LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

MODEL OPIOID LITIGATION PROCEEDS ACT

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O'NEILL INSTITUTE
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MODEL OPIOID LITIGATION PROCEEDS ACT

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SECTION I. TITLE.

This Act may be cited as the "Model Opioid Litigation Proceeds Act," "the Act," or "Model Act."

SECTION II. LEGISLATIVE FINDINGS AND PURPOSE.

(a) Legislative findings.—The [legislature][1] finds that:

(1) [Insert state name] anticipates the receipt of substantial payments based on legal claims made against [manufacturers and distributors of prescription opioid analgesics, pharmacies that dispensed prescription opioid analgesics, and related parties] for their alleged roles in contributing to the high rates of drug overdoses and other drug-related harms;

(2) Experience with the 1990s tobacco settlements suggests that, without firm commitment and planning, the opioid litigation proceeds may not be directed toward preventing and addressing substance use disorders, overdoses, and drug-related harms. Substance use disorders, overdoses, and drug-related harms have had a significant impact on the country and [state].

(3) According to the Centers for Disease Control and Prevention (CDC), over 94,000 drug overdose deaths occurred in the United States in the 12 months ending in January 2021, the highest number of overdose deaths ever recorded in a 12-month period.[2]

(4) It is estimated that the cost to society of the opioid misuse and overdose crisis in the United States from 2015 through 2018 was at least $631 billion.[3] This estimate accounts for the use of illicit substances and includes costs associated with additional health care services for those impacted by opioid use disorder, premature

[1] This Act contains certain bracketed words and phrases (*e.g.*, "[legislature]"). Brackets indicate instances where state lawmakers may need to insert state-specific terminology or facts.

[2] CTR. FOR DISEASE CONTROL AND PREVENTION, OVERDOSE DEATHS ACCELERATING DURING COVID-19 (Dec. 17, 2020), https://www.cdc.gov/media/releases/2020/p1218-overdose-deaths-covid-19.html; CTR. FOR DISEASE CONTROL AND PREVENTION, PROVISIONAL DRUG OVERDOSE DEATH COUNTS (Aug. 11, 2021), https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm.

[3] Stoddard Davenport, MPH, Alexandra Weaver, ASA, MAAA, Matt Caverly, *Economic Impact of Non-Medical Opioid Use in the United States,* SOCIETY OF ACTUARIES® 4 (Oct. 2019), https://www.soa.org/globalassets/assets/files/resources/research-report/2019/econ-impact-non-medical-opioid-use.pdf.

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mortality, criminal justice activities, child and family assistance programs, education programs, and lost productivity.[4]

(5) In [state], drug overdoses continue to devastate our residents and communities and strain government resources. In [year] alone, [number] people died from unintentional drug overdoses in the state;

(6) According to the Surgeon General, substance use disorders respond to treatment like other chronic diseases. Addiction can be managed successfully, and treatment enables people to counteract addiction's powerful disruptive effects on the brain and behavior and regain control of their lives. The chronic nature of the disease means that returning to substance use is not only possible but also likely, with symptom recurrence rates like those for other well-characterized chronic medical illnesses, such as diabetes, hypertension, and asthma;[5] and

(7) Addressing substance use disorders, overdoses, and drug-related harms will require dedicated resources and many years. Directing opioid litigation proceeds to establish, sustain, and expand substance use disorder abatement infrastructure, programs, services, supports, and resources for prevention, treatment, recovery, and harm reduction in [state] will represent a critically important down payment on the work to be done.

(b) Purpose.—It is the intent of the [legislature] through this Act:

(1) To maximize funds available to address the overdose crisis in [state] by encouraging [state] counties, cities, and localities that have made legal claims against [manufacturers and distributors of prescription opioid analgesics, pharmacies that dispensed prescription opioid analgesics, and related parties] to participate in any final settlement of legal claims against such defendants into which [state] may enter;

(2) To establish a dedicated fund, separate from the state's general treasury fund, that is designated for substance use disorder abatement, including prevention, treatment, recovery, and harm reduction infrastructure, programs, services, supports, and

[4] *Id*.

[5] *Facing Addiction in America: The Surgeon General's Spotlight on Opioids*, U.S. DEP'T OF HEALTH AND HUMAN SERV., OFF. OF THE SURGEON GEN. (Sept. 2018), https://addiction.surgeongeneral.gov/sites/default/files/Spotlight-on-Opioids_09192018.pdf.

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resources (the "Fund"). All proceeds received by the state arising out of legal claims made against [manufacturers and distributors of prescription opioid analgesics, pharmacies that dispensed prescription opioid analgesics, and related parties] shall be deposited into the dedicated fund in accordance with Section IV of this Act;

(3) To ensure that proceeds deposited into the Fund: (1) remain separate from the state treasury's general fund; (2) do not lapse, do not revert to the general fund, and are not otherwise subject to fiscal year limitations; and (3) are used only as intended for substance use disorder abatement, including prevention, treatment, recovery, and harm reduction infrastructure, programs, services, supports, and resources as set forth in Section IV of this Act;

(4) That any distributions from the Fund supplement, and not supplant or replace, any existing or future local, state, or federal government funding for such infrastructure, programs, services, supports, and resources, including, but not limited to, insurance benefits, federal grant funding, and Medicaid and Medicare funds;

(5) That a council of geographically, racially, and ethnically diverse stakeholders be established to ensure robust and informed public involvement, accountability, and transparency in allocating and accounting for the monies in the Fund;

(6) That the council have wide discretion, as set forth in Section V, regarding the types of substance use disorder abatement infrastructure, programs, services, supports, and resources that it may recommend and approve for funding, including, but not limited to, infrastructure, evidence-based programs and services, promising practices with emerging evidence, and pilot programs reasonably expected to yield evidence of effectiveness; and

(7) That substance use disorder abatement infrastructure, programs, services, supports, and resources yield reductions in mortality and improvements in prevention, treatment, harm reduction, and recovery outcomes, and that recipients of distributions from the Fund measure and report outcomes associated with such distributions.

