate by the state administrator, or to delete this section and rely on the state administrator to schedule a substance.

**SECTION 213. PUBLISHING OF SCHEDULES.** The [appropriate person or agency] shall publish updated schedules annually. Failure to publish updated schedules is not a defense in any administrative or judicial proceeding under this [Act].

#### **Comment**

The administrative agency should distribute updated schedules to all registrants under the Act.

**SECTION 214. CONTROLLED SUBSTANCE ANALOG TREATED AS SCHEDULE I SUBSTANCE.** A controlled substance analog, to the extent intended for human consumption, must be treated, for the purposes of this [Act], as

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

### **Comment**

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

## [ARTICLE] 3 REGULATION OF MANUFACTURE, DISTRIBUTION, AND DISPENSING OF CONTROLLED SUBSTANCES

**SECTION 301. RULES.** The [appropriate person or agency] may adopt rules and charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances in this State.

### **Comment**

This section permits a State to cover the costs of actual registration and control by charging reasonable fees. However, the section does not permit a State to charge exorbitant fees as a means of fully implementing the regulatory provisions of the Act and thereby avoiding the need for additional state appropriations.

### **SECTION 302. REGISTRATION REQUIREMENTS.**

(a) A person who manufactures, distributes, or dispenses a controlled substance within this State or who proposes to engage in the manufacture, distribution, or dispensing of a controlled substance within this State, shall obtain

annually a registration issued by the [appropriate person or agency] in accordance with rules adopted by the [appropriate person or agency].

(b) A person registered by the [appropriate person or agency] under this [Act] to manufacture, distribute, dispense, or conduct research with controlled substances may possess, manufacture, distribute, dispense, or conduct research with those substances to the extent authorized by the registration and in conformity with this [article].

(c) The following persons need not register and may lawfully possess controlled substances under this [Act]:

(1) an agent or employee of a registered manufacturer, distributor, or dispenser of a controlled substance if the agent or employee is acting in the usual course of business or employment;

(2) a common or contract carrier or warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of business or employment; and

(3) an ultimate user or a person in possession of a controlled substance pursuant to a lawful order of a practitioner or in lawful possession of a substance included in Schedule V.

(d) The [appropriate person or agency] by rule may waive the requirement for registration of certain manufacturers, distributors, or dispensers upon finding it consistent with the public health and safety.

(e) A separate registration is required for each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances.

(f) The [appropriate person or agency] may inspect the establishment of a registrant or applicant for registration in accordance with rules adopted by the [appropriate person or agency].

### **Comment**

This section requires any person who engages in, or intends to engage in, manufacturing, distributing, or dispensing of controlled substances to be registered by the State. Practitioners who administer, as that term is defined in Section 101(1), or who prescribe, will be required to register; however, under subsequent sections they may be exempt from the record-keeping requirements. By registering

every individual dealing with controlled substances, the State will know who is responsible for a substance and who is dealing in these substances. The registration requirements imposed by this section are designed to eliminate many sources of diversion, both actual and potential.

Common and contract carriers, warehousemen, ultimate users, and agents of registrants are specifically exempted from the registration requirements since to require otherwise would be extremely burdensome and afford little increase in protection against diversion.

Annual registration is called for so that a licensee can be screened and the registration lists purified should the need arise. In addition, the annual registration requirement will be a form of check on persons authorized to deal in controlled substances.

### **SECTION 303. REGISTRATION.**

(a) The [appropriate person or agency] shall register an applicant to manufacture or distribute substances included in Schedules I through V unless the [appropriate person or agency] determines that the issuance of the registration would be inconsistent with the public interest. In determining the public interest, the [appropriate person or agency] shall consider the following factors:

(1) maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific, research, or industrial channels;

(2) compliance with state and local law;

(3) promotion of technical advances in the art of manufacturing controlled substances and the development of new substances;

(4) convictions of the applicant under laws of another country or federal or state laws relating to a controlled substance;

(5) past experience of the applicant in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion of controlled substances into other than legitimate medical, scientific, research, or industrial channels;

(6) furnishing by the applicant of false or fraudulent material in an application filed under this [Act];

(7) suspension or revocation of the applicant's federal registration or the applicant's registration of another State to manufacture, distribute, or dispense controlled substances as authorized by federal law; and

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

(b) Registration under subsection (a) entitles a registrant to manufacture or distribute a substance included in Schedule I or II only if it is specified in the registration.

(c) A practitioner must be registered with the [appropriate person or agency] before dispensing a controlled substance or conducting research with respect to a controlled substance included in Schedules II through V. The [appropriate person or agency] need not require separate registration under this [article] for a practitioner engaging in research with nonnarcotic substances included in Schedules II through V if the registrant is already registered under this [article] in another capacity. A practitioner registered under federal law to conduct research with a substance included in Schedule I may conduct research with the substance in this State upon furnishing the [appropriate person or agency] evidence of the federal registration.

(d) A manufacturer or distributor registered under the federal Controlled Substances Act [21 U.S.C. 801 et seq.] may submit a copy of the federal application as an application for registration as a manufacturer or distributor under this section. The [appropriate person or agency] may require a manufacturer or distributor to submit information in addition to the application for registration under the federal act.

### **Comment**

This section sets out the factors under which a state authority registers persons to engage in the various activities concerning controlled substances. These factors are similar to those which must be considered in registering an applicant under the federal act.

Practitioners are to be registered to dispense substances in Schedules II through V, comprising all substances with recognized medical uses, if they are authorized to dispense under the laws of the State. If those practitioners wish to conduct research in nonnarcotic substances in Schedules II through V, the state authority may require, or not require, a separate registration. This permissive language will be beneficial to those States that wish to keep close tabs on all those individuals who conduct research within their borders. Practitioners who are

registered under federal law to conduct research with respect to Schedule I substances are permitted to conduct that research in a State solely upon notification to the appropriate state authority of a valid federal registration.

Under subsection (d), a manufacturer or distributor registered under federal law may be registered under this Act, upon submitting the information contained in the application for federal registration and any additional information required by the State. The applicant would still be subject to the determination under subsection (a).

#### **SECTION 304. SUSPENSION OR REVOCATION OF REGISTRATION.**

(a) The [appropriate person or agency] may suspend or revoke a registration under Section 303 to manufacture, distribute, or dispense a controlled substance upon finding that the registrant has:

(1) furnished false or fraudulent material information in an application filed under this [Act];

(2) been convicted of a felony under a state or federal law relating to a controlled substance;

(3) had the registrant's federal registration suspended or revoked and is no longer authorized by federal law to manufacture, distribute, or dispense controlled substances; or

(4) committed an act that would render registration under Section 303 inconsistent with the public interest as determined under that section.

(b) The [appropriate person or agency] may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

(c) If a registration is suspended or revoked, the [appropriate person or agency] may place under seal all controlled substances owned or possessed by the registrant at the time of suspension or the effective date of the revocation order. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. When a revocation order becomes final, the court may order the controlled substances forfeited to the State.

(d) The [appropriate person or agency] may seize or place under seal any controlled substance owned or possessed by a registrant whose registration has expired or who has ceased to practice or do business in the manner permitted by the registration. The controlled substance must be held for the benefit of the registrant or the registrant's successor in interest. The [appropriate person or agency] shall notify a registrant, or the registrant's successor in interest, whose controlled substance is seized or placed under seal, of the procedures to be followed to secure the return of the controlled substance and the conditions under which it will be returned. The [appropriate person or agency] may not dispose of a controlled substance seized or placed under seal under this subsection until the expiration of 180 days after the controlled substance was seized or placed under seal. Costs incurred by the [appropriate person or agency] in seizing, placing under seal, maintaining custody, and disposing of any controlled substance under this subsection may be recovered from the registrant, any proceeds obtained from the disposition of the controlled substance, or from both. The [appropriate person or agency] shall pay to the registrant or the registrant's successor in interest any balance of the proceeds of any disposition remaining after the costs have been recovered.

(e) The [appropriate person or agency] shall promptly notify the Drug Enforcement Administration of all orders restricting, suspending, or revoking registration and of all forfeitures of controlled substances.

### **Comment**

Subsection (a) sets out the criteria upon which a registration can be revoked or suspended during the year in which that particular registration is in force. In denial of registration renewal situations for manufacturers or distributors, the criteria in this subsection should not be used. Instead, the state authority should apply the broader criteria set out in Section 303(a) relating to initial registration.

Subsection (b) allows the state authority to limit the revocation or suspension of a registration to a particular substance rather than revoking or suspending the whole registration. This will be especially effective where a manufacturer committed a criminal violation, but certain mitigating circumstances militate against removing full registration. Instead, the right to manufacture a particular substance could be suspended or revoked. This would put the manufacturer out of the business of manufacturing the substance but would not totally remove the manufacturer's livelihood.

Subsection (c) relates to forfeitures of controlled substances where the registrant's registration has been revoked. This subsection is permissive rather than mandatory. Thus, if the registration of a sole medical practitioner or a community

pharmacy in a small town were revoked, the state authority could allow the former registrant to sell those substances to a new owner-registrant so that the inhabitants of the particular town would not have to go without needed pharmaceutical supplies.

Subsection (d) authorizes seizure or placement under seal of controlled substances owned or possessed by a registrant whose registration has expired or who has otherwise ceased to practice or do business. This authorization is based on the similar authorization granted in 1984 to the United States Attorney General under 21 U.S.C. 824(g).

Subsection (e) is necessary because suspension or revocation of a state registration is grounds for denial, suspension, or revocation of a Federal registration.

### **SECTION 305. ORDER TO SHOW CAUSE.**

(a) Before denying, suspending, revoking, or refusing to renew a registration, the [appropriate person or agency] shall serve upon the applicant or registrant an order to show cause why registration should not be denied, suspended, or revoked, or the renewal refused. The order must state its grounds and direct the applicant or registrant to appear before the [appropriate person or agency] at a specified time and place not less than 30 days after the date of service of the order. In case of a refusal to renew a registration, the order must be served not later than 30 days before expiration of the registration. The proceedings must be conducted in accordance with [insert appropriate administrative procedures]. The proceedings do not preclude any criminal prosecution or other proceeding. A proceeding to refuse to renew a registration does not affect the existing registration, which remains in effect until completion of the proceeding.

(b) The [appropriate person or agency] may suspend, without an order to show cause, a registration simultaneously with the institution of proceedings under Section 304, or if renewal of registration is refused, upon finding that there is an imminent danger to the public health or safety which warrants the action. The suspension continues in effect until the conclusion of the proceedings, including judicial review, unless earlier withdrawn by the [appropriate person or agency] or dissolved by a court of competent jurisdiction.

### **Comment**

This section requires the state authority to serve upon a registrant an order to show cause why the registrant's registration should not be revoked or suspended or

renewal refused prior to taking such action. The order should contain enough information to fully apprise the registrant of the charges. If, during the pendency of an administrative hearing to deny a renewal registration, the registration runs out, this section keeps the old registration in force until the administrative hearing is completed.

Subsection (b) allows the state authority, in cases of imminent danger to the public health or safety, to suspend the registration simultaneously with the institution of proceedings to revoke, suspend, or refuse a renewal. Such an emergency situation can occur when a practitioner, knowing that action is being taken to revoke the practitioner's registration, begins to buy and divert large quantities of controlled substances. Rather than having to wait until all administrative proceedings have been completed and allow substantial diversion of these substances, the state authority may act immediately to suspend the registration. It may then place all controlled substances under seal until the administrative hearing is completed.

**SECTION 306. RECORDS OF REGISTRANTS.** A person registered to manufacture, distribute, or dispense controlled substances under this [Act] shall keep records and maintain inventories in compliance with the federal law and rules adopted by the [appropriate person or agency].

#### **Comment**

This section ties into the federal system. By tying the state and federal systems together, different and duplicative "paper" requirements are avoided. However, if a State sees a need for any additional recordkeeping or inventory requirements, the appropriate state agency may impose those requirements by rule.

This section is also intended to exempt those individuals exempted by Federal law from recordkeeping and inventory requirements.

**SECTION 307. ORDER FORMS.** A registrant may distribute a substance included in Schedule I or II to another registrant only by means of an order form. Compliance with federal law respecting order forms constitutes compliance with this section.

#### **Comment**

This section requires order forms for the distribution of any Schedule I or II substances. It, too, is tied into the federal system and compliance with the federal

order form requirements should be sufficient to fulfill any state order form requirements.

### **SECTION 308. PRESCRIPTIONS.**

(a) As used in this section, “medical treatment” includes dispensing or administering a narcotic drug for pain, including intractable pain.

(b) A person may dispense a controlled substance only as provided in this section.

(c) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a substance included in Schedule II may not be dispensed without the written prescription of a practitioner.

(d) In an emergency, as defined by rule of the [appropriate person or agency], a substance included in Schedule II may be dispensed upon oral prescription of a practitioner, reduced promptly to writing, signed by the practitioner, and filed by the pharmacy. The pharmacy shall keep prescriptions in conformity with Section 306. A prescription for a substance included in Schedule II may not be refilled.

(e) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a substance included in Schedule III or IV, which is a prescription drug as determined under [appropriate state or federal statute], may not be dispensed without a written or oral prescription of a practitioner. The prescription must not be filled or refilled more than six months after its date or be refilled more than five times, unless renewed by the practitioner.

(f) A substance included in Schedule V may be distributed or dispensed only for a medical purpose, including medical treatment or authorized research.

(g) A practitioner may dispense or deliver a controlled substance to or for an individual or animal only for medical treatment or authorized research in the ordinary course of that practitioner’s profession.

(h) No civil or criminal liability or administrative sanction may be imposed on a pharmacist for action taken in reliance on a reasonable belief that an order purporting to be a prescription was issued by a practitioner in the usual course of professional treatment or in authorized research.

(i) An individual practitioner may not dispense a substance included in Schedule II, III, or IV for that individual practitioner's personal use except in a medical emergency.

### **Comment**

This section is not intended to impose any limitation on a physician or authorized hospital staff to administer or dispense controlled substances to persons with intractable pain for which no relief or cure is possible or none has been found after reasonable efforts. See 21 CFR 1306.07(c). Subsections (a), (f), and (g) are derived from the California Health and Safety Code §§ 11152, 11153(a), and 11156. "Dispense" is defined in Section 101(5) to include prescribe, administer, package, label, and compound. In subsection (c) the requirement for the practitioner's signature is added due to a similar requirement in 21 CFR 1306.05 (July 1, 1987). Under that regulation, the responsibility for proper dispensing of controlled substances is upon the prescribing practitioner and a corresponding responsibility rests with a pharmacist who fills a prescription. In subsection (f) medical treatment is specifically described as including use of narcotic drugs for painkilling purposes to make it clear to practitioners that such use is not prohibited by this Act. In subsection (g) a reasonable belief exception is added for filling what appears to be a valid prescription.

### **SECTION 309. DIVERSION PREVENTION AND CONTROL.**

(a) In this section, "diversion" means the transfer of a controlled substance from a lawful to an unlawful channel of distribution or use.

(b) The [appropriate person or agency] shall regularly prepare and make available to other state regulatory, licensing, and law enforcement agencies a report on the patterns and trends of distribution, diversion, and abuse of controlled substances.

(c) The [appropriate person or agency] shall enter into written agreements with local, state, and federal agencies to improve identification of sources of diversion and to improve enforcement of and compliance with this [Act] and other laws and regulations pertaining to unlawful conduct involving controlled substances. An agreement must specify the roles and responsibilities of each agency that has information or authority to identify, prevent, or control drug diversion and drug abuse. The [appropriate person or agency] shall convene periodic meetings to coordinate a state diversion prevention and control program. The [appropriate person or agency] shall arrange for cooperation and exchange of information among agencies and with other States and the federal government.

(d) The [appropriate person or agency] shall report [annually] to the governor and to the presiding officer [of each house] of the [legislative assembly] on the outcome of the program with respect to its effect on distribution and abuse of controlled substances, including recommendations for improving control and prevention of the diversion of controlled substances in this State.

### **Comment**

This section is patterned after Wisconsin Statutes Section 161.36. In selecting controlled substances it is intended that medical usefulness of the controlled substances be considered. Note that “diversion” as used in Section 303(a)(5) refers to diversion “into other than legitimate medical, scientific, research, or industrial channels.”

## [ARTICLE] 4 OFFENSES AND PENALTIES

### **SECTION 401. PROHIBITED ACTS A; PENALTIES.**

(a) Except as authorized by this [Act], a person may not knowingly or intentionally manufacture, distribute, or deliver a controlled substance, or possess a controlled substance with intent to manufacture, distribute, or deliver, a controlled substance.

(b) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of subsection (d) with respect to:

(1) a mixture or substance containing heroin;

(2) a mixture or substance containing:

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, or a salt, isomer, or salt of isomer of it;

(iii) ecgonine, or a derivative, salt, isomer, or salt of isomer of it; or

(iv) a compound, mixture, or preparation containing any quantity of a substance referred to in subparagraphs (i) through (iii);

(3) a mixture or substance described in paragraph (2) which contains cocaine base;

(4) phencyclidine or a mixture or substance containing phencyclidine;

(5) a mixture or substance containing lysergic acid diethylamide;

(6) a mixture or substance containing methamphetamine or any of its salts, isomers, or salts of isomers; or

(7) a mixture or substance containing [29] grams or more of marijuana.

(c) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of subsection (a) in the case of a controlled substance included in Schedule I or II, except as provided in subsections (b) and (f).

(d) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of subsection (a) in the case of a controlled substance included in Schedule III.

(e) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of subsection (a) in the case of a controlled substance included in Schedule IV or V.

(f) A person is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both, for a violation of subsection (a) in the case of marijuana, except as provided in subsection (b)(7).

[(g) Notwithstanding any other provision of this section:

(1) A person may not knowingly or intentionally distribute, purchase, manufacture, or bring into this State, or possess [28] grams or more of any mixture or substance containing heroin. If the quantity involved is:

(i) [28] grams or more, but less than [100] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [100] grams or more, but less than [500] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [500] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(2) A person may not knowingly or intentionally manufacture, distribute, purchase, bring into this State, or possess [56] grams or more of any mixture or substance containing cocaine or its related substances as described in subsection (b)(2). If the quantity involved is:

(i) [56] grams or more, but less than [450] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [450] grams or more, but less than [1] kilogram, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [1] kilogram or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(3) A person may not knowingly or intentionally manufacture, distribute, purchase, bring into this State, or possess [5] grams or more of a mixture or substance containing cocaine base. If the quantity involved is:

(i) [5] grams or more, but less than [25] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [25] grams or more, but less than [50] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [50] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(4) A person may not knowingly or intentionally distribute, purchase, manufacture, or bring into this State, or possess [10] grams or more of a mixture or substance containing phencyclidine. If the quantity involved is:

(i) [10] grams or more, but less than [50] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ], or both;

(ii) [50] grams or more, but less than [100] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [100] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(5) A person may not knowingly or intentionally distribute, purchase, manufacture, bring into this State, or possess [500] milligrams or more of a mixture or substance containing lysergic acid diethylamide. If the quantity involved is:

(i) [500] milligrams or more, but less than [1] gram, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [1] gram or more, but less than [5] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [5] grams or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(6) A person may not knowingly or intentionally distribute, purchase, manufacture, bring into this State, or possess [56] grams or more of a mixture or substance containing methamphetamine or any of its salts, isomers, or salts of isomers. If the quantity involved is:

(i) [56] grams or more, but less than [450] grams, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [450] grams or more, but less than [1] kilogram, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [1] kilogram or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(7) A person may not knowingly or intentionally distribute, purchase, manufacture, bring into this State, or possess [10] kilograms or more of marijuana. If the quantity of marijuana involved is:

(i) [10] kilograms or more, but less than [50] kilograms, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(ii) [50] kilograms or more, but less than [100] kilograms, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ];

(iii) [100] kilograms or more, the person is guilty of a crime and upon conviction [may] [must] be imprisoned for not less than [ ] nor more than [ ] and fined not less than [ ].]

(h) Except as authorized by law, a person may not knowingly or intentionally possess piperidine with intent to manufacture a controlled substance, or knowingly or intentionally possess piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture a controlled substance contrary to this [Act]. A person who violates this subsection is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

[(i) Except as provided in subsection (j), with respect to an individual who is found to have violated subsection (g), adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld, nor is the individual eligible for parole before serving the mandatory term of imprisonment prescribed by this section.]

(j) Notwithstanding any other provision of this [Act], the defendant or the attorney for the State may request the sentencing court to reduce or suspend the sentence of an individual who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of a person for a violation of this [Act]. The court shall give the arresting agency an

opportunity to be heard in reference to the request. Upon good cause shown, the request may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the assistance rendered was substantial.

### **Comment**

Except for Section 406, which contains a specific reference to a misdemeanor, criminal penalties throughout the Act are referred to by language “is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.” States that have a criminal penalty classification system should replace this language with references to their classified penalties, e.g., “is guilty of a class [ ] felony.” Actual penalties are not included because it is felt that such a designation is purely a state decision. The penalties imposed under the federal act are found at 21 U.S.C. 841, and additional federal penalties were created by the Anti-Drug Abuse Act of 1986, Public Law 99-570. The criminal penalties in subsection (a) are classified based on the penalties in the federal act, 21 U.S.C. 841(b) as amended by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1002 (the “Narcotics Penalties and Enforcement Act of 1986”). In subsection (a)(1) there are no references to amounts of mixtures or substances containing the proscribed controlled substances, and the adopting State should insert amounts appropriate for that State. A reference to an amount is contained in subsection (a)(1)(vii) with respect to marijuana to allow a State that includes this provision to distinguish this provision from subsection (a)(5). Subsections (b), (d), and (e) are based on Florida Statutes Section 893.135. Subsection (c) is based on the offense in the federal act with respect to piperidine, added in 1978 and found in 21 U.S.C. 841(d).

### **SECTION 402. PROHIBITED ACTS B; PENALTIES.**

(a) A person who is subject to [Article] 3 may not distribute or dispense a controlled substance in violation of Section 308.

(b) A person who is a registrant may not manufacture a controlled substance not authorized by that person’s registration, or distribute or dispense a controlled substance not authorized by that person’s registration to another registrant or other authorized person.

(c) A person may not refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this [Act].

(d) A person may not refuse entry into any premises for an inspection authorized by this [Act].

(e) A manufacturer or distributor, or agent or employee of a manufacturer or distributor, having reasonable cause to believe that a person will possess or distribute a controlled substance in violation of this [Act], may not deliver the controlled substance to that person.

(f) A person may not knowingly or intentionally keep, maintain, manage, control, rent, lease, or make available for use any store, shop, warehouse, dwelling, building, vehicle, vessel, aircraft, room, enclosure, or other structure or place, which the person knows is resorted to for the purpose of keeping for distribution, transporting for distribution, or distributing controlled substances in violation of this [Act].

(g) Except as authorized by this [Act], a person may not:

(1) knowingly or intentionally open or maintain any place that the person knows is resorted to for the purpose of unlawfully manufacturing a controlled substance; or

(2) manage or control a building, room, or enclosure, as an owner, lessee, agent, employee, or mortgagee, and knowingly or intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure that the person knows is resorted to for the purpose of unlawfully manufacturing a controlled substance.

(h) A person does not violate subsection (f):

(1) by reason of an act committed by another person while the other person is unlawfully on or in the structure or place, if the person lacked knowledge of the unlawful presence of the other person; or

(2) if the person has notified a law enforcement agency of the illegal conduct.

(i) A person who violates subsection (g) is guilty of a crime and upon conviction may be imprisoned for not more than [ ] years, fined not more than [ ], or both, or fined not more than [ ] if the person is not an individual.

(j) Except as provided in subsection (i), a person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

## Comment

This section defines those “commercial” offenses relating to registrants or other persons who unlawfully manufacture, distribute, or dispense controlled substances or fail to comply with the requirements of the Act.

Violation of subsection (a)(4) occurs when an inspector has an administrative inspection warrant, or is not required to have such a warrant under Section 602(b)(4), and the person whose premises are to be inspected refuses admittance.

Subsection (b) is derived from the California Health and Safety Code § 11153.5(a). As is generally available under criminal statutes, duress should be available as a defense to prosecution under subsection (c). Subsection (d) provides a similar offense with respect to establishment of manufacturing operations as that found in the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1841. Actual penalties are not included because it is felt that such a designation is purely a state decision. The penalties imposed under the federal act are found at 21 U.S.C. 842 and 856.

### **SECTION 403. PROHIBITED ACTS C; PENALTIES.**

(a) A person may not knowingly or intentionally:

(1) distribute as a registrant a controlled substance included in Schedule I or II, except pursuant to an order form required by Section 307;

(2) use in the course of the manufacture, distribution, or dispensing of a controlled substance, or to use for the purpose of acquiring or obtaining a controlled substance, a registration number that is fictitious, revoked, suspended, or issued to another person;

(3) acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4) furnish false or fraudulent material information in, or omit material information from, an application, report, or other document required to be kept or filed under this [Act], or a record required to be kept by this [Act]; or

(5) possess a false or fraudulent prescription with intent to obtain a controlled substance.

(b) A person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [    ], fined not more than [    ], or both.

#### **Comment**

This section sets out the fraud offenses relating to the manufacture and distribution of controlled substances. This area of criminal activity was segregated from Section 401 because of the nature of these offenses and their effect, regardless of the drug involved, on the integrity of the regulatory system.

It should be noted that the acts or omissions set forth in subsection (a)(4) are not only a violation of this Act but also provide a basis for revocation or suspension of registration under Section 304.

#### **SECTION 404. COUNTERFEIT SUBSTANCES PROHIBITED; PENALTY.**

(a) A person may not knowingly or intentionally manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance that, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or a likeness thereof, of a manufacturer, distributor, or dispenser, other than the person who manufactured, distributed, or dispensed the substance.

(b) A person may not knowingly or intentionally make or distribute or possess a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or a likeness of any of the foregoing upon any drug or container or labeling of it without authorization.

(c) A person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [    ], fined not more than [    ], or both.

#### **Comment**

This section is a consolidation of the counterfeit substance provisions found in Sections 101(e), 401(b), and 403(a)(5) of the 1970 Act. Provisions in this section may duplicate drug branding and labeling provisions in other laws of the enacting State.

**SECTION 405. IMITATION CONTROLLED SUBSTANCES  
PROHIBITED; PENALTY.**

(a) A person may not knowingly or intentionally deliver, or possess with intent to deliver, a noncontrolled substance representing it to be a controlled substance.

(b) A person may not knowingly or intentionally deliver or possess with intent to deliver, a noncontrolled substance intending it to be used or distributed as a controlled substance or under circumstances in which the person has reasonable cause to believe that the noncontrolled substance will be used or distributed for use as a controlled substance.

(c) It is not a defense that the accused believed the noncontrolled substance to be a controlled substance.

(d) A person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [    ], fined not more than [    ], or both.

**Comment**

This section is based on Annotated Code of Maryland Article 27, § 286B. Some States are more expansive, e.g., Wisconsin Statutes Section 161.41(2m), which prohibits the manufacture of an imitation controlled substance in lieu of a controlled substance, while others include “prima facie” factors to be considered evidence of delivery of “look-alikes,” such as prior convictions, evasive tactics, and proximity to controlled substances, as well as immunity for using imitation controlled substances as placebos, e.g., North Dakota Century Code Chapter 19-03.2. Factors that may be useful in determining whether this section is violated include whether the physical appearance is substantially identical to that of a controlled substance, whether the noncontrolled substance was packaged in a manner normally used for the illegal distribution of controlled substances, and whether delivery included an exchange of money or property substantially greater than the reasonable value of the noncontrolled substance.

**SECTION 406. POSSESSION AS PROHIBITED ACT; PENALTIES.**

(a) An individual may not knowingly or intentionally possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner’s professional practice, or was otherwise authorized by this [Act].

(b) An individual who violates subsection (a) with respect to a substance included in Schedule I or II, except for less than [29] grams of marijuana, is guilty of a [felony] and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

(c) An individual who violates subsection (a) with respect to a substance included in Schedule III, IV, or V is guilty of a [felony] [misdemeanor] and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

(d) An individual who violates subsection (a) with respect to less than [29] grams of marijuana is guilty of a [misdemeanor] and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

### **Comment**

This section is derived from Section 401(c) of the 1970 Act. The former Section 401(c) is treated as a separate section because the offense is mere possession as opposed to the other prohibited acts of Section 401.

**SECTION 407. CONSPIRACY; PENALTY.** A person may not conspire to commit a violation of this [Act]. A person who violates this section is guilty of a crime and upon conviction is subject to the same penalty as provided for the offense that was the object of the conspiracy.

### **Comment**

This section is based on 21 U.S.C. 846.

### **SECTION 408. SOLICITATION; [ATTEMPT;] PENALTY.**

(a) A person may not knowingly or intentionally solicit, induce, or intimidate an individual to engage in specific conduct constituting a violation of this [Act].

(b) [A person may not attempt to commit a violation of this [Act].

(c) A person who violates this section is guilty of a crime and upon conviction is subject to the same penalty as provided for the offense that was the object of the solicitation [or attempt].

## Comment

Subsection (b) provides an option for a State that does not have a general statute imposing a penalty for attempting to commit a crime.

### **SECTION 409. DISTRIBUTION TO INDIVIDUAL UNDER AGE 18; DISTRIBUTION NEAR SCHOOLS OR COLLEGES; PENALTIES.**

(a) An individual 18 or more years of age who violates Section 401 by distributing a controlled substance to an individual under 18 years of age who is at least two years younger than that individual is guilty of a crime and upon conviction is punishable by a term of imprisonment and fine not exceeding [two times] those authorized by Section 401.

(b) An individual may not violate Section 401 in or on, or within [one thousand feet] [300.48 meters] of, the real property comprising a public playground, a public or private elementary or secondary school, a public vocational school, or a public or private college or university. An individual who violates this subsection is guilty of a crime and upon conviction is punishable by a term of imprisonment and fine not exceeding [two times] those authorized by Section 401.

(c) An individual who violates subsection (b) after a previous judgment of conviction under that subsection has become final, is punishable by a term of imprisonment not exceeding [three times] that authorized by Section 401.

(d) It is not a defense to a violation of subsection (a) that the accused did not know the age of an individual to whom a controlled substance was distributed.

(e) It is not a defense to a violation of subsection (b) or (c) that the accused did not know the distance involved.

[(f) Notwithstanding any other provision of this section, with respect to an individual who is found to have violated this section:

(1) adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld;

(2) the individual must be imprisoned for at least [ ] for a violation of subsection (a) or (b); and

(3) the individual is not eligible for parole before serving the mandatory term of imprisonment prescribed by this section.]

## Comment

This section is designed to impose stiffer penalties on those persons over eighteen years of age who distribute controlled substances to persons under eighteen years of age. However, the recipient must be at least two years younger than the distributor before this section comes into effect. The two-year differential is in lieu of accepting the 18-year-old/21-year-old age distinction in the federal act, 21 U.S.C. 845, which could result in the stiffer penalty for an 18-year-old selling to a 20-year-old. Subsections (b) and (c) are similar to penalties contained in the federal act, 21 U.S.C. 845a, as enacted in 1984 and as amended by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1104 (the “Juvenile Drug Trafficking Act of 1986”), which added vocational school, college, and university, and also included “manufacturing.” Subsection (c) provides for a special subsequent offense penalty with respect to manufacturing or distributing controlled substances near schools. The penalty in Section 410 for a second offense would not apply in this case.

### **SECTION 410. EMPLOYMENT OR USE OF INDIVIDUAL UNDER 18 YEARS OF AGE IN DRUG OPERATIONS; PENALTIES.**

(a) An individual 18 or more years of age may not knowingly or intentionally employ, hire, use, persuade, induce, entice, or coerce an individual under 18 years of age to violate or assist in avoiding detection or apprehension for a violation of this [Act].

(b) An individual who violates subsection (a) is guilty of a crime and upon conviction is punishable by a term of imprisonment and fine not exceeding [two times] those authorized by Section 401.

(c) An individual who violates subsection (a) after a previous judgment of conviction under that subsection has become final, is punishable by a term of imprisonment not exceeding [three times] that authorized by Sections 401(a) through (f).

(d) An individual who violates subsection (a) by employing, hiring, using, persuading, inducing, enticing, or coercing an individual who is under 15 years of age, may be imprisoned for not more than [ ] years and fined not more than [ ] in addition to any other punishment authorized by this section.

(e) It is not a defense to a violation of this section that the accused did not know the age of a protected individual.

[f) Notwithstanding any other provision of this section, with respect to an individual who is found to have violated this section:

(1) adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld;

(2) the individual must be imprisoned for at least [ ] for a violation of subsection (a) or (b); and

(3) the individual is not eligible for parole before serving the mandatory term of imprisonment prescribed by this section.]

### **Comment**

This section provides for a special offense for using minors in drug operations. The section is derived from similar provisions in the federal act, as created by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1102 (the “Juvenile Drug Trafficking Act of 1986”) and from the California Health and Safety Code, § 11353.

### **SECTION 411. CONTINUING CRIMINAL ENTERPRISE; PENALTY.**

(a) A person who engages in a continuing criminal enterprise is guilty of a crime and upon conviction is punishable by a term of imprisonment and fine not exceeding [two times] those authorized by Section 401 for the underlying offense. For purposes of this subsection, a person is engaged in a continuing criminal enterprise if:

(1) the person violates any provision of this [Act] which is a felony; and

(2) the violation is a part of a continuing series of two or more violations of this [Act] on separate occasions:

(i) which are undertaken by the person in concert with five or more other persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management; and

(ii) from which the person obtained substantial income or resources.

(b) A person who violates subsection (a) after a previous judgment of conviction under that subsection has become final, is punishable by a term of imprisonment not exceeding [three times] that authorized by Section 401.

[(c) Notwithstanding any other provision of this section, with respect to an individual who is found to have violated subsection (a) or (b):

(1) adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld;

(2) the individual must be imprisoned for at least [ ] for a violation of subsection (a) or (b); and

(3) the individual is not eligible for parole before serving the mandatory term of imprisonment prescribed by subsection (a) or (b).]

### **Comment**

This section provides penalties for continuing criminal enterprises, similar to the penalties contained in the federal act, 21 U.S.C. 848, which was amended by the Anti-Drug Abuse Act of 1986, Public Law 99-570, § 1253 (the “Continuing Drug Enterprise Act of 1986”), which provides for enhanced penalties for principals of continuing drug enterprises. Under the comparable federal provision, 21 U.S.C. 848, the consensus of authority is that to establish a continuing “series” of violations the government must prove at least three felony violations, which does not necessarily mean that the government must obtain convictions on a minimum of three felony violations or that the defendant be indicted on three of the eligible predicate felonies. See *United States v. Young*, 745 F.2d 733 (2nd Cir. 1984).

### **SECTION 412. MONEY LAUNDERING AND ILLEGAL INVESTMENT; PENALTY.**

(a) A person may not knowingly or intentionally receive or acquire proceeds, or engage in transactions involving proceeds, known to be derived from a violation of this [Act]. This subsection does not apply to a transaction between an individual and the individual’s counsel necessary to preserve the individual’s right to representation, as guaranteed by [insert reference to State’s constitution] and by the Sixth Amendment of the United States Constitution. [This exception does not create a presumption against or prohibition of the right of the State to seek and obtain forfeiture of proceeds derived from a violation of this [Act].]

(b) A person may not knowingly or intentionally give, sell, transfer, trade, invest, conceal, transport, or otherwise make available anything of value that the person knows is intended to be used to commit or further the commission of a violation of this [Act].

(c) A person may not knowingly or intentionally direct, plan, organize, initiate, finance, manage, supervise, or facilitate the transportation or transfer of proceeds that the person knows are derived from a violation of this [Act].

(d) A person may not knowingly or intentionally conduct a financial transaction involving proceeds derived from a violation of this [Act] if the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds that the person knows are derived from a violation of this [Act] or to avoid a transaction reporting requirement under state or federal law.

(e) A person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than [ ] years, fined not more than [ ], or both.

### **Comment**

This section makes it unlawful to finance, invest, acquire, or expend finances or assets that are actually known to have been derived from or are intended to further narcotics trafficking. It also protects the legitimate Sixth Amendment rights of the defendant by exempting the defendant's attorney from prosecution for certain limited acts. However, it does not shield from forfeiture those funds otherwise subject to forfeiture. Subsection (d) is derived from 18 U.S.C.A. 1956(a)(1)(b).

### **SECTION 413. SECOND OR SUBSEQUENT OFFENSES; PENALTIES.**

(a) A person convicted of a second or subsequent offense under this [Act] may be imprisoned for a term not exceeding two times the term otherwise authorized and fined an amount not exceeding two times the fine otherwise authorized.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under this [Act] or under any statute of the United States or of any State relating to a narcotic drug, marijuana, or a stimulant, depressant, or hallucinogenic substance and judgment of that conviction has become final.

(c) This section does not apply to a second or subsequent offense under Section 406, 409(b), 410(a), or 411.

## Comment

Sections 409(b), 410(a), and 411 are excepted from the application of this section because second offense penalties for those sections are provided by Sections 409(c), 410(c), and 411(b).

### **SECTION 414. CONDITIONAL DISCHARGE FOR POSSESSION AS FIRST OFFENSE.**

(a) Whenever an individual who has not been convicted previously within the past ten years of any offense under this [Act] or under any statute of the United States or of any State relating to a narcotic drug, marijuana, or a stimulant, depressant, or hallucinogenic substance, tenders a plea of admission, guilty, no contest, nolo contendere, or similar plea to a charge of possession of a controlled substance under Section 406, or is found guilty of that charge, the court, without entering a judgment of conviction and with the consent of the accused, may defer further proceedings and place that individual on probation upon terms and conditions that must include attendance and successful completion of an education program or, in the case of a drug dependent individual, of a treatment and rehabilitation program.

(b) Upon violation of a term or condition, the court may enter a judgment of conviction and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings against that individual. A nonpublic record of the dismissal must be retained by the [appropriate state agency] solely for the purpose of use by the courts in determining whether, in later proceedings, the individual qualifies under this section.

(c) Discharge and dismissal under this section is without adjudication of guilt and is not a conviction for purposes of this section or for purposes of employment, civil rights, or any statute or regulation or license or questionnaire or any other public or private purpose, but not including additional penalties imposed for second or subsequent convictions or the setting of bail. Discharge and dismissal restores the individual, in the contemplation of the law, to the status occupied before the arrest, indictment, or information. The individual may not be held thereafter under any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge that arrest, indictment, or information, or trial in response to an inquiry made of that individual for any purpose. Discharge and dismissal under this section may occur only once with respect to an individual.

## Comment

This section is designed to permit a judge to place a first offender on probation in lieu of sentencing the offender to prison. However, it is applicable only to cases involving simple possession of controlled substances and is available only once with respect to any person. It should also be noted that first offender treatment is not available as a matter of right, but rather is discretionary with the judge.

An additional aspect of this section is that it provides for confidentiality of the defendant's record upon fulfilling all the terms and conditions of probation. This will preclude any permanent criminal record from attaching to and following the individual in later life.

The language on the effect of discharge and dismissal is based on similar language in the federal act, 21 U.S.C. 844(b)(2), and on Annotated Code of Maryland, Article 27, § 292. The language on attendance and completion of a treatment and rehabilitation program is to point out a specific condition that must be imposed.

**[SECTION 415. TREATMENT OPTION FOR VIOLATION OF [ACT]].**  
If an individual is adjudicated guilty of a violation of this [Act] for which the individual is eligible for probation, the court may impose a sentence authorized by this [Act], may place the individual on probation as authorized by this section, or may impose a combination of a sentence and probation as authorized by this section. The court, with the consent of the individual and with the consent of a treatment facility having inpatient or outpatient programs for the treatment of drug dependent individuals, may place the individual, if found by the court to be in need of treatment, on probation upon terms and conditions, including participation in a treatment program of the facility. The court shall order treatment for the period the treatment facility considers necessary. Treatment or a combination of a sentence and probation including treatment may not exceed the maximum sentence allowable unless the convicted individual consents to continued treatment. Upon violation of a term or condition, including failure to participate in the treatment program, the court may revoke the probation and proceed as otherwise provided. Upon fulfillment of the terms and conditions, including attendance and successful completion of the treatment program, the court shall terminate the probation.]

## Comment

This section provides for a treatment option in addition to or as an alternative to imprisonment. The section is intended as an authorization in addition

to any authority of a court to place an individual on probation. See 18 U.S.C. 3553, 3651 for factors used by federal courts with respect to requiring participation in treatment programs. This section is bracketed so states that have a general statutory provision allowing commitment to a treatment facility need not use this section.

**SECTION 416. ASSESSMENT FOR EDUCATION AND TREATMENT; APPROPRIATION OF MONEYS.**

(a) A person convicted of a violation of this [Act], and every individual placed on probation under Section 414, must be assessed for each offense a sum of not less than [\$500.00] nor more than [\$3,000.00]. The assessment is in addition to and not in lieu of any fine, restitution, other assessment, or forfeiture authorized or required by law.

(b) The assessment provided for in this section must be collected as provided for collection of [appropriate term, e.g., fines, restitution] and must be forwarded to the [appropriate agency] as provided in subsection (c).

(c) Moneys collected under this section must be forwarded to the [appropriate agency] for deposit in the drug abuse education and treatment fund. Moneys in the fund are appropriated on a continuing basis and are not subject to [state lapsing and related fiscal and appropriations restraints].

(d) The [appropriate state agency] shall administer expenditures from the fund. Expenditures may be made only for drug abuse education, prevention, and treatment services. Moneys from the fund may not supplant other local, state, or federal funds.

**Comment**

It is not intended that payment of the assessment is a condition for probation. Assessments under this section are not intended for use for law enforcement purposes. Each State should tailor the language in subsection (c) to its own requirements for establishing special funds in the state treasury and to its own appropriation requirements.

**SECTION 417. PENALTIES UNDER OTHER LAWS.** Penalties imposed for violation of this [Act] and civil remedies provided under this [Act] are in addition to, and not in lieu of, any civil remedy, administrative penalty, or sanction otherwise authorized by law.

**SECTION 418. BAR TO PROSECUTION.** If a violation of this [Act] is a violation of a federal law or the law of another State, a conviction or acquittal under federal law or the law of another State for the same act is a bar to prosecution in this State.

**SECTION 419. CRIMINAL FORFEITURE.**

(a) In addition to other penalties provided by this [article], a person convicted for conduct that subjects property to forfeiture under Section 503 forfeits property related to the offense forfeitable under [Article] 5.

(b) An interest in property is subject to forfeiture under this section only if an [indictment or information] for conduct that subjects property to forfeiture under Section 503 identifies the property and states that it is subject to forfeiture. The forfeitability of property under this section is not an element of a criminal offense.

(c) Except as otherwise provided in this section, an [indictment or information] has the same effect as a [complaint] required to commence a judicial forfeiture proceeding in personam under Section 516, and forfeiture under this section is subject to the same rules, requirements, and limitations as a judicial forfeiture proceeding in personam. A forfeiture proceeding against a criminal defendant must be conducted pursuant to the [Rules of Criminal Procedure].

(d) The court may bifurcate proceedings relating to the consideration of evidence regarding a criminal prosecution and a forfeiture. In determining whether to bifurcate proceedings in whole or in part, the court shall consider all relevant factors, including:

(1) whether the defendant might testify on the issues of guilt, forfeiture, or both;

(2) whether the defendant might offer evidence that some, but not all, of defendant's property is not forfeitable; and

(3) the extent to which separate issues of fact exist regarding the guilt of the defendant and the forfeitability of property.

(e) A criminal defendant is entitled to a trial by jury regarding the forfeiture of property. The State has the burden of proving by a preponderance of the evidence that the property is subject to forfeiture under Section 503. If a verdict of forfeiture is returned, the defendant forfeits the defendant's interest in property

subject to forfeiture, unless the property is exempt from forfeiture or forfeiture is otherwise precluded under [Article] 5.

(f) A person claiming an interest in property subject to forfeiture under this section may not intervene in a trial or appeal of a criminal conviction, but the person, after entry of judgment of forfeiture against the criminal defendant, may file a claim under Section 518(e) asserting that the interest is not subject to forfeiture. Before judgment of forfeiture against a criminal defendant, proceedings may be commenced for the substitution or release of property pursuant to Section 510 or 511.

(g) Before commencement of proceedings under Section 518(e), a person other than the criminal defendant may file a request for an administrative exemption or substitution of property under Section 513. The pendency of criminal proceedings under this section does not prevent the filing of a request for an administrative exemption or substitution of property. The State may not defer action on a request for an administrative exemption or substitution pending commencement of proceedings pursuant to Section 518(e). If an owner whose interest is determined to be nonexempt in an administrative proceeding files a demand for a judicial proceeding pursuant to Section 514, the State must commence proceedings as required by Section 518(e) within 30 days after entry of a judgment of forfeiture against the criminal defendant.

(h) For purposes of this section, conditional discharge under Section 414 constitutes a conviction. A judgment of forfeiture must be entered, notwithstanding other provisions permitting probation for the offender.

(i) Upon motion of the State in a forfeiture proceeding under this section, the court may order the substitution of property in lieu of property subject to forfeiture under Section 504(a)(4), (5), or (7) if:

(1) an interest in the substituted property is owned by the criminal defendant, or by a person holding the property for the benefit of or as a nominee for the criminal defendant; and

(2) as a result of an act or omission of the criminal defendant, the original property:

(i) cannot be located;

(ii) was transferred or conveyed to, sold to, or deposited with another person, including a transfer to an attorney as consideration for legal services;

(iii) is beyond the jurisdiction of the court;

(iv) has been substantially diminished in value while not in the physical custody of the State, except when the diminution in value is the result of routine use, casualty loss, or the forfeitability of the property;

(v) cannot be practicably divided because of commingling; or

(vi) has become an accession to some other property and cannot be separated without inordinate expense or without substantially diminishing the value of either the accession or the attached goods.

(j) Upon the substitution of property under subsection (i), the original property remains subject to forfeiture, but the total value of property forfeited as the result of the same conduct may not exceed the value of the criminal defendant's interest in the original property.

(k) Property substituted under subsection (i) is not required to be designated in an [indictment or information], but may be designated by the court upon a motion of the State after notice and an opportunity for an adversarial hearing. Before the designation of substitute property by the court, the State may not seize the substituted property or file or record a forfeiture lien but may seek a temporary restraining order or preliminary injunction under Section 518.

### **Comment**

Consistent with federal law and the law of most States, Section 419 adds a new section to Article 4 of the UCSA to authorize criminal forfeitures as an alternative to civil forfeitures authorized by Article 5. Section 505 of the 1970 version of the UCSA provided only for civil forfeitures.

Prosecutors are given the alternative to pursue either civil or criminal forfeitures to facilitate effective use of prosecutorial and judicial resources. The availability of criminal forfeiture proceedings may also be important in the event certain types of forfeitures are deemed to constitute criminal penalties subject to various criminal constitutional requirements.

Except to the extent that a forfeiture is grossly disproportionate under Section 520, subsection (a) does not grant courts the power to deny forfeiture of property properly subject to forfeiture.

Subsection (b) is similar to Federal Rule of Criminal Procedure 7(c)(2), which provides that, "No judgment of forfeiture may be entered in a criminal

proceeding unless the indictment or information shall allege the extent of the interest or property subject to forfeiture.” To be sufficient, the information contained in the charging document must indicate that the government seeks forfeiture and must identify the assets subject to forfeiture with sufficient specificity to permit the defendant to marshal evidence in defense. The charging document need not provide a bill of particulars regarding the proposed forfeiture. A more detailed notice, however, may be required pursuant to Section 518(b) prior to the entry of any temporary restraining order affecting property interests subject to forfeiture.

Subsection (b) clarifies that an allegation that property is subject to forfeiture does not constitute an element of the criminal offense for which property may be subject to forfeiture. Instead, the forfeiture of property is an additional penalty or sanction that may be imposed by the court following a criminal conviction. This provision is intended to support the evidentiary standard for forfeiture established by subsection (e).

Subsection (c) provides that criminal forfeitures are subject to the same rules, requirements and limitations as *in personam* civil forfeiture proceedings. Accordingly, property may be seized or made subject to a lien either before or after the issuance of an information or indictment as authorized by Sections 507 and 509 and may be released or replaced by substitute property following a preliminary hearing as authorized by Section 511. The authorization provided by Section 518(a) for the issuance of ex parte temporary restraining orders is not intended to prevent a warrantless seizure as authorized by Section 507(a). Subsection (c) does not authorize the property to be held pursuant to post-indictment restraining orders without the opportunity for a probable cause hearing prior to a criminal trial.

With respect to persons criminally accused of conduct that subjects property to forfeiture, the proceedings are conducted pursuant to the rules of criminal procedure. With respect to other persons with ownership interests in property subject to criminal forfeiture, proceedings relating to the forfeiture of the property are conducted in accordance with the rules of civil procedure. As a result, the State’s ability to obtain discovery may differ as regards the defendant’s and other claimants’ interests, and the defendant may have lesser discovery options than in a civil forfeiture action.

Subsection (d) authorizes, but does not require, bifurcated proceedings on issues relating to the underlying criminal offense and forfeiture. Bifurcated proceedings are useful in ensuring that the criminal forfeiture count does not permit introduction of evidence that would otherwise be excluded and might prejudice the jury against the defendant on the underlying criminal counts. In some cases, however, the extra complexity associated with bifurcated proceedings is not

necessary. This section permits the judge to consider on a case-by-case basis which approach is preferable.

Subsection (e) provides that criminal defendants have a right to a trial by jury regarding criminal forfeitures. Other interest holders in the property have a right to a jury trial under Section 518(e)(3).

Subsection (e) provides that the burden of proof in a criminal forfeiture proceeding regarding whether some interest of the defendant in property is forfeitable is the same as in a civil proceeding, *i.e.*, proof by a preponderance of the evidence. If the State proves that some interest in property is subject to forfeiture, persons claiming exempt interests in property, including the defendant, must prove their entitlement to an exemption in the same manner as in a civil forfeiture proceeding, generally by a preponderance of the evidence. *See infra* Section 521(e).

Similar to 21 U.S.C. § 853(k), subsection (f) prohibits persons from intervening in criminal trials or appeals. After a determination of responsibility for conduct that subjects property to forfeiture, however, persons other than the defendant may file claims for exemptions as provided by Section 518(e), in a manner similar to 21 U.S.C. § 853(n). Contrary to federal law, however, subsection (f) allows persons seeking the interim release or substitution of property to initiate preliminary collateral proceedings pursuant to Section 512 or 513.

Subsection (g) establishes special rules for preliminary administrative proceedings regarding requests for exemptions. Under Section 513(c) administrative proceedings may not be commenced if judicial forfeiture proceedings have been initiated. As provided by subsection (c), however, a criminal indictment or information is deemed to initiate an in-personam judicial forfeiture proceeding. Subsection (g) provides that the pendency of criminal proceedings does not prevent the initiation of administrative collateral proceedings. Subsection (g) and Section 519(b), however, clarify that judicial forfeiture proceedings (other than the criminal prosecution) need not be commenced until the completion of the criminal trial.

Paragraph (i)(2)(vi) clarifies a situation that otherwise might be treated under paragraph (i)(2)(v). When original property has become an “accession” – a good which is not “so commingled in a manufacturing process that [its] original identity is lost,” U.C.C. § 9-314 Comment 3 – substitution is permitted only when certain additional showings are made. Where the original property has lost its original identity, paragraph (i)(2)(v) permits substitution.

Subsection (j) limits the forfeiture of substituted property to an amount equal to the value of defendant's interest in the original property. The value of the defendant's forfeitable interest in property cannot be determined without examination of the extent of any debt secured by the property.

The requirements of subsection (j) may be satisfied even when the person whose interest is forfeitable has a more valuable interest in the substituted property than in the original property. In such a situation, a court may order a partial forfeiture of the interest under Section 522.

This Act permits forfeiture of substituted property only when the predicates for such forfeiture are demonstrated by clear and convincing evidence. *See infra* Section 521(a).

## [ARTICLE] 5 CIVIL FORFEITURE

### **SECTION 501. DEFINITIONS.** In this [article]:

(1) "Actor" means a person whose conduct subjects property to forfeiture under Section 503.

(2) "Attorney for the State" means an officer authorized to prosecute a forfeiture under Section 502(a).

(3) "Conduct subjecting property to forfeiture," "conduct that subjects property to forfeiture," or "conduct" means the conduct described in Section 503.

(4) "Custodial agency" means the agency designated in Section 502(c).

(5) "Judicial lien" means a lien attached to property and obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

(6) A person "knows" a fact or acts with "knowledge" if the person is aware of the existence of the fact or displays willful blindness as to whether the fact exists. A person other than an individual "knows" a fact or acts with "knowledge" if an individual for whom criminal liability may be imputed to the person pursuant to [Section 2.07 of the Model Penal Code] knows the fact or acts with knowledge of the fact. As used in this paragraph, a person displays "willful blindness" as to

whether a fact exists if the person is aware of a substantial probability that the fact exists and consciously avoids information corroborative of the existence of the fact.

(7) “Owner” means a person who has a legal or equitable interest in property, including a security interest.

(8) “Proceeds” includes identifiable property received upon the sale, exchange, or other disposition of property, including insurance or other proceeds received for loss of or damage to property, and interest, rents, dividends, collections, and other income derived from an interest in property.

(9) “Property” means all property, whether real, personal, mixed, tangible, or intangible.

(10) “Security interest” means an interest in property that secures payment or performance of an obligation. The term includes an interest treated as a security interest under [Section 1-201(37) of the Uniform Commercial Code]. The term does not include an interest created by retention of the title to real property by a seller for less than one year after the buyer enters into possession.

(11) “Seizing agency” means an agency authorized to seize property under Section 502(b).

(12) A person gives “value” for a right if the person acquires it:

(i) in return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon or a charge-back is provided;

(ii) as security for or in total or partial satisfaction of a preexisting claim;

(iii) by accepting delivery pursuant to a preexisting contract for purchase; or

(iv) generally, in return for consideration sufficient to support a simple contract.

### **Comment**

The term “knows” incorporates principles of culpability applicable to corporations or unincorporated business associations which are used for purposes of criminal responsibility. The criminal standard of culpability is adopted because

conduct that allows forfeiture constitutes criminal violations of the UCSA. A State may either cross-reference appropriate provisions of its Crimes Code or add to the definition applicable provisions of Section 2.07 of the Model Penal Code, 10 Uniform Laws Annotated 471-73 (Master Ed. 1974).

Section 2.07 of the Model Penal Code provides that a corporation or unincorporated association is responsible for the acts of an agent acting on its behalf within the scope of the agent's office or employment and for acts authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or a high managerial agent acting on its behalf, unless the defendant proves by a preponderance of the evidence that a high managerial agent having supervisory responsibility over the subject matter of an offense employed due diligence to prevent its commission. A high managerial agent is any person having duties of such responsibility that the agent's conduct may fairly be assumed to represent the policy of the corporation or the association.

The definition of "willful blindness" is patterned on federal criminal cases declaring certain forms of avoiding knowledge – sometimes also called "deliberate ignorance" or "conscious avoidance" – as adequate to satisfy a statute's requirement of "knowledge" for conviction. *See, e.g., United States v. Rothrock*, 806 F.2d 318, 323 (1st Cir. 1986) ("The purpose . . . is to impose criminal liability on people who, recognizing the likelihood of wrongdoing, nonetheless consciously refuse to take basic investigatory steps"); *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, instruction no. 7.04 (1992) (defendant must be "aware of a high probability" that the fact exists and "deliberately avoid[] learning the truth"; defendant must have "deliberately closed his eyes to what would otherwise have been obvious to him"). It does not establish a negligence standard. *See United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986) (urging caution in giving willful blindness instruction so as to avoid "the possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known [an illegal act] was taking place").

The term "owner" includes a tenant with a leasehold interest in property.

The term "proceeds" is similar to Section 9-306 of the Uniform Commercial Code, but also includes earnings generated by other property.

The term "property" is based upon the definition in the Uniform Partnership Act, 6 Uniform Laws Annotated 228 (1994 Supp.).

The first sentence in the definition of the phrase "security interest" is the same as the basic definition of that phrase in Section 1-201(37) of the Uniform

Commercial Code. The second sentence, by alluding to the full reach of the term under Section 1-201(37), also includes as personal property other transactions, such as a lease that is a secured transaction. The first sentence should be construed to include like transactions involving real estate, that is, a lease intended as security or an absolute deed intended as a mortgage. The implication of the last sentence, that retention of title for more than one year should be treated as a security interest in the form of an installment land contract or contract for deed, also should be recognized.

The term “value” is defined to include the giving of any consideration sufficient to support a simple contract. *See* Section 505(c).

## **SECTION 502. AGENCIES RESPONSIBLE FOR FORFEITURES.**

(a) A forfeiture proceeding under this [article] may be prosecuted by [designate the appropriate prosecuting attorney]. The responsibility to prosecute a forfeiture proceeding may not be delegated to a private attorney.

(b) Property may be seized pursuant to this [article] only by an officer or employee of the [designate the appropriate law enforcement agency].

(c) Property seized or received before forfeiture under this [article] must be placed in the custody of the [designate the appropriate custodial agency].

### **Comment**

States should designate the appropriate government attorneys under subsection (a) to initiate and prosecute forfeiture actions. Depending upon local practice, a State may designate prosecutorial agencies of either local or statewide jurisdiction or may divide responsibilities among such agencies. Similar decisions must be made under subsection (b).

The Conference recommends that States designate a custodial agency or agencies under subsection (c) to manage property other than the agency or agencies charged with prosecuting forfeiture proceedings. The use of separate custodial agencies may reduce opportunities for conflicts of interest.

As is the case with the designation of prosecutorial agencies, States may designate custodial agencies of either local or statewide jurisdiction or may designate appropriate agencies to correspond to designated prosecutorial agencies. In order to reduce the potential for conflicts of interest, the Conference recommends that States designate custodial agencies with statewide jurisdiction.

Subsections (a) and (b) allow forfeitures to be prosecuted and property seized only by public officers and employees and prohibits the use of private attorneys or contractors for these purposes. Allegations of abusive forfeiture practices are often associated with the use of non-governmental officials to prosecute forfeitures and seize property. Regardless of the merits of these claims, the Conference has concluded that the goal of preserving public confidence in forfeiture proceedings is promoted by requiring that forfeitures be undertaken only by public officers and employees.

**SECTION 503. CONDUCT THAT SUBJECTS PROPERTY TO FORFEITURE.**

(a) The following conduct subjects property to forfeiture:

(1) an act or omission punishable under this [Act] [by imprisonment for more than one year] [as a felony];

(2) an act or omission committed in furtherance of any act or omission described in paragraph (1) and punishable [by imprisonment for more than one year] [as a felony]; or

(3) an act or omission occurring outside this State which:

(i) is punishable in the State in which it occurred or under federal law [by imprisonment for more than one year] [as a felony]; and

(ii) would be punishable under paragraph (1) or (2) if the act or omission had occurred in this State.

(b) Conduct covered by subsection (a) subjects property to forfeiture even if it has not been the subject of a criminal prosecution.

**Comment**

This section sets out the meaning of the phrase “conduct that subjects property to forfeiture.” The phrase is used throughout the act, but is especially important in Section 504, which sets out which property is “subject to forfeiture.”

This provision operates in conjunction with the other articles of the UCSA (1990). It assumes that the adopting jurisdiction has adopted the UCSA, including the optional provisions of Section 408 that prohibit attempts to violate the Act.

This article does not require a criminal conviction as a prerequisite to forfeiture proceedings. An acquittal of criminal charges precludes forfeiture based on the same alleged acts only if other law so requires.

Conduct that subjects property to forfeiture is only necessary in order to forfeit property to the extent provided by Section 504. There are circumstances, such as forfeiture of contraband, in which conduct that subjects property to forfeiture need not be established.

#### **SECTION 504. PROPERTY SUBJECT TO FORFEITURE.**

(a) The following property is subject to forfeiture:

(1) a controlled substance, controlled substance analog, or imitation controlled substance manufactured, distributed, dispensed, possessed, acquired, or used in violation of this [Act], or property used to counterfeit a controlled substance in violation of this [Act];

(2) a controlled substance in Schedule I or II if the owner is unknown;

(3) a plant from which a controlled substance in Schedules I or II may be derived if it is planted or cultivated in violation of this [Act], the owner or cultivator is unknown, or it is a wild growth;

(4) property furnished or intended to be furnished in an exchange that constitutes conduct subjecting property to forfeiture;

(5) property used or intended to be used to facilitate conduct subjecting property to forfeiture;

(6) weapons possessed, used, or available for use to facilitate conduct subjecting property to forfeiture; and

(7) proceeds traceable to property described in paragraphs (1) through (6).

(b) The commingling of other property with property subject to forfeiture does not make the other property forfeitable as proceeds. Equitable tracing rules may be used to identify property that is forfeitable as proceeds. Income or gain attributable to commingled property is subject to forfeiture in the proportion that the value of the forfeitable property bears to the value of the commingled property.

(c) Except as otherwise modified by [adverse possession or a prescriptive easement], the boundary of real property subject to forfeiture is the boundary that appears in the recorded legal description of the lot, portion, or parcel. Whether or not a person whose interest in real property is subject to forfeiture owns other lots, portions, or parcels of property, the property subject to forfeiture is the lot, portion, or parcel upon which conduct subjecting property to forfeiture occurred, unless the lots, portions, or parcels were separately described of record to avoid forfeiture, or the lot, portion, or parcel would not be reasonably marketable without inclusion of the owner's contiguous lots, portions, or parcels. Forfeiture of a lot, portion, or parcel of real property includes all appurtenances and improvements.

### **Comment**

**Overview.** This section identifies property “subject to forfeiture.” Sections 505 and 506 identify which interests in property “subject to forfeiture” are nevertheless “exempt” from forfeiture. It is important to distinguish between whether property is “subject to forfeiture” and whether an interest in the property is “forfeited.” Only in cases where property is “subject to forfeiture” need an “innocent owner” establish the applicability of an exemption. Thus, the prime role of this section is to specify the showing necessary for the government to forfeit property if no evidence of exemption is shown, and to identify when innocent owners must present proof of their entitlement to an exemption.

The distinction between property subject to forfeiture and property interests that are forfeited is particularly significant in light of the broad definition of property in Section 501. Security interests, for example, are “subject to forfeiture” when the collateral is used to facilitate a violation of this Act. Thus, if an automobile is used to facilitate a drug transaction, not only is the offender's interest in the car subject to forfeiture, but so is a lender's security interest in the car. Though “subject to forfeiture,” the bank's interest may be exempt from forfeiture under Section 505. Likewise, if a lessee uses his or her apartment to sell drugs, the lessee's interest in the apartment is subject to forfeiture, as is the lessor's interest. The lessor's interest, however, may often be exempt from forfeiture under Section 505. One spouse's illegal activity in the family home, undertaken without the knowledge of the other spouse, may make both spouses' interests in the home subject to forfeiture, but the innocent spouse's interest may be exempt from forfeiture under Section 505. When the State wishes to relieve innocent owners of the burden of legal proceedings, it may structure a forfeiture action in a way that does not require innocent interest holders to establish their innocence – for example, by filing the action only against the leasehold interest of a wrongdoer.

Many of the categories of property subject to forfeiture in this section are drawn from 21 U.S.C. § 881(a). Cases construing that statute should guide courts in elaborating on these provisions.

For definitions of “controlled substance” and “controlled substance analog,” see UCSA § 101(2), (3) (1990).

No special provision is made for forfeiture of raw materials, equipment used in producing controlled substances, and books, records, and formulas integral to the manufacturing process. This article’s facilitation theory, *see* paragraph (a)(5), is sufficient to reach such property.

**Facilitation.** Subsection (a)(5) follows federal law in permitting forfeiture of property that has been used or intended to be used to “facilitate” conduct that subjects property to forfeiture. 21 U.S.C. § 881(a)(4), (6)-(7). The subsection expands on federal law, however, by making all personal property subject to forfeiture when it facilitates drug activity. While § 881(a)(4) makes conveyances subject to forfeiture, no general provision in current federal law makes all personal property subject to forfeiture on a facilitation theory.

Although it is difficult to provide a formulation that specifies exactly how substantially property must aid drug conduct before it can be said to facilitate that conduct, *see United States v. One 1979 Porsche Coupe*, 709 F.2d 1424 (11th Cir. 1983) (applying “substantial connection” test); *United States v. Real Estate Known as 916 Douglas Ave.*, 903 F.2d 490, 493 (7th Cir. 1990) (facilitation does not occur when property has only an “incidental or fortuitous connection to criminal activity”), courts have tended to agree on the resolution of certain recurring fact patterns.

Under Section 881(a), courts have upheld the forfeiture of property at which a drug exchange takes place. *E.g.*, *United States v. Real Property & Residence at 3097 S.W. 111th Ave., Miami*, 921 F.2d 1551 (11th Cir. 1991). Courts have upheld the forfeiture not only of cars used to transport illegal drugs to the scene of a drug transaction, but also cars that were used merely to commute to the scene of a drug transaction. *E.g.*, *United States v. One 1981 Datsun 280 ZX*, 563 F. Supp. 470, 473 (E.D. Pa. 1983). *But see Weinstein v. Mueller*, 563 F. Supp. 923, 929 (N.D. Cal. 1982) (suggesting different result). Courts have also upheld the forfeiture of cars in which the negotiation of a drug transaction has occurred. *United States v. One 1981 Datsun 280 ZX*, 563 F. Supp. 470, 473 (E.D. Pa. 1983).

As property becomes less clearly related to the ultimate crime, the cases reach less consistent outcomes. *Compare, e.g.*, *United States v. One 1982 Buick Regal*, 670 F. Supp. 808 (N.D. Ill. 1987) (car facilitates drug transaction even if it

was only driven to a meeting where the future transaction was discussed), *and United States v. One 1984 Ford Bronco*, 674 F. Supp. 424 (E.D.N.Y. 1987) (vehicle forfeited where drug traffickers used it to circle apartment building and stare into lobby 2 and 1/2 hours before drugs delivered there), *and United States v. Approximately 50 Acres of Real Property*, 920 F.2d 900 (11th Cir. 1990) (forfeiting real property at which important aspects of large transaction were negotiated and planned even though the transaction took place elsewhere), *and Real Estate Known as 916 Douglas Ave., supra*, 903 F.2d 490 (use of home telephone to negotiate two-ounce cocaine sale to undercover agent constitutes facilitation), *with United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026 (1st Cir. 1980) (no facilitation where car transported drug conspirator to a meeting at which he intended to receive the repayment of money that he had “fronted” a coconspirator), *and United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525, 527 (8th Cir. 1985) (refusing to forfeit vehicle used to transport wrongdoer to inspect marijuana crop), *and United States v. 124 East North Ave., Lake Forest, Ill.*, 651 F. Supp. 1350, 1354 (N.D. Ill. 1987) (isolated use of phone to discuss narcotics sale arguably insufficient to establish facilitation by property on which phone located), *and Real Property & Residence at 3097 S.W. 111th Ave., Miami*, 921 F.2d at 1556 (property where transaction took place probably not forfeitable if the government “maneuver[s]” to have the transaction occur there), *and City of Clearwater v. One 1980 Porsche 911 SC*, 426 So. 2d 1260 (Fla. App. 2 Dist. 1983) (construing a similar statute to conclude that car does not facilitate sale where seller drove it to Tampa airport to catch a flight to North Dakota, where the sale was to take place).

Because weapons present a recurring problem, and because this section expands on federal law respecting the forfeitability of weapons, subsection (a)(6) makes explicit what would be implicit under subsection (a)(5) – that weapons are among the “personal property” that might facilitate conduct subjecting property to forfeiture. *Cf.* 21 U.S.C. § 881(a)(11) (limiting forfeiture to “firearm[s]” as defined in 18 U.S.C. § 921).

**Traceable proceeds.** Subsection (a)(7) is modelled on 21 U.S.C. § 881(a)(6), which also permits forfeiture of “proceeds traceable” to property exchanged for drugs. Federal law, however, does not authorize forfeiture of the proceeds traceable to either “facilitation” property or property intended to be exchanged for drugs but never actually exchanged. Federal law also makes forfeitable proceeds traceable to forfeitable firearms. *See* 21 U.S.C. § 881(a)(11). The limitations on federal proceeds forfeiture are largely meaningless, for under the “relation-back doctrine,” *see infra* Section 522 Comment, the government can invoke constructive-trust principles to get rents and other proceeds from all categories of forfeitable property dating back to the time of the conduct making the property forfeitable. *See, e.g., United States v. Monkey*, 725 F.2d 1007, 1012 (5th Cir. 1984) (citing cases).

One goal of this provision is to deprive the drug dealer of the profit in crime. Thus, the drug dealer is unable to frustrate forfeiture by simply spending the cash received by selling drugs, because the property acquired is traceable to the cash received and remains forfeitable under this provision. Familiar restitutionary concepts should assist courts in determining what should be forfeitable under this provision. For example, if a drug dealer takes real estate in return for drugs, not only the real estate but also the rent received from the property would be forfeitable. *Cf. Restatement of the Law of Restitution* § 205 (1937). Where the drug dealer invests the cash received by selling drugs, and where that investment appreciates in value, the entirety of the investment – including the appreciation – is forfeitable. *Cf. Restatement, supra*, § 202. However, when clean and dirty money are mingled to buy property, the property should be forfeited only in proportion to the contribution of the dirty money. *Cf. Restatement, supra*, § 210(2) (wrongdoer must disgorge property, including profit, in proportion to use of fraudulently obtained assets to purchase the property).

This Act should not be construed to permit the drug dealer to insulate from forfeiture a portion of the property received in exchange for drugs. The definition of “proceeds” does not affect this question; wholly apart from the meaning of “proceeds,” Section 504(a)(4) permits forfeiture of the “property . . . furnished” in exchange for drugs, and nothing in that provision permits the drug dealer to retain that portion of the property needed to cover the expenses of manufacturing drugs.

**Real property.** Subsection (c) is similar to 21 U.S.C. § 881(a)(7), which provides that “the whole of any lot or tract of land and any appurtenances or improvements” used to facilitate a drug offense leads to forfeiture of the entire lot or tract of land. The term “portion” in subsection (c) refers to an interest in real estate designated for separate ownership pursuant to recorded documents, such as a unit in a condominium, and is not intended to refer to any distinct geographical part of a parcel of real property upon which conduct that subjects property to forfeiture has occurred. Practical considerations militate against forfeiture of only the part of a lot of real property – the field in which marijuana was grown, for example – that was used to facilitate drug conduct. Such considerations will rarely require elaboration on the language in subsection (a)(5) outside the context of real property.

## **SECTION 505. INTERESTS EXEMPT FROM FORFEITURE.**

(a) The following interests in property are exempt from forfeiture:

(1) property owned by general or special purpose units of government and other property dedicated to public use;

(2) statutory or recorded liens for taxes, special assessments, and fees due a governmental entity; and

(3) utility, road, sewer, and other easements of record owned by or dedicated to a utility or unit of government.

(b) An interest in property acquired by an owner before the occurrence of conduct that subjects the property to forfeiture is exempt from forfeiture if:

(1) the owner did not know the conduct would occur at the time of acquisition of the interest and at any later time when an actor controlled or possessed the property; or

(2) the owner acted in a manner the owner reasonably believed appropriate to prevent an actor's conduct and assist in the prosecution of the actor.

(c) An interest in property acquired by the owner after the occurrence of conduct that subjects property to forfeiture of the property is exempt from forfeiture if:

(1) the owner acquired the property for value, other than as consideration for the provision of future services, and at the time of acquisition did not know that the conduct had occurred or the property had been seized for forfeiture;

(2) [except as otherwise provided in Section 506,] the owner acquired the property for value as consideration for the provision of future services, and at the time of acquisition did not know that the conduct had occurred or the property had been seized for forfeiture, but only to the extent that, at the time of obtaining knowledge of a judicial determination of probable cause that the property is subject to forfeiture, the owner would be required to provide the services notwithstanding the forfeiture of the property or would have the right to retain the interest upon a termination of the contract by the transferor without cause; or

(3) the owner acquired the property without giving value, and is the spouse of a person whose interest in the property is subject to forfeiture, if the property is the spouse's primary residence or the spouse's only remaining automobile, and at the time of acquisition the spouse did not know that the conduct had occurred or the property had been seized for forfeiture.

(d) An interest in property is exempt from forfeiture under subsection (c)(3) in an amount not to exceed [insert value] for a residence and in an amount not to exceed [insert value] for an automobile.

(e) Except for the owner of an interest in property exempt from forfeiture under subsection (a), (f), or (j), in order to claim an exemption from forfeiture the owner must file a request for an administrative exemption under Section 513 or a demand for a judicial proceeding under Section 514, or assert an exemption in a judicial forfeiture proceeding.

(f) The following interests in property owned by a person other than an actor are regarded as exempt from forfeiture without filing a request, demand, or pleading under subsection (e), until the attorney for the State gives notice under subsection (g) asserting that the interests claimed are not exempt:

(1) judicial liens and liens created by law;

(2) easements, covenants, restrictions, and reservations burdening the property;

(3) rights to remove natural resources from real property, including water, mineral, and timber rights, if the rights have been severed from other interests in the property;

(4) interests in substitute property designated pursuant to Section 419(i);

(5) interests created or acquired in obligations to pay money, including leases of specific property, and recorded or perfected security interests, and interests acquired under a repurchase agreement, if held, as applicable, by a person:

(i) regularly engaged in leasing specific property or extending credit on the security of property;

(ii) regularly engaged in the purchase of obligations to pay money or property subject to a repurchase agreement;

(iii) that issues participations in or claims backed by an identifiable pool of obligations to pay money or security interests, or both; or

(iv) that sold property and holds the interest as security for the payment of the purchase price; and

(6) interests of a lessee or licensee in control of or with a right to use property if the lessor or licensor is the person whose conduct subjects the interests to forfeiture.

(g) Notwithstanding the requirements of Section 605(a), if the attorney for the State has probable cause to assert that an interest in property described in subsection (f) is not exempt from forfeiture under subsection (b), (c), or (l), the attorney for the State may give notice to the owner that the property is not exempt under subsection (f). The notice must:

(1) specifically state that the interest is subject to forfeiture;

(2) be provided to the owner of the interest in the manner provided by Section 512(c); and

(3) be received by the owner of the interest before the conclusion of the forfeiture proceeding.

(h) An owner of property who receives notice pursuant to subsection (g) must claim an exemption from forfeiture in the manner provided by subsection (e). The time limits applicable to filing a request for an administrative exemption under Section 513 or a demand under Section 514 are extended to the extent necessary to provide a reasonable opportunity to file a request or a demand.

(i) The transfer of property exempt from forfeiture vests in the transferee any right to an exemption of the transferor, but the transferee cannot acquire an exemption by a transfer, directly or indirectly, if the transferee engaged in conduct that subjects the property to forfeiture or precludes exemption under subsection (l).

(j) If an owner of an interest described in subsection (f)(5) received value for a promise to transfer the property to another person before receiving notice pursuant to subsection (g), the purchaser's interest is exempt from forfeiture, but the previous owner's interest in the property and any value received are not exempt from forfeiture under subsection (f).

(k) In addition to other measures that satisfy the requirements of subsection (b)(2), an owner satisfies those requirements by:

(1) notifying an appropriate law enforcement agency of information that led the owner to know the conduct would occur and of other information the agency reasonably requests to prevent the conduct and prosecute the actor; and

(2) revoking permission for the actor to use the property or taking reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property, but a person is not required to undertake any action the owner reasonably believes may threaten any individual's personal security or safety.

(l) Except for property exempt under subsection (a), an interest in property is not exempt from forfeiture under this section if the owner:

(1) holds the interest for the benefit of or as nominee for the person whose conduct subjects the property to forfeiture; or

(2) is criminally responsible for the conduct that subjects the property to forfeiture, whether or not a prosecution is commenced.

(m) For purposes of this section [and Section 506], an owner acquires an interest in property pursuant to a contract at the time the contract is made, whether or not the property is identifiable at that time.

(n) Knowledge of conduct that subjects property to forfeiture may not be inferred from an owner's awareness that property has been seized for forfeiture, made subject to a lien under Section 509, or previously was the subject of an administrative or judicial forfeiture proceeding, if the property has been released by the State, any lien has been removed, or the forfeiture proceeding has been dismissed.

(o) An interest in property exempt under this section [or Section 506] may be subordinate to the State's interest created by a lien under Section 509.

### **Comment**

Subsection (a) identifies various types of property which will always be exempt from forfeiture. Because the categories of property listed in subsection (a) are used for the benefit of the public, it is inappropriate to subject such property to the risk of forfeiture.

Subsection (a)(1) exempts from forfeiture "public property." It includes not only property held by general purpose units of government, but also property held by authorities, quasi-governmental entities and public and private trusts for the public benefit. Any private interests in such property, however, such as leases provided to non-governmental entities or private rights to utilize trust property, are subject to forfeiture.

Subsection (a)(3) exempts from forfeiture "utility" easements. The exemption is not limited only to "public utilities" as defined under state law, but also applies to other types of utility easements, such as drainage easements, which benefit the public but which may not be held by public utilities.

Subsections (b) and (c) provide a more concise statement of the various “innocent-owner” exemptions currently provided by most state and federal forfeiture laws. Generally, the 1970 UCSA and most current laws provide an exemption from forfeiture if the “conduct that subjects property to forfeiture” involved acts or omissions committed or omitted without the “knowledge or consent of the owner.” *E.g.*, 18 U.S.C. § 981(a)(2).

Courts have differed on the issue of whether an owner must prove the lack of both knowledge and consent. *Compare, e.g., United States v. Property Known As 6109 Grubb Rd.*, 886 F.2d 618 (3d Cir. 1989) (owner need only disprove consent), *with United States v. Lot 111-B*, 902 F.2d 1443 (9th Cir. 1990) (owner need disprove both knowledge and consent). Courts have also differed considerably regarding the appropriate requirements to prove a lack of “consent” to conduct that subjects property to forfeiture.

In place of the problematic concept of “consent,” subsection (b) requires a property owner with knowledge that property will be used for conduct that subjects property to forfeiture to gain an exemption by taking actions which the owner reasonably believed were appropriate to prevent the conduct and assist its prosecution. *See also* subsection (k). Many federal courts have interpreted the “consent” requirement as being satisfied only upon proof of reasonable efforts to prevent conduct that subjects property to forfeiture. *United States v. 141st St. Corp. by Hersh*, 911 F.2d 870, 879 (2d Cir. 1990).

Subsection (c)(1) and (2) limit the availability of an innocent-owner exemption for interests acquired after conduct which allows forfeiture to interests acquired for value. In this regard the exemptions provided by subsection (c)(1) and (2) are narrower than exemptions provided under federal law, which also apply to mere donees. *United States v. Parcel of Land, Bldgs., Appurtenances and Improvements, Known as 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993). Wrongdoers could too easily evade forfeiture, and receive benefits from their ill-gotten gains, if innocent donees were permitted to keep property that would be subject to forfeiture in the hands of the person whose conduct subjects the property to forfeiture.

Subsection (c)(1) and (2) reject the use of a negligence standard to determine eligibility for exemptions. A willful blindness standard is incorporated in subsection (c) by virtue of the definition of “knowledge” provided by Section 501(6). A negligence standard has been rejected as imposing excessive uncertainty in commercial transactions. The use of a willful blindness standard is consistent with most judicial interpretations of the federal innocent owner exemptions. *United States v. 1980 Red Ferrari*, 827 F.2d 477, 480 (9th Cir. 1987); *United States v. One Single Family Residence*, 933 F.2d 976 (11th Cir. 1991).

Subsection (c)(2) addresses the status of property acquired in exchange for executory contracts with a person whose conduct subjects the property to forfeiture. The State may take property paid to a contractor for goods or services not yet delivered if the contractor would not otherwise have a right to keep the property upon a termination of the contract by a person whose conduct subjects the property to forfeiture. The contractor's interests will not be unfairly impinged upon if other law would not have permitted the contractor to keep the deposit had the contract been terminated without cause. If the contractor would only be permitted to keep a portion of the deposit, only that portion is exempt from forfeiture. These provisions will apply to construction contractors, architects, engineers, and similar vendors of services, including attorneys. The presence of subsection (c)(2) reduces somewhat the need for the optional attorney's fee provisions of Section 506. Nothing in subsection (c)(2) is intended to prevent an owner of property subject to forfeiture from enforcing an obligation against any party, except the State, to make payments pursuant to a contract to provide services.

Subsection (c)(3) avoids the need to resolve whether a spouse "gives value" in exchange for the acquisition of a marital interest in certain property. Subsection (c)(3) provides a special rule for a spouse who would qualify under the innocent-owner provisions as if he or she had given value for an interest in a primary residence or only automobile. Subsection (d) limits the amount of the exemption provided by subsection (c)(3). A State should insert values in the bracketed provisions adequate to permit maintenance of an average residence or vehicle.

Subsection (e) provides that to claim the exemptions provided by subsections (b) and (c), a request or demand under Section 513 or 514, or a petition in a judicial forfeiture proceeding, must be filed. Requests, demands, and petitions are not required for the exemptions provided under subsection (a), and are only required to claim exemptions under subsection (f) as otherwise provided by this section. Subsection (e) does not address the allocation of burdens of proof regarding exemptions. Instead, the burdens of proof with respect to exemptions are provided by Section 521.

Subsection (f) lists several categories of property which under ordinary circumstances are not the proper subject of forfeiture proceedings. Subsection (f) allows the owners of such interests to enjoy an exemption without bearing the affirmative duty of proving their eligibility for an exemption, unless the attorney for the State gives notice to the owner that the owner's interests are believed not to be exempt as provided by subsection (g). Because the likelihood that such property will be subject to forfeiture is low, imposing an obligation upon such property owners to claim an exemption in all circumstances is unwarranted. The subsection (f) exemptions apply "notwithstanding the requirements of Section 605(a)" because that section provides that "it is not necessary for the State to negate any exemption

or exception in this [Act] in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under this [Act].”

Except for the procedural advantages conferred by subsection (f), the subsection is not intended to confer any added exemptions from forfeiture. The attorney for the State may give notice of forfeiture of any type of property listed in the subsection if probable cause exists that the property is not eligible for an exemption. Subsection (g)(3), however, requires notice to be given before the conclusion of forfeiture proceedings.

The exemption provided by subsection (f)(2) for easements, covenants, restrictions, and reservations burdening the property includes prescriptive easements arising due to adverse possession.

In the usual case, prosecutors will be able to discern from the records that certain interests in property are covered by subsection (a) or (f) and will proceed accordingly – for example, by entering discussions with the interest owner as to how best to protect the owner’s interest in the property and by notifying the court that certain interests in forfeited property are exempt under these provisions. In some situations, however, the applicability of these provisions may not be apparent. Owners should alert prosecutors that their interests are exempt under subsection (a) or (f) in those cases. Although failure to do so will not result in forfeiture of their interests, evidence that the prosecutor had been notified of the owner’s interest may be helpful to establish a claim in the event that the State sells property in which the owner had a non-forfeited interest. This article does not address whether an owner would have an action against the State in those circumstances. Moreover, this article does not address when a buyer of forfeited property from the State will take clear of an owner’s unforfeited interest of which the buyer is unaware.

Subsection (g) provides that the exemptions provided by subsection (f) do not apply if probable cause exists that the interest would not be exempt from forfeiture under subsection (b), (c), or (l), provided the attorney for the State gives the owner of the interest notice that the interest is not exempt from forfeiture. In the event the attorney for the State gives notice that property interests are not exempt under subsection (f), but does not have probable cause for such a determination, the only recourse is to seek release of the property under Section 511. Section 511 provides that if the attorney for the State demonstrates probable cause that some interest in the property is subject to forfeiture, a person claiming an exemption might still gain access to the property on certain conditions. No separate action exists under this article for the release of the property because the attorney for the State lacked probable cause to give a subsection (g) notice.

Subsection (i) codifies the “shelter principle,” whereby an owner of an exempt interest passes his or her right to exemptions to subsequent owners. In a manner similar to restrictions on the holder-in-due-course provisions of the Uniform Commercial Code, however, a person who is party to conduct that allows the forfeiture of property is not permitted to wash the property clean by passing it into the hands of an exempt owner and then repurchasing it. *See* UCC § 3-203(b).

Subsection (j) provides that security interests and securitized property held by subsequent purchasers, *i.e.*, persons who acquire the property from persons who themselves qualify for an exemption under subsection (f)(5), enjoy an absolute exemption from forfeiture unless their seller received notice that the interest was not exempt before the subsequent purchasers gave value in exchange for the property. These provisions are intended to preserve the negotiability of property interests which are widely transferred in secondary markets without creating excessive due-diligence burdens upon the purchasers of such property. An attempt to use the exemption provided by subsection (j) to subsequent purchasers of security interests and securitized property to “launder” money and other property may disqualify the owner for the subsection (f) exemption under subsection (l).

For subsection (j) to accomplish its purpose, it must permit the subsequent purchaser to act to protect its interest in the event of a default. The “interest” exempted by subsection (j) hence is not limited to the precise legal interest the subsequent purchaser originally obtains, but also includes such interests as may be acquired upon foreclosure or the like to the extent necessary to protect the originally acquired interest. It also includes the interest in conveying clear title to the property in the event of a foreclosure sale. However, to the extent the sale of collateral generates proceeds in excess of those necessary to satisfy the subsequent purchaser’s interest, that excess, which may be returned to the borrower, is not exempt from forfeiture under subsection (j).

For the purposes of subsection (b), subsection (k) provides a “safe harbor” regarding actions that will satisfy the requirement of acting reasonably to prevent wrongful conduct. The absence of comparable standards in federal law, where the issue arises as to whether the owner “consented” to the activity, has led to questions about the minimum requirements imposed on owners by the forfeiture regime. *See United States v. Certain Real Property and Premises Known as 418 57th St., Brooklyn, N.Y.*, 922 F.2d 129 (2d Cir. 1990) (remanding for reconsideration of sufficiency of landlord’s actions; after being notified of tenant’s drug arrests for conduct at property, landlord consulted attorney, who advised that eviction was not permitted under state law until tenant was convicted).

The “safe harbor” provisions of subsection (k) require more than mere notification of a law enforcement agency because of the importance of programs

initiated by law enforcement agencies in high crime neighborhoods to work with property owners to prevent drug offenses. A safe harbor based upon mere notification might discourage property owners from participating in such programs.

Subsection (k) does not override other law that may impose confidentiality requirements precluding disclosure of certain information. Such limits are relevant in assessing whether disclosures short of those specified in this subsection satisfy the requirements of subsection (b)(2). In an appropriate case, failure to provide any assistance may be reasonable.

Subsection (l) disqualifies certain property owners for the exemptions provided by subsections (b), (c), (f), (i), and (j). Exemptions are unavailable to straw owners and those criminally responsible for the conduct subjecting property to forfeiture. For example, in a jurisdiction following the approach to co-conspirator liability of *Pinkerton v. United States*, 328 U.S. 640 (1946), a co-conspirator who may not have known of the plan to commit a crime (and thus appear to qualify for an innocent-owner defense) will nevertheless be criminally liable for the crime if it was a reasonably foreseeable consequence of the conspiracy, and will therefore lose the ability to raise an innocent-owner defense.

Subsection (m) provides a special rule to deal with interests that arise pursuant to a contract, but after the contract is made. For example, suppose that a lender has taken a security interest in borrower's inventory. Later, lender learns that borrower is using drug proceeds to purchase new inventory. If the lender's interest were regarded as being acquired at the time the new inventory is purchased, the lender would acquire the interest in new inventory after the conduct that subjects the property to forfeiture; at that time, the lender would know of the conduct and thus lose the innocent-owner protection under subsection (c). If the lender's interest is acquired as of the making of the contract, however, the lender acquires the interest as of that date, and is able to act to protect its interests pursuant to subsection (b)(2).

Alternatively, consider a lender that has entered a contractual agreement to advance funds to a borrower on a periodic basis without knowledge of borrower's drug activity. Before making an advance, the lender learns that the borrower has purchased inventory using drug proceeds. If lender were deemed to acquire interests in borrower's inventory as funds were advanced, the lender would have knowledge of the conduct that subjects the property to forfeiture prior to the new advance, and hence would have no innocent-owner protection to the extent of the interest taken to secure the new advance. Subsection (m) clarifies that lender's interest is acquired at the time the contract is formed.

Subsection (n) provides that property will not become “tainted” by virtue of being seized and released, made subject to a lien that is released, or made subject to a forfeiture action which is dismissed or terminated. It proscribes inferring knowledge of conduct that subjects property to forfeiture from the prior seizure, lien, or forfeiture action, if the property was released, the lien removed, or the action dismissed or terminated. A subsequent purchaser may treat the property as if it had never been seized.

Subsection (o) clarifies the relationship between exemptions and the interest the State acquires by filing a lien under Section 509.

**[SECTION 506. ATTORNEY’S FEES.**

(a) An interest in property acquired by an attorney as payment of or as security for payment of a reasonable fee for legal services in a criminal matter or for the reimbursement of reasonable expenses related to those services is exempt from forfeiture unless

[ALTERNATIVE ONE

the attorney was aware at the time the interest was acquired that the property was subject to forfeiture.]

[ALTERNATIVE TWO

the attorney, before the interest was acquired, knew of a judicial determination of probable cause that the property was subject to forfeiture.]

[ALTERNATIVE THREE

the payment or security interest acquired represents a fraud or sham to protect the interest from forfeiture.]

(b) The State has the burden of proving that an attorney is not entitled to an exemption claimed under this section. Evidence made available by the compelled disclosure of confidential communications between attorney and client, other than nonprivileged information relating to attorney’s fees, is not admissible to satisfy the State’s burden of proof.]

## Comment

This section provides States with three optional provisions relating to attorney's fees. In addition, States may choose not to include any version of Section 506 and apply the general exemptions provided by Section 505. States which elect not to include any version of Section 506 should "reserve" the section number to maintain uniformity of sectional cross references among the states.

Because of the special role that attorneys play in our system, the general rules exempting the interests of "innocent owners" may not be sufficient to resolve the problems raised by the provision of fees to attorneys. Requiring attorneys to prove that they were not "willfully blind" to whether their fees have been paid with property subject to forfeiture might deter attorneys from accepting criminal drug cases. While representing the client, the attorney's job requires the attorney to seek exactly the kind of information that might reveal facts that could be argued to establish the attorney's willful blindness. A desire to protect fees might impel attorneys to demand proof of a legitimate source for a fee. Such efforts early in the attorney-client relationship may frustrate the development of trust necessary for the attorney to obtain the information needed to provide effective representation, and may send a message to the client that the attorney should not be told of the client's wrongdoing.

Alternatively, the risk of forfeiture could lead attorneys to fail to live up to their ethical obligations to encourage full disclosure from their clients. *Compare American Bar Association Standards Relating to the Administration of Criminal Justice: The Defense Function* §§ 4-3.1(a), 3.2(b) (1979) (attorney "should explain the necessity of full disclosure of all facts known to the client," and it is "unprofessional conduct for the lawyer to instruct the client or to intimate to the client in any way that the client should not be candid in revealing facts so as to afford the lawyer free rein to take action which would be precluded by the lawyer's knowing of such facts") with *United States Attorneys' Manual* § 9-111.230 (Oct. 1, 1990) (requiring attorney to prove lack of reasonable cause to suspect forfeitability of fee "may prevent the free and open exchange of information between an attorney and a client").

Any of these possibilities is problematic. Though federal statutes do not embrace a special exemption for attorney's fees, these concerns are reflected in official Department of Justice policy, which precludes any forfeiture of fees paid in a criminal case if the attorney lacked "actual knowledge" that the fee was forfeitable. *See id.* §§ 9-111.300, .430.

Alternative One addresses these difficulties by embracing the same "actual knowledge" standard applied by the Department of Justice. This alternative

expands on federal practice, however, in its treatment of attorneys who accept payments without actual knowledge of their forfeitability but become aware of their forfeitability later. For example, when an attorney accepts an advance payment with the understanding that the attorney will become entitled to draw on the fund as legal services are rendered, federal practice dictates that forfeitability turns on the attorney's mental state as the fee is earned. Accordingly, if the attorney comes to possess actual knowledge that the advance payment was forfeitable, the attorney who continues to work on the case works at the risk that only the fee earned up to the point of the attorney's acquisition of actual knowledge will be immune from forfeiture. Alternative One focuses on the attorney's mental state at the time the interest in the payment was acquired – that is, when the attorney first accepted the payment in return for a promise to provide services. *See supra* Section 505(m).

The first alternative is preferable to federal practice, which continues to provide attorneys with incentives not to seek full information from their clients. Moreover, federal practice places the attorney who does acquire actual knowledge in a dilemma – the attorney can either risk working for free by continuing to represent the client, or the attorney can attempt to withdraw and thereby risk indicating to the prosecution that the client's assets are forfeitable. In fact, however, federal practice is closer to Alternative One than a simple comparison of standards might suggest. Since federal practice forbids compelling confidential communications to establish forfeitability of the attorney's fee, *United States Attorneys' Manual, supra*, at § 9-111.430, attorneys who do acquire actual knowledge of the forfeitability of their fee may continue working on the case with little risk that the fee will ultimately be forfeited.

Alternative Two differs from the first alternative by permitting the attorney, in some cases, to take an advance fee even when the attorney had actual knowledge that the fee was tainted. A jurisdiction may prefer this alternative to the first alternative for several reasons.

First, while Alternative One is preferable to no exception for attorney's fees, the first alternative fails to remove the incentives for private attorneys to shy away from representing drug defendants. Even an attorney who lacks actual knowledge of the forfeitability of a fee may be concerned that a factfinder will later erroneously conclude that the attorney possessed actual knowledge when the fee was received.

In addition, Alternative One gives the attorney at least some incentive to avoid learning all the facts about a case at its inception. If the only difference between the first and second alternatives is that attorneys will be certain to accept their fees prior to interviewing in earnest under Alternative One, it might be thought that the benefits of Alternative One are slight in comparison to its cost. On the other hand, if attorneys actually do seek information from their clients before

accepting fees, and if they therefore decline representation, the systemic benefit may be more apparent than real, for the client, educated by the experience, is likely to lie to future attorneys to secure representation.

Finally, under Alternative One, the truthful client with only tainted assets, unable to secure private counsel, will also be put to a difficult choice in attempting to secure court-appointed counsel: the client must either hide assets or explain that, upon consultation, no member of the private bar could deny actual knowledge of the forfeitability of the client's assets.

Alternative Three further limits the forfeitability of amounts paid as attorney's fees based upon the 1985 and 1986 recommendations of the House of Delegates of the American Bar Association. Alternative Three provides that amounts paid as attorney's fees will not be subject to forfeiture unless the attorney by accepting the fees is engaging in a fraud or sham transaction intended to protect the property from forfeiture. The third alternative is more protective of the attorney-client relationship than the first two alternatives.

All three alternatives are limited to "reasonable" fees, muting concerns that a fee exemption permits difficult-to-discover, collusive "fee" arrangements that ultimately put assets back in the wrongdoer's hands.

Subsection (b) is consistent with current federal practice which forbids compelling confidential communications to establish forfeitability of the attorney's fee. *Id.* § 9-111.430.

One could object that an attorney's fees exemption is unwarranted because an exemption would permit a wrongdoer to benefit from misconduct by using drug proceeds to retain private counsel rather than making do with less expensive counsel or court-appointed counsel. This, however, is only part of the equation; it does not take account of the effect of the threat of forfeiture on those whose funds actually are not forfeitable, a group deserving consideration given that the alternatives in this section primarily apply when there has not yet been any judicial finding of even probable cause that the fee is forfeitable. Nor is the exemption equivalent to permitting attorneys to receive their fees in the form of money stolen from a bank. *Cf. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989). When a fee is paid with stolen money, the choice is between returning the asset to an innocent individual and fostering policies of the kinds addressed here. That the balance tips in favor of the innocent individual does not mean that it should also tip in favor of the State, which is better able to bear the loss of property that it might otherwise have forfeited. Indeed, given that the State often would be compelled to pay for the defense of the wrongdoer if the fee were not exempted, it is mistaken to consider the entire sum a loss. *See also supra* Section 419(i)(2)(ii)

(authorizing State to forfeit substitute property of the owner when the owner paid legal fees with forfeitable assets). Moreover, even if the State is unable to forfeit otherwise forfeitable fees, the goal of depriving the wrongdoer of the assets is accomplished; once they are spent on the attorney, they are no longer available to the wrongdoer. *Commonwealth v. Hess*, 617 A.2d 307 (Pa. 1993) (making this argument in support of its conclusion that the Pennsylvania constitution forbids the State, prior to conviction, from restraining a criminal defendant's lawyer from using a possibly forfeitable retainer, even respecting portions of the retainer that the attorney had not yet earned at the time of acquiring knowledge that the fee was paid with tainted funds).

### **SECTION 507. SEIZURE OF PROPERTY FOR FORFEITURE.**

(a) The State may seize property for forfeiture only as provided by subsection (b) or (c) unless:

(1) in the circumstances, a warrantless seizure would be lawful if the property were evidence of a crime; or

(2) the person in possession of the property voluntarily delivers it to the seizing or custodial agency.

(b) Upon a showing that probable cause for forfeiture exists or property has been the subject of a previous final judgment of forfeiture for conduct that subjects property to forfeiture, the [appropriate court] shall issue a warrant authorizing seizure of the property for forfeiture or direct legal process ordering a person in possession of the property to transfer control of the property to a custodial agency or law enforcement official. In issuing a seizure warrant or directing legal process, the court may order that the property be seized by or transferred to the custodial agency. Property lawfully seized as evidence may be held for forfeiture without the issuance of a separate warrant authorizing seizure for forfeiture if the seizing agency complies with the requirements of this section.

(c) The following additional rules apply to a seizure that affects an interest in real property:

(1) Except as otherwise provided in paragraph (3), the State may not seize property unless the owner has first been afforded an opportunity for an adversarial judicial determination that:

(i) probable cause for forfeiture exists; and

(ii) an alternative to seizure will not adequately protect the State's interest in forfeiture, including the State's interest in income generated by the property and in preventing future violations of law.

(2) For the purposes of paragraph (1)(ii), alternatives to seizure include the recording of a notice of lien pursuant to Section 509, the execution of an occupancy agreement, the designation of substitute property under Section 510, or the entry of a restraining order.

(3) Upon a finding of probable cause that the property will continue to be used for activity proscribed by this [Act], a court may authorize the State to seize the property without first providing an opportunity for a hearing under paragraph (1) if the public interest so dictates. Access may be restricted to the extent reasonably necessary to prevent the continued illegal use of property and to protect the public health, safety, and welfare.

(d) The opportunity for a hearing under Section 511 does not meet the requirements of subsection (c) unless the owner has been notified that the State intends to seize the property.

(e) At the time of seizure, an individual seizing property under this section shall deliver to the person from whose possession or control the property is seized a written statement that the property has been seized for forfeiture and a receipt indicating that custody of the property has been transferred to the State. If no identified person is in possession or apparent control, the individual seizing the property shall post the statement and receipt in a conspicuous place on immovable property or at the place of seizure of movable property. The receipt must contain a general description of the property seized, the date and place of seizure, the name and official capacity of the individual seizing the property, and the address and telephone number of the individual or agency from which information about the seizure may be obtained.

(f) As soon as practicable after seizure, the seizing agency shall prepare an inventory of the property seized and transfer the property to a custodial agency.

(g) The seizure of property from a person holding a lien on the property does not affect the person's lien insofar as possession is a prerequisite to the existence, perfection, or priority of the lien.

(h) Property may be seized before the commencement of an administrative or judicial proceeding, except as otherwise provided for substituted property forfeitable only under Section 419(i).

(i) Failure to follow the requirements of this section does not affect the forfeitability of property. However, property must be seized or subject to a lien to establish jurisdiction in rem.

(j) The State's seizure of property does not establish the priority of the State's interest over later-acquired interests in the property. The State may establish its priority with respect to seized property by filing or recording a lien under Section 509.

### **Comment**

This section regulates the manner in which property may be seized to preserve it for possible forfeiture. It sets forth the standards governing the issuance of warrants or legal process authorizing seizure. Similar to federal law, this Act permits seizure on a showing of probable cause that property is subject to forfeiture. In addition, this Act requires a warrant or legal process for seizure unless the circumstances satisfy an exception to the warrant requirement.

With respect to real property, subsection (c) provides that seizure may not normally occur unless an opportunity has been provided for an adversarial judicial determination of probable cause, a requirement that is constitutionally based. *E.g.*, *U.S. v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993); *Department of Law Enforcement v. Real Property, Etc.*, 588 So. 2d 957, 965 (Fla. 1991) (discussing federal due process but resting decision on state constitution). These restrictions do not apply when the State merely subjects property to a lien under Section 509.

Due process may likewise dictate the requirement in paragraph (c)(1)(ii) that real property not be seized prior to a final judicial forfeiture order where less restrictive alternatives would be adequate. *Cf. Department of Law Enforcement v. Real Property, Etc.*, 588 So. 2d 957, 954-66 (Fla. 1991) (finding support in federal due process cases for the conclusion that the state constitution recognizes the right to the least restrictive method of preserving real or personal property for possible forfeiture; respecting real property, the State "can use a notice of lis pendens, a property bond, a restraining order, or a combination thereof"). While methods short of seizure fail to eliminate the risk that the property will be used to facilitate drug offenses during the pendency of the forfeiture proceeding, the frequent current use of occupancy agreements by federal and state authorities indicates that in some cases this risk is not significant; in appropriate cases, this risk might be dealt with by conditioning continued occupancy on the occupant's consent to periodic searches of the premises even in the absence of probable cause. The State's interest in preserving the cash stream generated by potentially forfeitable property can be protected by requiring receipts to be deposited with the court or with a court-

appointed custodian who could authorize payment of necessary expenses but keep excess funds in an interest-bearing account. In light of this Act's provision for gaining release of property by posting a bond, *see infra* Section 510(a), this Act does not require a least-restrictive alternative analysis in cases merely involving personal property.

The exigent-circumstances exception in paragraph (c)(3) to the requirement of a pre-removal adversarial proceeding is limited to cases in which the drug activity likely to recur is sufficiently extensive that pre-hearing removal is dictated by the public interest. Where the feared continued drug activity is personal use, pre-hearing removal usually will not be justified.

An opportunity for an adversarial hearing is all that must be provided under subsection (c). Thus, if the State files a lien against real property, the owner's right to a hearing under Section 511 satisfies the requirement of subsection (c), provided the owner has notice that the State will seize the property if no hearing is requested.

Subsection (f) requires that an inventory be prepared after the property is seized. To reduce the risk of false claims, the seizing agency would be well advised to note the condition of the seized property. A formal estimate of value is not thought sufficiently important to be required in all cases.

Subsection (i) provides that seizure on less than probable cause or in violation of a warrant requirement does not insulate property from forfeiture. The question of forfeitability should be distinguished from the question whether probable cause exists at the preliminary hearing, *see* Section 511(f) (requiring release of property when probable cause for forfeiture is not established at the preliminary hearing), and the question whether evidence should be suppressed at the forfeiture proceeding in light of the unconstitutional invasion during which property was seized, a question resolved by other law. Property that has not been seized, whether in compliance with this section or not, may be forfeited in some situations. *Cf.* Section 512(d) (as predicate for administrative forfeiture proceeding, requiring filing of lien on property that has not been seized); Section 517(b) (jurisdiction established by seizure of the property or by filing lien on property).

## **SECTION 508. CUSTODY AND RELEASE OF SEIZED PROPERTY.**

(a) Seized property must be placed in the custody of a custodial agency, but the attorney for the State may authorize its release.

(b) A custodial agency may:

- (1) remove the property to a place designated by the court;
- (2) retain the property as evidence if authorized by other law;
- (3) limit access to the property or remove it to a storage area for safekeeping or otherwise take reasonable measures to preserve its value;
- (4) provide for an agency or receiver, who may be an owner, to take custody of the property and to service, maintain, and operate it as necessary to preserve its value; and
- (5) with the approval of all owners or the court, arrange the sale of the property before the conclusion of the forfeiture proceeding.

(c) The court may approve a sale pursuant to subsection (b)(5) if the cost of maintaining the property or its likely depreciation makes it unreasonable to maintain the property until the proceeding is concluded and no owner with a right to possession wishes to provide substitute property pursuant to Section 510.

#### **Comment**

Although interim sales of property that would likely decline in value may often take place through a secured party's offering substitute property under Section 510, subsection (c) provides a mechanism to achieve this result where no owner wishes to take possession of the property.

#### **SECTION 509. LIENS.**

(a) If there is probable cause that the property is subject to forfeiture pursuant to this [article] or if the State prevails in a forfeiture proceeding, the State may obtain a lien with respect to an interest in property by filing or recording, as appropriate, a notice of lien.

(b) A lien has the same effect upon the specified interests as a judicial lien obtained by a creditor on a simple contract which attached at the time the notice under this section is filed or recorded, but:

(1) the State may dispose of property subject to the lien only as provided in this [article];

(2) a lien in effect at the time an interest is acquired does not affect the interest if the lien is later released;

(3) a lien does not have priority over a previously created but unperfected security interest, if the existence and exemption of that interest is proven as provided by Section 521(b);

(4) a transferee's interest is not subject to the lien if the transferee would take free of a perfected security interest in the property; and

(5) a person other than the owner in possession or control of an interest secured by a lien, including a financial institution holding accounts, may transfer the interest as directed by the owner until the person knows of the lien.

(c) A notice of lien must be:

(1) recorded upon real property in the office of the [recorder of deeds] of the [county] in which real property subject to the lien is situated; and

(2) filed upon personal property, whether tangible or intangible, as provided by [Uniform Federal Lien Registration Act].

(d) A notice of lien must set forth:

(1) a description of the property reasonably sufficient for filing or recording and enabling a person who examines the notice to identify the property;

(2) the name of the lienor and a statement that the property may be subject to forfeiture under this [article];

(3) the property interest over which a lien is claimed by the lienor and name of the owner of that interest unless the name of the owner is unknown; and

(4) the name, address, and telephone number of a person who can provide information as to the nature of the claim of the lienor.

(e) The attorney for the State may amend a notice of lien or release, in whole or in part, a lien at any time by recording or filing an amended notice or release.

(f) As soon as practicable after filing or recording a notice of lien or an amended notice of lien, the attorney for the State shall furnish a copy of the notice to every person named in the notice. Failure to give the notice does not affect the validity of the lien.

(g) A lien does not affect an interest exempt from forfeiture under Section 505(a). A lien affects an interest described in Section 505(f) only after the attorney for the State gives notice under Section 505(g) that the property is subject to forfeiture.

### **Comment**

Once the State identifies that probable cause exists for the forfeiture of property, it has interests in ensuring that the property is not conveyed to third parties who lack knowledge of the State's claim. This section permits the State to protect this interest by recording a notice of lien. The lien provides notice to the world that the State has an interest in the property. Third parties who deal with the property take the risk that the State will ultimately prevail in establishing the forfeitability of the property. If the State does prevail, after-acquired interests in the property will usually be junior to the State's interest.

For a discussion of the limitations on filing liens against substitute property, *see supra* Section 419(k) and Comment.

Under subsection (b), a filed or recorded lien has the same priority over third-party interests in the property as would a judicial lien. "Judicial lien" is defined in Section 501 as "a lien attached to property and obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." The rules concerning the steps necessary to a judgment or other judicial lien against particular property vary from State to State. In some States, a judgment lien attaches to real estate from the time the judgment is entered in the docket book of the clerk of court; in other States, the lien of the judgment does not attach until it, or an abstract of it, is recorded in the land records. Similarly, the rules vary as to personal property. In some States, a judicial lien attaches to tangible personal property only upon levy on the property by the sheriff or other officer of the court; in other States the lien attaches when a writ of execution is issued to the sheriff. There are also different rules as to the attachment of a judicial lien under garnishment or similar procedures for reaching intangible property.

The definition of judicial lien, taken from Section 101 of the Bankruptcy Code, 11 U.S.C. § 101(36), takes into account the differing steps required to create a judicial lien from State to State. Therefore, it is not necessary to draft language referring to the specific methods for acquiring a judicial lien in each State adopting this Act. Under this section, filing or recording a notice of lien gives the State the interest in the property identified in the notice that the State would have if the State held a judicial lien that had attached to the property under the other law of the State. Therefore, recording or filing under this Act substitutes for issuance of a writ, levy,

docketing of a judgment, or other act that would be necessary to create a judicial lien under other law of the State.

A special rule is provided by subsection (b)(3) for unperfected security interests the existence of which can be proven by clear and convincing evidence (as required by Section 521(b)). A valid security interest may fail to be perfected for any number of reasons, including technical errors in filing. The State's interest in forfeiture does not demand that it take ahead of such interests. In recognition of the possibility that unperfected security interests may be fraudulent, however, this article requires that their existence be proven by clear and convincing evidence.

Subsection (b)(4) addresses the problem of buyers in the ordinary course of business and lessees in the ordinary course of business, whose interests may take priority over a previously perfected security interest in inventory. If the State wishes to avoid this result, it should seize the inventory rather than merely filing or recording a lien.

Subsection (b)(5) permits a bank to honor checks on an account on which a lien has been filed without incurring liability for interfering with a forfeiture. In the ordinary course of business, a bank would not necessarily become aware that a lien had been placed on a person's bank account, and the bank's actions in honoring checks in such circumstances ought not subject it to liability. Again, the State may seize the account or obtain an injunction or restraining order to ensure a different outcome.

The reference to the rights of a creditor on a simple contract in subsection (b) is intended to preclude the argument that the lien under this section is among the type of "superlien" that routinely trumps previously recorded interests.

The absence of a recorded lien at the time an owner's interest is acquired does not ensure that the owner's interest will triumph over the State's. If the owner knew of either the conduct subjecting the property to forfeiture or the State's seizure of the property at the time the owner acquired the interest, the owner will be unable to prove that its interest is exempt from forfeiture under Section 505(c); the fact that the owner's interest was acquired before the State recorded its lien will be of no consequence, for the owner's interest, while senior to the State's, is itself forfeitable. The State benefits from recording a lien both because it gives notice to those who would not know of the State's interest and because it eliminates litigation over whether after-acquiring owners actually knew that property had been seized.

The lien is effective only with respect to property interests designated in the notice. Precision in identifying the interests covered by the lien is necessary to

ensure that the lien gives fair notice to those whose interests it affects. For example, the purchaser of a security interest in property generally need not check the records relating to the underlying property to take the security interest. To freeze the security interest, the State must designate it in the lien. The need for specificity under this section, however, does not alter the general structure of forfeiture. If any interest in property is subject to forfeiture under Section 504, owners of other interests in the same property must generally prove their innocence under Section 505 to avoid forfeiture of their interests. This section simply requires greater specificity to ensure that an interest not be conveyed than is required to forfeit the interest in the hands of the original owner.

While the State may send the notice of lien to those whose interest in the property are not affected by the lien, it need not do so. Notice to those persons will be required when the forfeiture proceedings are formally initiated.

#### **SECTION 510. SUBSTITUTION OF PROPERTY.**

(a) Property may be substituted for property subject to forfeiture upon a request by an owner. The offered substitute property must be accepted if:

(1) its value equals or exceeds the value of the original property upon the date of substitution, but property of lesser value, including a secured or unsecured agreement to pay to the State an amount equal to the owner's interest in the released property, must be accepted if the owner establishes a high probability that the owner's interest in the original property is exempt from forfeiture, other than under Section 505(f);

(2) conditions are imposed upon the acceptance of the substituted property to protect the State's interest in the forfeiture proceeding, to prevent future violations of law, to preserve other interests in the original property protected by law, including property interests protected in foreclosure, and to minimize the cost of maintenance or management of the substituted property;

(3) other affected owners of the substituted property have consented to the designation; and

(4) the original property is not contraband, evidence relevant to a prosecution, or, by reason of its design or other characteristics, particularly suited for use in illegal activities.

(b) An owner of property subject to forfeiture may request the substitution of property pursuant to Section 511(a)(3) or 513(a) or in a judicial forfeiture

proceeding. An owner whose right to possession of the original property requires a judicial determination may establish a right to possession by making the required showing in a proceeding for substitution. An owner may establish its right to possession of the original property by proving in a proceeding for substitution that it would have the right to self-help repossession if the original property were released by the State.

(c) A surety or collateral bond may be accepted as substituted property pursuant to standards established by the [court having rulemaking authority].

(d) Upon the substitution of property, the original property must be released, any lien filed upon it removed, and forfeiture proceedings against it terminated, and the State shall proceed against the substituted property. The substituted property is subject to forfeiture to the same extent as the original property, and the original property is no longer subject to forfeiture for the same conduct that subjected the property to seizure or forfeiture.

### **Comment**

Subsection (a) is designed to reduce the disruptiveness of forfeiture while protecting the State's legitimate interest in forfeiture. For example, if an owner wishes to make cash available to the State to avoid the possible forfeiture of an automobile, the cash will often be sufficient to protect the State's interest in forfeiture; the State has no legitimate interest in imposing needless inconvenience on the owner. Likewise, subsection (a) reduces the risk that the State will employ its powers to forfeit substituted property under Section 419 as a tool to harass. If the State proceeds against a certain piece of substituted property when proceeding against other substituted property would protect the State's interest but be less disruptive to the owner, subsection (a) permits the owner to replace the State's chosen property with adequate alternative property.

Release often will benefit not only interest holders in the seized property, but also will benefit the State by relieving it of the primary responsibility to maintain the property pending a possible final order of forfeiture. For example, if an individual is willing to post security in the amount of the State's interest in forfeiture of property, both the individual and the State will often benefit from release of the property.

When property is substituted for original property that is subject to forfeiture, the substitute property becomes the res against which the forfeiture action proceeds, with its ultimate forfeitability turning on whether the original property would have been forfeitable.

Though posting a bond will likely be the most frequent method by which a claimant seeks release of seized property, this Act recognizes that the cost of obtaining a bond might be avoided in appropriate cases by providing a different form of substituted property. The adequacy of the property to protect the State's interests must be demonstrated by the owner. The State's interest in forfeiture is not always protected simply because substituted property has the same value as the property initially seized. For example, the State's interest in forfeiting controlled substances includes removing those substances from the stream of illegal commerce. Moreover, a bond in the fair-market value of the original property will not satisfy the State's interest in forfeiture if the bond was purchased with assets that themselves may be subject to forfeiture. The State's interest in forfeiting cash may not be protected by the posting of real property of the same value where the property may be difficult to sell at that price at the end of a forfeiture proceeding.

Nothing in this section precludes an offer of substitute property when more than one owner has an interest in the original property. The requirement of considering "other interests . . . protected by law" in paragraph (a)(2) is to ensure that the State address who has a right to possession of the property prior to releasing property under this section. For example, a secured interest holder should not be able to bypass an owner's ordinary rights in a foreclosure proceeding simply by posting a bond. In the absence of agreement among the owners, release to a secured interest holder may best be accomplished by petitioning the court under Section 511. For example, to the extent that state law would require the secured interest holder to make a judicial showing of default before taking possession of its collateral, such an interest could not be adequately protected without judicial involvement. Even respecting property as to which the creditor would have the right, pre-seizure, to self-help repossession, some judicial determination of the creditor's right to possession should be required to ensure satisfaction of the requirements of constitutional due process, in light of the State's involvement in seizing the property initially and turning it over to the creditor. Similarly, where an apartment has been seized, an innocent landlord might evict a tenant under this section, but only if the tenant receives the same procedural protections that would have obtained in a separate eviction proceeding.

Certain types of property are subject to self-help repossession when in the hands of the borrower. In analyzing whether property fits within that category, the court should merely consider whether property is of the type that is subject to self-help repossession. For example, the court need not explore the counterfactual of whether, had the property remained in the borrower's hands, the property could have been repossessed without violating any applicable prohibition on breach of the peace; the interest sought to be protected by the breach-of-the-peace restriction is fully protected so long as the transfer is peaceably made.

Property released to a creditor with a security interest in the property should be treated subject to the same liabilities (for example, for commercially unreasonable sales) as would attach had the lender acquired the collateral through a foreclosure proceeding. Also to be preserved is any interest the borrower would have in a foreclosure action to redeem the property, including statutory waiting periods designed to permit the borrower time to redeem property. Interests of other secured interest holders should likewise be protected in the way that they are under other provisions of law. *See, e.g.*, [U.C.C. § 9-504(1)(c) (junior lienholder's right to share in proceeds of sale on certain conditions).]

An owner making a high showing that its interest is not forfeitable should not need to post a bond for the res' entire value in order to secure possession. By permitting the State to hold property until the conclusion of a forfeiture proceeding, forfeiture law has traditionally assured the State that it would be able to realize upon any interest ultimately declared forfeited. When an owner strongly disproves the likely forfeitability of its interest, however, the argument for providing the State such assurance is seriously undermined. The State's interest in forfeiture will probably be protected by requiring the interest holder to post security adequate to cover the potentially forfeitable interests of other interest holders. Alternatively, the State might require the owner to sell the seized property in a commercially reasonable way and provide the State any sale proceeds exceeding the petitioner's interest in the property. In cases in which some doubt exists as to whether the owner's interest will ultimately be declared forfeitable, the State might require the petitioner to agree to pay the State a sum equalling the value of the owner's interest if that interest is ultimately deemed to be forfeitable. This approach prevents the continuing forfeiture proceeding from becoming meaningless with respect to the owner's interest notwithstanding the failure of any substituted res to secure petitioner's interest.

When a security interest has been created in property through an arm's-length transaction in the normal course of business, the State may determine without difficulty that the owner has a high probability of establishing its exemption at trial. Moreover, when the owner is a concern with substantial assets, the owner's promise to pay in the event its interest is ultimately declared forfeitable will often be adequate to protect the State's interests and minimize concerns that the State has miscalculated the likelihood that the owner's interest in fact is exempt. In other cases, however, reluctance to release property in the absence of complete security is understandable, and such owners might fairly be required to establish their probable innocence at a Section 511 hearing.

Determining whether a particular owner has established a high probability that it will prevail at trial in establishing its exemption will require attention to the circumstances. The showing that would suffice with respect to a security interest

created in an arm's-length transaction in the ordinary course of business might well be inadequate when the claim is that a possessory owner permitted a friend to use property without knowledge of the friend's criminal plans.

**SECTION 511. RELEASE OF PROPERTY UPON PRELIMINARY HEARING.**

(a) An owner of property seized pursuant to Section 507 or subject to a lien under Section 509 may obtain release of the property or lien, or other appropriate relief, if:

(1) the State lacks probable cause for its forfeiture;

(2) the State intends to seize real property notwithstanding the availability of an alternative adequate under Section 507(c); or

(3) the owner is entitled to substitute property under Section 510.

(b) An owner may file a petition under this section in the [appropriate court]. All petitions relating to the property may be consolidated for hearing, and the hearing may be consolidated with a hearing on an application for an injunction under Section 518. The petition must be served on the attorney for the State by a means authorized for personal service of process.

(c) The court shall conduct a hearing on the petition upon at least five day's notice and within 30 days after its service. The court shall render a ruling as soon as practicable. Upon good cause shown or with consent of the parties, the court may depart from the requirements of this subsection for scheduling and notice.

(d) In a proceeding under this section, the State has the burden of proving that probable cause exists that property is subject to forfeiture under Section 504. The petitioner has the burden of proof by a preponderance of the evidence on all other issues.

(e) The owner of property is not entitled to the release of property or a lien if the property is subject to summary forfeiture under Section 515, is evidence of a violation of law, or is particularly suited by reason of design or other characteristic for use in illegal activities.

(f) If the court finds probable cause does not exist that property is subject to forfeiture, the court shall order the State to release the property and file notice of release of its lien.

(g) If the court finds that Section 507(c) is satisfied by an alternative to seizure of real property, the court shall order the State not to seize the property, or to release it if seized, unless the owner rejects the alternative.

(h) If the court finds probable cause that property is subject to forfeiture under Section 504, the court may order the custodial agency to accept substituted property and release the original property as provided in Section 510(d).

(i) The release of property or a lien under this section does not preclude a subsequent seizure for forfeiture, filing of a lien, or commencement of a forfeiture proceeding.

### **Comment**

In recognition of the harm that can be done to a party's interests when property is held pending final disposition of a forfeiture case, this section permits affected parties to insist on a prompt post-seizure adversarial judicial proceeding. The hearing permits a party to contest whether probable cause exists for forfeiture, regardless whether the seizure took place pursuant to a warrant. When probable cause does exist, this section nevertheless provides in some circumstances for release of a seized res prior to a final judicial determination of its forfeitability.

Subsection (h) authorizes the court to enforce the State's obligations set forth in Section 510. For a fuller description of those obligations, see *infra* Section 510 Comment. Though judicial involvement is not necessary in all cases, such involvement may be necessary when there is a dispute over the value of the seized property, the value of offered substitute property, whether offered substitute property is itself independently subject to forfeiture, whether a particular owner has a right to possession of property in light of the interests of other owners, and whether a particular owner has shown a high probability that its interest is likely to be declared exempt at trial.

The court may exercise its power to depart from the scheduling and notice requirements of subsection (c) on its own motion.

### **SECTION 512. ADMINISTRATIVE PROCEDURES.**

(a) The attorney for the State may commence an administrative forfeiture by serving a notice of proposed forfeiture.

(b) The notice of proposed forfeiture must contain:

- (1) the name and address of the attorney for the State;
- (2) a description of the property and the interests sought to be forfeited;
- (3) the date and place of seizure of property and the name and address of the seizing agency, if applicable;
- (4) the reason the property is alleged to be forfeitable; and
- (5) a summary of the procedures and procedural rights applicable to the forfeiture.

(c) A notice of proposed forfeiture must be served on all owners of the property subject to forfeiture in accordance with the following rules:

(1) If the owner's name and current address are known or are reasonably ascertainable, service must be made by personal service [or by mailing the notice by certified mail, return receipt requested, to that address].

(2) If the owner's current address is not known and is not reasonably ascertainable, but the owner's address is required to be on file or of record with an agency of the federal or any state government to perfect or record an interest in the property, service may be by certified mail, return receipt requested, sent to the last known address on file or of record with the agency.

(3) If an owner's interest or address is not known and is not reasonably ascertainable, service may be by publication for at least three consecutive weeks in one issue weekly of a newspaper of general circulation in the [county] in which the property was located at the time of seizure or, if the property has not been seized, in the [county] in which the notice of proposed forfeiture was issued.

(d) If property subject to an administrative forfeiture has not been seized, the notice of proposed forfeiture must also be posted as soon as practicable in a conspicuous place on the property and a forfeiture lien must be filed or recorded pursuant to Section 509.

(e) An interest in property is forfeited 30 days after notice of proposed forfeiture is served unless a judicial forfeiture relating to the property is commenced, or the owner requests an administrative exemption under Section 513 or files a demand for a judicial proceeding under Section 514.

(f) The State may elect to commence a judicial forfeiture within the time allowed by Section 519, notwithstanding the pendency of a request for an

exemption under Section 513, or an administrative forfeiture. The commencement of a judicial forfeiture does not relieve the attorney for the State from the obligation to produce a statement of exempt and nonexempt interests if the requirements of Section 513 are met.

(g) [The State Administrative Procedures Act] does not apply to proceedings conducted under this section and Sections 513 through 515.

### **Comment**

This section, in conjunction with Section 513, permits the prosecutor to pursue “administrative forfeiture.” Many forfeitures are not contested. Administrative forfeiture permits the State to gain ownership of property in such cases without the need to seek court approval. This mechanism avoids the expense and the drain on judicial resources accompanying judicial forfeitures. It also expedites the process. Even an uncontested judicial forfeiture will require time for processing by the courts; the length of time will largely depend on the size of the court’s docket. During any period of delay, property may depreciate. Administrative forfeiture reduces this problem.

Insurance companies may be reluctant to issue title insurance on real property forfeited administratively. To ensure receiving maximum value for forfeited real property at sale, the attorney for the State should assess carefully whether to forfeit real property under these provisions.

Administrative proceedings also provide a means by which innocent interest holders can obtain a formal commitment that their interests will be protected in any judicial forfeiture proceeding. This mechanism will prove especially useful when one interest in property appears forfeitable but others appear exempt from forfeiture. Section 513 sets forth the method by which an interest holder may seek administrative exemption of its interests. If an exemption is granted, the interest holder will avoid the uncertainties – and accompanying costs – associated with preparing for trial, as the administrative exemption binds the State at the judicial forfeiture proceeding. Though a similar result might be reached through unstructured bargaining between the claimant and the prosecutor, this mechanism is provided to reduce transaction costs and general uncertainty about the means by which these objectives might be achieved.

The State’s failure administratively to declare an interest exempt is not judicially reviewable. However, information provided to the government during the administrative process would be relevant in any later dispute about whether the government’s litigation positions expose it to liability for maintaining frivolous litigation.

This Act seeks to place the secured creditor in the same general position it would occupy if a junior lienholder tried to realize on the secured creditor's collateral. *See infra* Section 522. Thus, this Act permits the secured creditor administratively to recover attorney's fees from the proceeds of forfeiture when the secured creditor's contract with the owner specifies the creditor's right to recover fees necessary to protect the creditor's interest in the property.

**SECTION 513. ADMINISTRATIVE EXEMPTION OR SUBSTITUTION OF PROPERTY.**

(a) If property has been seized under Section 507, is subject to a lien under Section 509, or is subject to an administrative forfeiture under Section 512, an owner may request the administrative recognition of an exemption under Section 505 [or 506], or administrative approval of the substitution of property under Section 510. The request must be in substantial compliance with the requirements of this section, and factual allegations are made under penalty of perjury.

(b) A request filed pursuant to this section must set forth:

(1) the relief sought;

(2) the name and location of the administrative agency conducting the proceeding, or if notice of proposed forfeiture has not been given, a description of the property seized and, if known, the name of the seizing and custodial agency and the date and circumstances of the seizure;

(3) the name and the address of the owner filing the request;

(4) the nature and extent of the interest claimed by the owner filing the request;

(5) the date and circumstances of the acquisition of the owner's interest, and the identity of the transferor to the owner; and

(6) the reason the interest should not be forfeited or that substitute property should be designated, with facts supporting the request.

(c) A request must be made within 30 days after service of notice of proposed forfeiture. The request may not be made after a judicial forfeiture has been commenced or by a person who has filed a demand under Section 514.

(d) A request under this section must be made to the attorney for the State by a means authorized for personal service of process.

(e) If a person requests substitution and release of the original property, the attorney for the State, within 30 days after receiving the request, shall either direct the custodial agency to accept the substituted property and release the original property or deny the request for substitution.

(f) With respect to a person who requests an exemption, the following rules apply:

(1) The attorney for the State, not later than 90 days after service of the request upon the State, shall furnish to the person filing the request a written statement of proposed exempt and nonexempt interests. Notice of the statement must be given in the manner prescribed by Section 512(c) for a notice of proposed forfeiture. The person's interest is exempt if the attorney for the State fails to furnish a timely statement.

(2) An interest in property determined to be exempt must be released or disposed of pursuant to Section 522, unless another person claiming an interest in the property objects to the statement and files a timely demand for a judicial proceeding under Section 514(c).

(3) An interest in property determined not to be exempt is forfeited to the State and must be disposed of pursuant to Section 522, unless the owner files a demand for a judicial proceeding under Section 514 within 30 days after service of the statement.

(4) If a judicial forfeiture proceeding is commenced, the statement of exempt and nonexempt interests is binding on a person who does not file a timely demand under Section 514, but is not effective with respect to a person who files or has filed a timely demand and is treated as a rejected offer to compromise the dispute.

### **Comment**

For a discussion of the reasons for the petition process, see *supra* Section 512 Comment.

This provision is not intended to impose any particular proof requirement as a prerequisite to declaring an interest exempt. The responsible government official will doubtless take into account whether the party claiming an exempt interest acquired the interest in the course of a regularly operated business activity. The

ultimate decision must be left to the discretion of the responsible official, who will have incentives not to pursue contested forfeitures where the proof of innocence is strong.

#### **SECTION 514. DEMAND FOR JUDICIAL PROCEEDINGS.**

(a) An owner of property seized pursuant to Section 507, subject to a lien under Section 509, or subject to an administrative forfeiture proceeding, may file with the attorney for the State a demand for a judicial proceeding to determine whether the interest is exempt from forfeiture or otherwise not forfeitable. If a timely demand is filed, the State may not forfeit the property without commencing a judicial proceeding. An owner who files a timely demand is not bound by an administrative statement of exempt and nonexempt interests under Section 513, and the State is not bound by the statement with respect to that owner.

(b) A demand must be made to the attorney for the State by a means authorized for personal service of process.

(c) A demand must be served within 30 days after the effective date of the notice of proposed forfeiture pursuant to Section 512(a) or, if the owner has filed a request for an exemption under Section 513, within 30 days after notice of the statement of exempt and nonexempt interests.

(d) A demand must set forth the information required by Section 513(b)(1) through (4) for a request for an exemption.

#### **Comment**

Unlike the request seeking administrative exemption, a demand need not be extensive. The difference is explained by the different purposes of the documents. A request seeks final administrative exemption of interests; a demand merely triggers judicial proceedings. No good reason justifies requiring a claimant to provide a detailed defense in order to impose an obligation on the State to file a judicial complaint. Before being compelled to plead, a claimant should be able to require the prosecutor to file a complaint pleading facts capable of withstanding a motion to dismiss and sufficiently capable of proof so as to meet the prosecutor's ethical and legal obligations not to take frivolous litigation positions.

The provisions of this section are similar to federal law, which requires judicial proceedings on claimant's filing a claim merely "stating his interest" in property seized for forfeiture. 19 U.S.C. § 1608.

This section requires the filing of a demand for a judicial proceeding within 30 days of notice of proposed forfeiture or the receipt of an administrative statement of exempt and non-exempt interests. In contrast, current federal law permits only 20 days from notice for the filing of claims in civil proceedings.

#### **SECTION 515. SUMMARY FORFEITURE.**

(a) The following property is subject to summary forfeiture if it is subject to forfeiture under Section 504:

(1) a controlled substance in Schedule I or II;

(2) a plant from which a controlled substance in Schedule I or II may be derived; and

(3) dangerous, toxic, or hazardous property relating to controlled substances, including raw materials and containers or equipment from which raw materials cannot be separated safely.

(b) Property that is subject to summary forfeiture is forfeited to the State upon seizure without further proceedings, but the State may elect to commence an administrative or judicial forfeiture proceeding.

(c) Upon a judgment of conviction under this [Act], the court may order forfeiture of a defendant's interest in a controlled substance involved in the offense.

(d) This section does not apply to property seized from a person permitted to possess or cultivate the property unless the person fails to provide proof of appropriate registration to possess or cultivate the property.

(e) This section does not affect the obligation of the State to preserve evidence that may exculpate a criminal defendant.

#### **Comment**

The procedures set forth in this article need not be followed with respect to property reasonably believed to fall within particular categories subject to summary forfeiture. The costs of storing property and litigating its forfeitability cannot be justified with respect to property about which there can be no doubt of ultimate forfeitability. Moreover, hazards attend the storage of some property during the pendency of a forfeiture proceeding. This section is patterned on 21 U.S.C. § 881(f)-(g).

In cases in which the State is not sure about the applicability of this section, the State may elect to initiate formal forfeiture proceedings; and even with respect to Schedule III, IV, and V controlled substances, the State may request the court to order forfeiture as a part of a criminal judgment.

This section follows federal law by making forfeitable controlled substances in schedules I or II whose owners are unknown. *See supra* Section 505(a)(2); 21 U.S.C. § 881(f)(1).

Subsection (c) addresses the situation in which summary forfeiture is most likely to be inappropriate – where the owner is registered to possess the substance, but may have violated the terms of the registration (as, for example, where a pharmacist has dispensed drugs illegally). Even Schedule I drugs may, in limited cases, be possessed legally. *See* UCSA § 303(c) (practitioners registered under federal law to conduct research with Schedule I substances may conduct research within the State). When a person is so registered, the factual issues will often be sufficiently disputable that summary procedures are not available. The requirement that documentation be provided on request expands on 21 U.S.C. § 881(g)(2) (applicable only to plants).

This section does not preclude a criminal defendant from arguing that a substance seized and destroyed by the State was not what the State alleges.

## **SECTION 516. JUDICIAL PROCEDURES.**

(a) The State may commence a proceeding in rem or in personam to forfeit property. Except as otherwise provided in this [article], a judicial forfeiture proceeding is governed by [the rules of civil procedure].

(b) The court may issue restraining orders or injunctions; require execution of performance bonds; establish receiverships; appoint conservators, appraisers, accountants, custodians, guardians, or trustees; or take action to seize, secure, or maintain the property or to ensure its availability for forfeiture, including issuance of process for its seizure or a writ of attachment, whether before or after the filing of a notice of proposed forfeiture or a petition for forfeiture.

(c) A party is entitled to a trial by jury in a judicial forfeiture proceeding.

(d) The court may stay civil forfeiture proceedings during an investigation or trial of a related criminal matter, except for preliminary hearings under Section 511 and proceedings relating to substitution of property under Section 513.

(e) Separate proceedings relating to the same property may be consolidated on motion by an owner and must be consolidated on motion by the attorney for the State.

### **Comment**

This Act provides that any party may demand trial by jury. An owner who files a proper claim in an in personam forfeiture under Section 518(e)(2) may demand that any in rem trial required under Section 518(e)(3) shall be to a jury; the right does not extend to opening the in personam judgment against some other person.

The right to jury trial recognized in this section does not necessitate a jury trial in all contested cases. For example, a motion for summary judgment may be granted when no triable issue of fact is presented, and a party may lose the right to jury trial by failing timely to request it. *See* subsection (a). When multiple pieces of property are at issue, special verdicts may be useful to identify which property the jury finds subject to forfeiture or exempt.

## **SECTION 517. REQUIREMENTS FOR PROCEEDINGS IN REM.**

(a) The attorney for the State shall commence a proceeding in rem by serving a complaint in the manner and on the persons required to commence an administrative forfeiture proceeding under Section 512(c).

(b) To establish jurisdiction in rem, the State shall either seize the property or file or record a lien pursuant to Section 509.

### **Comment**

Like Section 518, this section imposes no requirement that a claimant post a cost bond to obtain judicial resolution of a claim. This Act's rejection of a cost bond requirement is part of its general approach that the rules applicable to ordinary civil proceedings should apply in forfeiture cases unless good reason dictates a different result. *See, e.g.*, Section 521 (burdens of proof and admissible evidence).

**SECTION 518. REQUIREMENTS FOR PROCEEDINGS IN PERSONAM.**

(a) In a forfeiture proceeding in personam, the court may issue a temporary restraining order ex parte on application of the attorney for the State, upon a showing that:

(1) the State is likely to prove at trial that the property is subject to forfeiture under this [article];

(2) notice of the action will jeopardize the availability of the property;  
and

(3) the need for the injunction outweighs the likely hardship on the owners of the property and a less restrictive alternative likely will be inadequate to protect the State's interests.

(b) The court may issue a preliminary injunction only upon notice by the State in the manner and to the persons required to commence an administrative forfeiture proceeding under Section 512(c) and after an opportunity for those persons to appear and be heard. The hearing must be held at the earliest possible date consistent with [applicable civil rule]. The injunction must be issued if the showings required by subsection (a)(1) and (3) are made.

(c) A temporary restraining order or a preliminary injunction does not authorize a seizure that affects an interest in real property if Section 507(c) would prohibit the seizure. An owner's rights that could be protected under Section 511 if the State had seized the property must be similarly protected under this section.

(d) After a determination in a proceeding in personam that the defendant's interest is forfeited, the court shall direct entry of a judgment of forfeiture and may authorize the seizing agency to seize forfeited property not already in the custody of the State. The court may issue an appropriate order to protect the State's interest in the property.

(e) After entry of a judgment of forfeiture, the following procedures apply:

(1) The attorney for the State shall give notice within 30 days that every interest in the property, except as otherwise provided by Section 505 [or 506], will be declared forfeited unless a person claiming an interest in the property files a claim within the time specified in paragraph (2). Notice must be given in the manner and to the persons required for notice of the commencement of an administrative forfeiture proceeding under Section 512(c). However, notice need

not be given to a defendant against whom the judgment of forfeiture has been entered. The notice must inform a recipient whose interest has been declared exempt of the right to be heard respecting disposition of the property.

(2) An owner may make a claim setting forth the information required by Section 513(b)(1) through (4). The claim must be filed within 30 days after the notice required by paragraph (1) is given. A person who has received a binding administrative determination under Section 513 that the person's interest is exempt from forfeiture need not file a claim, and the attorney for the State shall inform the court that the person's interest is exempt from forfeiture.

(3) Unless within a reasonable time the attorney for the State and all claimants agree which interests are exempt from forfeiture, the attorney for the State shall immediately commence a proceeding in rem to resolve outstanding claims. The proceeding must be conducted in accordance with Sections 516 and 517. Notice of the proceeding need not be given to a person who did not file a claim under paragraph (2).

### **Comment**

Subsections (a) and (b) are patterned on the federal forfeiture temporary restraining order provisions found in 21 U.S.C. § 853(e). There is no need to show irreparable injury.

Subsection (c) clarifies that the State's election to pursue a temporary restraining order or preliminary injunction does not eliminate rights secured to claimants elsewhere in the article. For example, an owner who would be permitted to obtain release of a seized res by posting a bond should be similarly protected if the State seeks an injunction that is equivalent to a seizure of the property.

### **SECTION 519. TIME FOR COMMENCEMENT OF PROCEEDINGS; REMEDIES.**

(a) An administrative or judicial forfeiture proceeding must be commenced by the attorney for the State within 90 days after seizing property or filing or recording a forfeiture lien, whichever is earlier, unless the owners of all interests subject to forfeiture agree to extend the time, or the court extends the time for good cause shown.

(b) Except as otherwise provided by Section 419(g), if a demand for a judicial forfeiture is filed under Section 514, the State shall commence a judicial proceeding within 90 days after the demand is served unless the owners of all

interests subject to forfeiture agree to extend the time or the court extends the time for good cause shown.

(c) If a forfeiture proceeding is not commenced within the time required by subsection (a) or (b) or the time allowed by Section 419(g):

(1) the custodial agency shall release property seized and file or record a notice of the release of any lien filed or recorded under Section 509; and

(2) a seizure, lien, or forfeiture proceeding may not be subsequently undertaken or pursued based upon the same conduct.

### **Comment**

This section requires prompt initiation of forfeiture proceedings after seizure of property or the recordation of a lien. It encourages prompt state action by requiring the outright release of property when the designated time limits are exceeded. To avoid the simple expedient of re-seizing the property, this section also bars future efforts to forfeit the property based upon the allegations supporting the previous seizure.

In addition to providing the State with an incentive to investigate and file forfeiture cases expeditiously, this provision also seeks to remove any cloud cast on the property by the prior act of seizure. Even after the property has been released, the State's prior seizure of the property may make potential purchasers reluctant to deal with the property. Given the additional time available to the State to make its case, stronger measures to dissipate this cloud are justifiable here than would be warranted when a State simply fails to establish probable cause at a prompt post-seizure hearing. *Cf. supra* Sections 505(n) and 511(i) (prior seizure cannot be used to defeat subsequent owner's innocent purchaser defense, but no bar on later action involving the same asset).

This section does not require the return of substances that the owner cannot lawfully possess or material that is held as evidence of crime pursuant to other authority. Some illegal drugs are summarily forfeited under Section 515 upon seizure, and hence no proceedings need be commenced. As to other items that cannot lawfully be possessed, an owner would be unwise to request return of such items, since their possession would constitute a new grounds for forfeiture not barred by paragraph (c)(2), as well as grounds for criminal prosecution. Regarding evidence of crime, this section addresses only material held solely for forfeiture, and does not affect other law that might authorize retention of items for evidence.

If all owners are content to permit the State to proceed administratively, the State will have 90 days from seizure under subsection (a) to initiate the administrative proceeding, unless it elects to initiate judicial proceedings within that time instead. The State is required to provide an administrative resolution of an owner's claim within 90 days of the owner's service of a request for exemption. *See* Section 513(f)(1). The owner's request may be filed as late as 30 days after the State initiates an administrative proceeding. However, the owner may file a request before the State's filing of the administrative proceeding. *See* Section 513(a). Consequently, the State, in that instance, will have fewer than 90 days from the notice of proposed forfeiture to provide the statement of exempt and nonexempt interests.

For owners who invoke the administrative procedures for resolving claims of exemption, the filing of the statement of exempt and nonexempt interests permits the dissatisfied owner of an interest declared nonexempt another 30 days within which to file a demand for judicial proceedings. From the date such a demand is filed, the State has 90 days under subsection (b) to initiate a judicial proceeding. Thus it is possible under this section that the State would not be required to initiate judicial proceedings until 330 days after property is seized, if the State delays 90 days between seizing property and filing notice of pending forfeiture, the owner delays 30 additional days before making a request, the State takes the entire 90 days to provide a statement of exempt and nonexempt interests, the owner delays another 30 days before filing a demand, and the State takes the maximum 90 days from demand to initiation of a judicial proceeding. However, the owner may eliminate 120 days of that period simply by filing the request immediately upon seizure of the property, and may reduce the time even further by filing the demand immediately upon receipt of the statement of exempt and nonexempt interests.

Moreover, an owner desirous of a judicial resolution as soon as possible may bypass the administrative process altogether. Immediately upon the seizure of property, an owner may file a demand, in which event subsection (b) requires the initiation of a judicial proceeding within 90 days. This avenue is available even if the State has already filed an administrative notice of pending forfeiture and even if another owner has sought an administrative exemption.

This section applies even when the State has voluntarily released property or when property has been released by the court pursuant to Section 513(e) based on the absence of probable cause. The release of the property and the marketability of the property, however, should be taken into account in determining whether good cause exists to extend the time for filing under subsection (a) or (b).

**SECTION 520. EXCESSIVE FORFEITURES.** The court shall limit the scope of a forfeiture judgment to the extent the court finds the effect of the forfeiture is grossly disproportionate to the nature and severity of the owner's conduct. In determining whether a forfeiture is grossly disproportionate, the court may consider:

- (1) the degree to which the property was used to facilitate the conduct that subjects property to forfeiture and the importance of the property to the conduct;
- (2) the gain received or expected by an owner from the conduct that subjects property to forfeiture and the value of the property subject to forfeiture;
- (3) the nature and extent of the owner's culpability; and
- (4) the owner's efforts to prevent the conduct or assist in prosecution.

#### **Comment**

This section avoids grossly disproportionate forfeitures. Such limits are appropriate because forfeiture is a civil remedy that can be pursued without the heightened procedural safeguards attending the criminal process. Though a general proportionality provision of necessity creates greater uncertainty than would exist without such a provision, this uncertainty seems necessary because of the inability of specific rules to provide sufficient judicial power to prevent grossly disproportionate forfeitures without limiting forfeiture in cases where extensive forfeiture is justified.

In determining whether a forfeiture is grossly disproportionate, this section allows a court to consider all relevant factors. Accordingly, under this section a court may consider a broader array of factors than may be constitutionally required. *See Austin v. United States*, 113 S.Ct. 2801, 2815 (concurring opinion of Justice Scalia).

This Act treats proportionality in the same way that the Uniform Commercial Code treats unconscionability – as an issue to be decided as a matter of law by the court. *See* Uniform Commercial Code § 2-302, 1A Uniform Laws Annotated 15-16 (Master Ed. 1989).

If the court finds that forfeiture of the entirety of an interest would be disproportionate, the court is required by Section 522(f) to designate the extent of the loss that may be imposed on the owner. In assessing whether a forfeiture is disproportionate, the court should be mindful of the potential for harm in the

particular conduct that subjects property to forfeiture. No one-to-one ratio is intended.

### **SECTION 521. BURDENS OF PROOF; ADMISSIBLE EVIDENCE.**

(a) The State has the burden of proof, by a preponderance of the evidence, that property is subject to forfeiture under Section 504 and that notice required by Section 505(g) has been given, and by clear and convincing evidence that the requirements of Section 419(i) permitting the forfeiture of substituted property have been met.

(b) Except as otherwise provided by Section 505, a person claiming an exemption from forfeiture has the burden of proof by a preponderance of the evidence that the claimant has an interest in the property and that the interest is exempt from forfeiture under Section 505. However, if the interest claimed is an unperfected security interest, the claimant must prove by clear and convincing evidence that the claimant possesses the interest and that it is exempt from forfeiture.

(c) Evidence admissible in determining probable cause for issuance of a search warrant may be considered in determining probable cause in a proceeding under Section 507 or 511.

#### **Comment**

The requirement in this section that the State prove the property to be subject to forfeiture is similar to the requirement under federal law that the prosecutor show property to be forfeitable. If the prosecutor cannot make this initial showing, then interest holders prevail without the necessity of proving their exemptions. If the prosecutor makes the threshold showing of forfeitability, however, a claimant bears the burden of proving exemptions, like innocent-owner defenses, by a preponderance of the evidence. This Act does not require any specific showing of forfeitability to support a default judgment, leaving the question to the State's usual procedures for obtaining default judgments, which often will not impose such an obligation on the State.

By requiring that the prosecutor's initial showing be by a preponderance of admissible evidence, this Act departs from federal practice, which requires an initial showing of only "probable cause" and permits the prosecutor to rely on hearsay to make that showing.

This Act reflects the position that the normal civil standard is the appropriate one to apply when forfeiture – not simply pretrial seizure, *see supra* Section 507 (permitting seizure on showing of probable cause) – is at issue. Though the State’s interest in forfeiture is legitimate, an owner should not lose property in a case where the factfinder cannot say that there is a better than 50-percent likelihood that the property is actually subject to forfeiture. The State’s interest in forfeiture is no greater than the interests of a private citizen who claims to have been injured by a defendant’s actions. If the private citizen must prove a superior right to property by a preponderance of the evidence, it would be anomalous to permit a lesser showing to suffice for the government, which is better situated than the private plaintiff to bear the impact of an erroneous verdict against it. *Cf. Department of Law Enforcement v. Real Property, Etc.*, 588 So. 2d 957 (Fla. 1991) (Florida constitution requires government to prove forfeitability by clear and convincing evidence); *United States v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F.2d 801, 807 (8th Cir. 1992) (Beam, J., dissenting) (arguing that federal probable cause standard does not satisfy due process).

The general burden of proof provisions in this section yield to the more specific burden of proof provision in Section 506 for attorney’s fees.

## **SECTION 522. DISPOSITION OF FORFEITED PROPERTY.**

(a) At the conclusion of an administrative or judicial forfeiture proceeding, property must be disposed of in accordance with this section.

(b) If no interest in the property is forfeited, the custodial agency shall release the seized property and file or record notice of release of any forfeiture lien.

(c) If all interests in the property are forfeited in a judicial proceeding, the court shall issue an order of forfeiture transferring ownership of the property to the unit of government with jurisdiction over the attorney for the State. If all interests in property are forfeited in an administrative proceeding under Section 512, the unit of government with jurisdiction over the attorney for the State acquires ownership of the property without a court order but may request the court to issue an order confirming the forfeiture or may commence a judicial forfeiture proceeding.

(d) If one or more interests in the property are forfeited and others are exempt:

(1) in a judicial proceeding, the court shall issue an order transferring ownership as agreed by the owners of the exempt interests and the attorney for the State or, if agreement cannot be reached, in a manner that protects the owners of

exempt interests as completely as they would be protected if the unit of government with jurisdiction over the attorney for the State were an ordinary judgment creditor of the owner of the forfeited interest attempting to execute its judgment; and

(2) in an administrative proceeding, the attorney for the State shall transfer ownership as agreed by the owners of the exempt interests and the attorney for the State, or request the court to issue an order confirming the transfer, but if agreement cannot be reached, the attorney for the State shall request the court to issue an order transferring ownership of the property in the manner provided by paragraph (1).

(e) Except as otherwise provided in this section, if property not harmful to the public is forfeited, the custodial agency shall sell the property, other than money, by public sale or other commercially reasonable means, unless the [State Attorney General] determines that circumstances justify public ownership of the property [for law enforcement or, if authorized, other public purposes as provided by law,] or until a suitable buyer can be found.

(f) If a forfeiture judgment affecting indivisible property is modified pursuant to Section 520, the custodial agency shall:

(1) sell the property by public sale, or other commercially reasonable means and divide the proceeds pursuant to an order of the court; or

(2) dispose of the property in accordance with court order.

(g) If a federal agency or an agency of another State has contributed to the forfeiture, the attorney for the State, with the approval of the court, may direct the custodial agency to transfer to the federal agency or the agency of the other State a portion of the proceeds. The transfer must be justified by the extent to which the agency participated in the investigation that led to forfeiture or by the extent to which the conduct subjecting property to forfeiture occurred in the other State.

(h) Money remaining after the satisfaction of the requirements of subsections (e) through (g) must be deposited into the [general fund] of the State.

(i) Property or money received from the federal government or another State as the result of a forfeiture for conduct that subjects property to forfeiture under this [article] must be disposed of pursuant to subsections (e), (g), and (h).

## Comment

While it is anticipated that innocent parties and the State will often agree on the appropriate disposition of property in which only some interests are forfeitable, perhaps on the payment of some consideration, the rule in the absence of agreement seeks to protect innocent interest holders largely as they would be protected against judgment creditors of the person whose interest is found forfeitable. In the case of an ordinary tenancy in common between an innocent party and a guilty one, the State would become a tenant in common with the innocent owner of the property in the absence of agreement to the contrary, since nothing would have prevented a judgment creditor of the guilty person from assuming that status. The State or the innocent owner might then pursue the methods available to tenants in common under state law to divide the property or divide the proceeds of a sale. If a security interest in property is exempt but the fee interest is forfeitable, the State may become the holder of the fee interest subject to the security interest, and the secured interest holder would retain the right to foreclose on the property or to share in the proceeds of any sale of the property.

This Act rejects the “relation-back doctrine” as provided by 21 U.S.C. § 881(h) under which title to property is deemed to have vested in the government as of the conduct that subjects property to forfeiture. On the federal level, the doctrine has caused confusion and resulted in needless litigation expense as courts have grappled with the relationship between the relation-back doctrine and innocent-owner defenses. The relation-back doctrine causes such mischief that any objective of the doctrine is best achieved through precise provisions lacking these untoward effects.

The tenancy by the entirety has prompted conflicting approaches in the case law. Because the tenancy is a marital estate, the State cannot simply assume the ownership role of the wrongdoing spouse and become a tenant by the entirety with an innocent spouse. Some courts have concluded as a result that no forfeiture of such a tenancy may occur until an event that destroys the tenancy, like divorce, occurs. *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511 (11th Cir. 1990). Though this approach protects the innocent spouse, it also protects the guilty spouse at the same time, insulating the guilty spouse’s interest from forfeiture until the occurrence of an event that terminates the estate under other provisions of law. Other courts have concluded that forfeiture itself terminates the entireties estate and permits the State to become a tenant in common with the innocent spouse. *United States v. One Parcel of Real Estate*, 715 F. Supp. 355 (S.D. Fla. 1989). While protecting the State’s interest in forfeiture, that approach deprives the innocent spouse of the right to prevent sale of the property, among other rights, that would obtain under an entireties estate. This article adopts the approach of *United States v. Parcel of Real Property Known as 1500 Lincoln Ave.*, 949 F.2d 73 (3d Cir. 1991)

(forfeiting guilty spouse's interest but ordering that innocent spouse have full and exclusive use and possession of the property during her life, be protected against conveyance of or execution by third parties upon her husband's former interest, and retain the right to survivorship). By immediately forfeiting the guilty spouse's remainder interest to the State, this approach may avoid the problems that can arise when the State must await termination of the entireties estate before its interest arises.

Forfeiture of partnership interests may raise similar problems because of legal obstacles to involuntary creation of partnership arrangements. However, the State's interest is usually adequately protected by permitting it to attach the guilty party's interest. The scope of the State's interest will depend on the case. If, for example, the wrongdoer's right to receive distributions stems entirely from a single contribution of tainted capital, then the State will be entitled to all future distributions that would otherwise be owed to the wrongdoer. If only a portion of the wrongdoer's contribution was tainted, the percentage of distributions due the State is set by Sections 504(a)(7) and 504(b). That a guilty partner's interest has been attached may lead innocent partners to dissolve the partnership voluntarily.

In the context of partnerships, one must also distinguish the claim that a person's partnership interest is forfeitable from the claim that partnership property is subject to forfeiture. When, for example, partnership property has been used to facilitate drug activity, the question is whether the owner of the property – the partnership – lacks knowledge of the conduct under relevant agency principles. This article addresses that question in Section 501(5). If a partner uses partnership property to facilitate drug activity, however, the partner's interest in the partnership should be forfeitable in proportion to the value of the property to the total value of the partnership, even if the partnership itself is innocent. *Cf.* Section 504(a)(5).

Subsections (c) and (d) allow the State to obtain an order of forfeiture, which the State may record if deemed useful to avoid controversy over ownership of property. Section 511 permits the State to file or record a lien even after a forfeiture proceeding has concluded. These provisions are not intended to suggest that the State must take such measures to establish ownership of the forfeited property. In the rare case in which property is forfeited but the State has not taken possession of the property, this article leaves to other law the determination as to whether a purported conveyance to an unwitting buyer can create ownership rights in the buyer.

Subsection (h) provides the recommendations of the Conference regarding the disposition of revenues generated by forfeitures. Though many jurisdictions have earmarked forfeited property for law enforcement uses, the National Conference has concluded that giving seizing agencies direct financial incentives in

forfeiture is an unsound policy that risks skewing enforcement priorities. *Cf. Connally v. Georgia*, 429 U.S. 245 (1977) (declaring unconstitutional a system whereby unsalaried justice of peace received \$5 for each issued search warrant but nothing for refusing to issue a warrant); *Harmelin v. Michigan*, 111 S. Ct. 2680, 2693 n.9 (1991) (opinion of Scalia, J.) (Eighth Amendment may demand more careful scrutiny of fines than terms of imprisonment because “fines are a source of revenue”).

Although the Conference recommends that States deposit the revenues generated by forfeitures into general operating funds subject to ordinary appropriation requirements, the Conference recognizes that many States have earmarked or restricted the use of the proceeds of forfeitures. States that wish to direct the use of the proceeds of forfeitures for specific purposes may wish to consider modifying subsection (h) in a manner similar to 28 U.S.C. § 524(c), which provides for the deposit of forfeiture revenues into a restricted receipt account eligible for use only for designated purposes, but makes the annual allocation of the account subject to the ordinary legislative appropriations process. Such an alternative would ensure continuing legislative oversight and control over the actual use of the proceeds of forfeitures, but nonetheless earmarks such proceeds for purposes relating to the enforcement and implementation of the UCSA. Such an approach would reduce the potential for abuses which the Conference finds to be inherent in giving seizing agencies a direct financial interest in the outcome of forfeiture proceedings.

The Conference also recognizes that some state constitutions require that forfeited property be used for designated purposes. In those States, subsection (h) should be modified to conform to local constitutional requirements. States should also modify the provisions of subsection (h) as appropriate to reflect local terminology, practice and requirements regarding the appropriation of funds.

**SECTION 523. EVADING FORFEITURE.** In addition to any other remedy provided by law, the State may maintain a civil action for damages against a person who, having notice or being aware of the seizure for forfeiture, the filing or recording of a forfeiture lien, or the issuance of an order or injunction, except as allowed by this [article], intentionally or recklessly causes waste, destroys, encumbers, disposes of, removes from the jurisdiction of the court, conceals, or otherwise renders the property unavailable for forfeiture. If a civil proceeding under this [Act] is pending, the action must be heard by the court in which the civil proceeding is pending.

### **Comment**

Damages do not include the value of destroyed contraband.

### **SECTION 524. RESTRICTION ON ACTIONS; REMEDIES.**

(a) A person claiming an interest in property subject to forfeiture may not maintain an action for possession or ownership of the property or removal of a forfeiture lien other than as provided in this [article].

(b) A person claiming an interest in forfeited property may petition for the reopening of a judgment of forfeiture or an administrative forfeiture order as otherwise provided by law.

(c) In addition to any other remedy to reopen a judgment or order of forfeiture, within [one year] after an administrative forfeiture under Section 512 or a judgment of forfeiture, an owner who was prejudiced by the failure to receive timely notice of the pendency of a forfeiture proceeding may maintain a civil action against the State to establish the interest in the property.

(d) In a proceeding under subsection (b) or (c), if the forfeited property has been sold, a court may only order the State to compensate the claimant for the value of the claimant's interest, unless setting aside the sale is constitutionally required. If the sale is set aside, the State must reimburse the purchaser for the purchase price and other reasonable expenses incurred in relation to the purchase and ownership of the property.

(e) If the State was not substantially justified in seizing property, filing or recording a lien, or commencing a proceeding or action under this [article], the court may award costs and reasonable attorney's fees to the owner.

(f) An owner may maintain a civil action against the State to recover damages resulting from the negligent management of property seized for forfeiture.

### **Comment**

Subsection (a) precludes invocation of remedies such as mandamus to secure the release of property seized for forfeiture.

Subsection (b) excepts motions to reopen a judgment from the general rule stated in subsection (a). To ensure marketability of forfeited property, however,

subsection (d) limits the remedies available to the court when the forfeited property has been sold.

Subsection (c) states a specific rule to deal with the situation in which a claimant has not received actual notice of a forfeiture proceeding. It applies even when the State has complied with this article's notice provisions. Especially when administrative forfeitures are pursued, the chance that notice will fail to reach a person in time for the person to file a timely claim justifies a special rule permitting relief. *Cf.* Fed. R. Civ. Pro. 60(b) (one year from entry of judgment to seek relief for excusable neglect). Though the remedy set forth in this subsection is limited by subsection (d), in cases in which notice was constitutionally deficient, the limitation may not apply. *See, e.g., James Moore, 7A Moore's Federal Practice* ¶ C.14, at 697-99 (2d ed. 1993) (constitutionally defective notice constitutes a jurisdictional defect that defeats any claim to title by the subsequent purchaser).

Subsection (e) provides for the payment of attorney's fees and costs to prevailing defendants if the position of the State in seizing property, filing or recording a lien, or prosecuting a forfeiture action was not "substantially justified." This standard is derived from the federal Equal Access to Justice Act. 28 U.S.C. § 2412(d).

Subsection (f) creates a remedy for an owner who suffers damages from the State's negligent management of seized property. The owner cannot suffer damages if the property is forfeited to the State.

**SECTION 525. STATUTE OF LIMITATIONS.** The seizure of property, filing or recording of a lien, or commencement of a proceeding or action under this [article] must occur within [five] years after the last conduct that subjects property to forfeiture is discovered unless property subject to forfeiture has been concealed or removed from this State.

### **Comment**

This section is similar to 19 U.S.C. § 1621 and 28 U.S.C. § 2462. It should be interpreted as requiring the State to exercise reasonable care and diligence in seeking to learn about facts relating to conduct that subjects property to forfeiture. Accordingly, the statute of limitations will begin to run whenever the State is aware of facts that should trigger an investigation leading to discovery of the offense. *United States v. \$116,000 in U.S. Currency*, 721 F. Supp. 701, 703-04 (D.N.J. 1989).

This section applies to forfeitures notwithstanding the optional seven-year statute of limitations provided by Section 705.

[ARTICLE] 6  
ENFORCEMENT AND ADMINISTRATIVE PROVISIONS

**[SECTION 601. POWERS OF ENFORCEMENT PERSONNEL.** An officer or employee of the [appropriate agency] designated by the [appropriate person] may:

(1) carry firearms in the performance of the officer's or employee's official duties;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of this State;

(3) make arrests without warrant for an offense under this [Act] committed in the officer's or employee's presence, or if the officer or employee has probable cause to believe that the individual to be arrested has committed or is committing a violation of this [Act] which may constitute a felony;

(4) make seizures of property pursuant to this [Act]; and

(5) perform other law enforcement duties the [appropriate person] assigns.]

**Comment**

This section is bracketed to provide an option to consider in granting powers to personnel of the appropriate agency, particularly powers normally associated with law enforcement personnel, e.g., the carrying of firearms. The purpose of this section is to ensure that those individuals charged with the enforcement of the Act may be given full enforcement authority. Full enforcement authority, as opposed to authority restricted to offenses relating only to controlled substances, should give additional flexibility in the utilization of enforcement personnel within the State. This section does not give blanket authority to all members of a particular agency to carry weapons, execute and serve search warrants, make arrests, make seizures or perform other law enforcement duties. It does place discretion in the appropriate person or agency to select those field enforcement personnel who will enforce the Act.

## SECTION 602. ADMINISTRATIVE INSPECTIONS AND WARRANTS.

(a) In this section, “controlled premises” means:

(1) Places where persons registered or exempted from registration requirements under this [Act] are required to keep records; and

(2) Places, including factories, warehouses, establishments, and conveyances, in which persons registered or exempted from registration requirements under this [Act] are permitted to hold, manufacture, compound, process, sell, deliver, or otherwise dispose of a controlled substance.

(b) The procedure for issuance and execution of administrative inspection warrants is as follows:

(1) A [judge of a state court of record, or any state magistrate] within the [judge’s or magistrate’s] jurisdiction, and upon proper oath or affirmation showing probable cause, may issue warrants to conduct administrative inspections of controlled premises authorized by this [Act] or rules adopted under this [Act], and seizures of property appropriate to the inspections. For the purpose of issuance of an administrative inspection warrant, probable cause exists upon showing a valid public interest in the effective enforcement of this [Act], or rules adopted under this [Act], sufficient to justify administrative inspection of the area, premises, building, or conveyance in the circumstances specified in the application for the warrant;

(2) A warrant may issue only upon an affidavit of a designated officer or employee having knowledge of the facts alleged, sworn to before the [judge or magistrate], and establishing the grounds for issuing the warrant. If the [judge or magistrate] is satisfied that grounds for the application exist or that there is probable cause to believe they exist, the [judge or magistrate] shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any. The warrant must:

(i) state the grounds for its issuance and the name of each individual whose affidavit has been taken in support thereof;

(ii) be directed to an individual authorized by Section 601 to execute it;

(iii) command the individual to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(iv) identify the item or types of property to be seized, if any; and

(v) direct that it be served during normal business hours and designate the [judge or magistrate] to whom it must be returned;

(3) A warrant issued pursuant to this section must be executed and returned within ten days after its date unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy must be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant must be made promptly, accompanied by a written inventory of any property taken. The inventory must be made in the presence of the individual executing the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible individual other than the individual executing the warrant. A copy of the inventory must be delivered to the person from whom or from whose premises the property was taken and to the applicant for the warrant;

(4) The [judge or magistrate] who has issued a warrant shall attach to the warrant a copy of the return and all papers returnable in connection therewith and file them with the clerk of the [appropriate state court for the judicial district] in which the inspection was made.

(c) The [appropriate person or agency] may make administrative inspections of controlled premises in accordance with the following provisions:

(1) If authorized by an administrative inspection warrant issued pursuant to subsection (b), an officer or employee designated by the [appropriate person or agency], upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, may enter controlled premises for the purpose of conducting an administrative inspection;

(2) If authorized by an administrative inspection warrant, an officer or employee designated by the [appropriate person or agency] may:

(i) inspect and copy records required by this [Act] to be kept;

(ii) inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material,

containers and labeling found therein, and, except as provided in paragraph (4), all other things therein, including records, files, papers, processes, controls, and facilities bearing on violation of this [Act]; and

(iii) inventory any stock of a controlled substance therein and obtain samples thereof;

(3) This section does not prevent the inspection without a warrant of books and records pursuant to an administrative subpoena issued in accordance with [insert appropriate state code section], nor does it prevent entries and administrative inspections, including seizures of property, without a warrant:

(i) if the owner, operator, or agent in charge of the controlled premises consents;

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

(iii) in situations involving inspection of conveyances if there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

(iv) in an emergency or other exceptional circumstance where time or opportunity to apply for a warrant is lacking; or

(v) in all other situations in which a warrant is not constitutionally required;

(4) An inspection authorized by this section may not extend to financial data, sales data, other than shipment data, or pricing data unless the owner, operator, or agent in charge of the controlled premises consents in writing.

### **Comment**

The purpose of this section is to codify certain United States Supreme Court decisions, in particular *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), *See v. City of Seattle*, 387 U.S. 541 (1967), and *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970), with regard to inspection warrants.<sup>1</sup> The section sets out in very careful terms the procedures and restrictions for obtaining and issuing an administrative inspection warrant. This is of vital

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<sup>1</sup> See also: *Kramer Grocery v. U.S.*, 294 F.Supp. 65 (1968); and *United States v. Stanack Sales Co.*, 387 F.2d 849 (1968).

importance to the States because they are involved in the regulation of the legitimate drug industry and must have the ability to inspect records, books, and premises if access is denied. By having a carefully delineated code section dealing with administrative inspection warrants, law enforcement officers will be more certain of what is needed to obtain them and the courts can apply a uniform standard. Perhaps even more important, the industry being inspected will have more certainty as to its rights and obligations in this area.

It should be noted that the Supreme Court, in *Camara v. Municipal Court* spoke of the requirement of “probable cause” for issuance of an administrative inspection warrant. But the Court was not, however, speaking in terms of criminal probable cause, which would require a specific knowledge of the condition of the particular building to be inspected. Instead, rejecting the criminal probable cause argument, it required merely a valid public interest in the effective enforcement of a particular public health or safety act which justified the intrusion contemplated.

Although this section codifies the Court’s view for administrative inspection warrants, it in no way affects criminal probable cause as that phrase is defined under present criminal statutes or case law.

Finally, it should be noted that while Section 402(a)(4) makes it a violation of the Act to refuse entry into any premises for inspection, it is contemplated that such inspection will have been authorized under the rules set out in this section.

### **SECTION 603. INJUNCTIONS.**

(a) The [trial courts of this State] have [may exercise] jurisdiction to restrain or enjoin violations of this [Act].

(b) The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this section.

### **SECTION 604. COOPERATIVE ARRANGEMENTS AND CONFIDENTIALITY.**

(a) The [appropriate person or agency] shall cooperate with federal and other state agencies in discharging the [appropriate person’s or agency’s] responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, the [appropriate person or agency] may:

(1) arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(2) coordinate and cooperate in training programs concerning controlled substance law enforcement at local and state levels;

(3) cooperate with the Drug Enforcement Administration by establishing a centralized unit to accept, catalog, file, and collect statistics, including records of drug dependent persons and other controlled substance law offenders within this State, and make the information available for federal, state, and local law enforcement purposes, but may not furnish the name or identity of a patient or research subject whose identity could not be obtained under subsection (c); and

(4) conduct programs of eradication aimed at destroying wild growth or unlawful propagation of plant species from which controlled substances may be extracted.

(b) Results, information, and evidence received from the Drug Enforcement Administration relating to the regulatory functions of this [Act], including results of inspections conducted by it, may be relied and acted upon by the [appropriate person or agency] in the exercise of its regulatory functions under this [Act].

(c) A practitioner engaged in medical practice or research is not required or compelled to furnish the name or identity of a patient or research subject to the [appropriate person or agency], nor may the practitioner be compelled in any state or local civil, criminal, administrative, legislative, or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

### **Comment**

The purpose of this section is to establish a basis for increased cooperation and exchange of information among state, local, and federal law enforcement agencies. Implementation of these cooperative arrangements will provide a means of obtaining meaningful statistics on drug dependent persons and other controlled substance law offenders. There is a definite need to obtain these statistics if there is to be an accurate assessment of the total drug abuse problem in the United States. The intent of this section is to ensure that federal and state agencies responsible for enforcement of these laws work in harmony and maximize their direction and efforts, rather than duplicate and overlap each other's activities.

## **SECTION 605. PLEADINGS; PRESUMPTIONS; LIABILITIES.**

(a) It is not necessary for the State to negate any exemption or exception in this [Act] in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this [Act].

(b) No person is presumed to be the holder of an appropriate registration or order form issued under this [Act].

(c) This [Act] does not impose civil or criminal liability on any authorized state, county, or municipal officer, engaged in the lawful administration or enforcement of this [Act].

### **Comment**

Subsections (a) and (b) are not intended to affect the rule in any State as to who has the burden of persuasion. Under subsection (c), the immunity from civil or criminal liability only extends to administration or enforcement of the Act, not to performance of other duties.

**SECTION 606. JUDICIAL REVIEW.** Final determinations, findings, and conclusions of the [appropriate person or agency] under this [Act] are subject to judicial review under [the State Administrative Procedure Act].

### **Comment**

This section recognizes state administrative agencies practice acts, which generally provide for judicial review of agency decisions. The Uniform Law Commissioners' Model State Administrative Procedure Act (1981) provides for judicial review of final, and in some cases nonfinal, decisions of administrative agencies and for the scope of review. Paragraph 5-116(c)(7) of the model Act establishes the "substantial evidence on the whole record" test for judicial review of determinations of fact. Other standards are the "clearly erroneous" test or the "preponderance of evidence" standard.

## **SECTION 607. EDUCATION AND RESEARCH.**

(a) The [appropriate person or agency] shall carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs the [appropriate person or agency] may:

(1) promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;

(2) assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances;

(3) consult with interested groups and organizations to aid them in solving administrative and organizational problems;

(4) evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances;

(5) disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to alleviate them; and

(6) assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

(b) The [appropriate person or agency] shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of this [Act], the [appropriate person or agency] may:

(1) establish methods to assess accurately the effects of controlled substances and identify and characterize those with potential for abuse;

(2) make studies and undertake programs of research to:

(i) develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this [Act];

(ii) determine patterns of misuse and abuse of controlled substances and the social effects thereof; and

(iii) improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances; and

(3) enter into contracts with public agencies, institutions of higher education, and private organizations or individuals for the purpose of conducting

research, demonstrations, or special projects that bear directly on misuse and abuse of controlled substances.

(c) The [appropriate person or agency] may enter into contracts for educational and research activities without performance bonds and without regard to [appropriate code section].

(d) The [appropriate person or agency] may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of individuals who are the subjects of the research. A person who obtains this authorization is not compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

(e) The [appropriate person or agency] may authorize the possession and distribution of controlled substances by persons engaged in research. A person who obtains this authorization is exempt from state prosecution for possession and distribution of controlled substances to the extent of the authorization.

### **Comment**

This section, setting out the education and research provisions, is designed to make it clear that education and research are an integral part of the total law enforcement effort. Broad language is used in order to provide maximum latitude. The various authorizations granted by this section may be relevant to several state agencies, e.g., education, human services, law enforcement, and occupational licensure. Thus, the “appropriate person or agency” may be an entity other than the agency that administers this Act.

Of primary importance are subsections (c) and (d) authorizing persons engaged in legitimate research to withhold the identities of research subjects and allowing the State to authorize possession and distribution of controlled substances. These provisions allow legitimate researchers to carry on much needed research without fear of exposing either themselves or their research subjects to criminal prosecution.

It should be noted that a grant of federal immunity would preempt any state grant or denial of immunity. However, the converse would not be true, and a researcher in possession of controlled substances under a state grant of immunity could be prosecuted under federal law if the federal government elected not to confer immunity. However, it is unlikely that this situation will arise.

[ARTICLE] 7  
MISCELLANEOUS

**SECTION 701. PROSPECTIVE APPLICATION.** This [Act] applies to violations of law, seizures and forfeiture, injunctive proceedings, administrative proceedings, and investigations that occur following its effective date.

**SECTION 702. PENDING PROCEEDINGS.**

(a) This [Act] does not affect or abate a prosecution for a violation of law occurring before the effective date of this [Act]. If the offense being prosecuted is similar to one set out in [Article] 4, the penalties under [Article] 4 apply if they are less than those under former law.

(b) This [Act] does not affect a civil seizure, forfeiture, or injunctive proceeding commenced before the effective date of this [Act].

(c) An administrative proceeding pending under laws that are superseded by this [Act] must be continued and brought to a final determination in accordance with the laws and rules in effect before the effective date of this [Act]. A substance controlled under superseded law but which is not listed in Section 204, 206, 208, 210, or 212 is automatically controlled without further proceedings and must be added in the appropriate schedule.

(d) The [appropriate person or agency] shall initially permit a person to register who owns or operates an establishment engaged in the manufacture, distribution, or dispensing of a controlled substance before the effective date of this [Act] and who is registered or licensed by the State.

**Comment**

Subsection (d) is a provisional grandfather clause that provides for the automatic licensing of any person already licensed or registered by the State to engage in the manufacture, distribution, or dispensing of controlled substances on the Act's effective date. After that date, they will then be subject to the annual renewal requirements and will have to meet all the requirements of Sections 302 and 303.

**SECTION 703. CONTINUATION OF RULES; APPLICATION TO EXISTING RELATIONSHIPS.** Orders issued and rules adopted under any law

affected by this [Act] and in effect on the effective date of this [Act] and not in conflict with this [Act] continue in effect until modified, superseded, or repealed. Rights and duties that matured, penalties that were incurred, and proceedings that were begun before the effective date of this [Act] continue in effect and are not affected by Section 709.

**SECTION 704. CONTINUING CRIMINAL ENTERPRISE; CIVIL ACTION.**

(a) The [appropriate authority] may maintain a civil action against a person who violates Section 411 to obtain a judgment for damages in an amount equal to three times the gross income and the value of assets acquired directly or indirectly by the person by reason of violation of Section 411, together with costs incurred for resources and personnel used in the investigation and prosecution of the proceedings through which liability was established.

(b) The standard of proof in actions brought under this section is a preponderance of the evidence.

**[SECTION 705. STATUTE OF LIMITATIONS.** A civil action under this [Act] must be commenced within [seven] years after the [claim for relief] became known or should have become known, excluding any time during which a party is out of the State or in confinement or during which criminal proceedings relating to a party are in progress.]

**Comment**

This statute of limitations applies to any civil action under this Act including continuing criminal enterprise.

**SECTION 706. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it.

**SECTION 707. SHORT TITLE.** This [Act] may be cited as the Uniform Controlled Substances Act (1994).

**SECTION 708. SEVERABILITY CLAUSE.** If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

**Comment**

This section is included for States which have no general saving statute. If a State has such a statute, with a comparable severability clause, this section is not necessary as part of the Act.

**SECTION 709. REPEALS.** The following laws are repealed:

[List statutes to be repealed].

**SECTION 710. EFFECTIVE DATE.** This Act takes effect on [            ].