(c) Applicability.—It is the intent of the [legislature] through this Act:

(1) That the requirements and protections set forth in this Act as applied to disbursement and allocation of proceeds of any state settlement of claims against a

[manufacturer or distributor of prescription opioid analgesics, pharmacy that dispensed prescription opioid analgesics, or related party] apply to only those counties, cities, and localities that execute an agreement to participate in such settlement and adhere to the terms of such agreement; and

(2) That monies be disbursed from the Fund to both governmental and not-for-profit non-governmental entities.

Commentary

According to 2018 data, an estimated 21.2 million Americans (or 1 in every 12 people) had a substance use disorder, of whom two million had opioid use disorder.[6] Yet, only a fraction of those with a substance use disorder (17 percent) received any form of treatment.[7] Common reasons for not receiving substance use treatment among people who perceived a need for treatment were as follows: not being ready to stop using (39.9 percent), not knowing where to go for treatment (23.8 percent), and having no health care coverage and not being able to afford the cost of treatment (20.9 percent).[8]

Substance use disorder affects people of all racial and ethnic groups at all stages of life, including before, during, and after pregnancy; in cities, suburbs, small towns, and rural areas; and rates of drug overdose are rising among almost all groups.[9] States anticipate an influx of funds from legal claims made against manufacturers and distributors of prescription opioid analgesics, pharmacies that dispensed prescription opioid analgesics, and related parties. Experience with the 1990s tobacco settlements suggests that, without firm commitment and planning, the opioid litigation proceeds may not be directed toward addressing substance use disorders, overdoses, and drug-related harms.

In the 1990s, 46 states settled claims against the four largest tobacco manufacturers, under which the states received billions of dollars in payments over the course of more than 20 years.[10] States still receive that money today.[11] In fiscal year 2020, states collected $27.2 billion from the

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[6] CTR. FOR DISEASE CONTROL AND PREVENTION, OPIOID OVERDOSE PREVENTION SAVES LIVES (last updated Oct. 22, 2020), https://www.cdc.gov/drugoverdose/featured-topics/abuse-prevention-awareness.html.
[7] *Id*.
[8] *Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health,* SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERV. (2020), https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR1PDFW090120.pdf.
[9] *The Drug Overdose Epidemic Affects All Communities*, NAT'L INST. ON MINORITY HEALTH AND HEALTH DISPARITIES (Oct. 25, 2019), https://www.nimhd.nih.gov/news-events/features/community-health/overdose-epidemic.html#reference1.
[10] *Master Settlement Agreement*, TRUTH INITIATIVE, https://truthinitiative.org/who-we-are/our-history/master-settlement-agreement.
[11] *Where Did All that Tobacco Settlement Money Go?*, INDUS. SAFETY & HYGIENE NEWS (Dec. 24, 2019), https://www.ishn.com/articles/112038-where-did-all-that-tobacco-settlement-money-go.

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settlements and tobacco taxes.[12] Only a fraction of the proceeds are used for their intended purpose – to reduce tobacco use.[13]

Some states have used tobacco litigation proceeds to fill budget holes or pay off debts.[14] As of 2019, no state funds its tobacco prevention and cessation programs at CDC-recommended levels, and only six states provide a minimum of half the recommended amount.[15] For example, in 2020, states spent less than three percent of annual tobacco settlement and tax revenues – just $739.7 million – on programs to prevent youth from using tobacco and tobacco cessation programs – less than a quarter (22.4 percent) of the total funding recommended by the CDC.[16]

This Act intends to avoid the missed opportunities associated with the wide-ranging expenditures of the tobacco settlement funds and to ensure that opioid litigation proceeds will be targeted to substance use disorder prevention, treatment, recovery, and harm reduction. As such, the Act is crafted in a manner that: (1) the proceeds are only used for their intended purposes (*i.e.*, substance use disorder prevention, treatment, recovery, and harm reduction); (2) unused monies will not expire at the end of a fiscal year or be transferred into the general treasury for unrelated purposes; and (3) the monies supplement, not supplant, existing funding or funding that would otherwise have been allocated or secured to address the overdose crisis (*i.e.*, existing and future local, state, and federal funding for substance use disorder infrastructure, programs, and services cannot be replaced and redirected for purposes unrelated to substance use disorder). The Act also gives spending recommendation and approval power to a diverse council of stakeholders with specific subject matter knowledge and experience to optimize the public health benefits of the distributions as well as align funding with other efforts to address substance use disorders, overdoses, and drug-related harms.

Opioid use disorder makes up only nine percent of substance use disorders in the United States. In addition, among people with opioid use disorder, polysubstance use is the norm, not the exception.[17] Alcohol use, for example, is responsible for more than 95,000 deaths in the U.S. per year.[18] Alcohol was involved in 15.5 percent of fatal heroin poisonings in 2017.[19] Therefore, to effectively address public health needs, prevention, treatment, recovery, and harm reduction services must be offered to all individuals who are at risk of, or have, a substance use disorder,

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[12] *Id.*
[13] Editorial Staff, *Who is Really Benefiting from the Tobacco Settlement Money?*, AM. LUNG ASS'N (Feb. 3, 2016), https://www.lung.org/blog/who-benefit-tobacco-settlement.
[14] *Id.*
[15] INDUS. SAFETY & HYGIENE NEWS, *supra* note 11.
[16] *Id.*
[17] Theodore J. Cicero, Matthew S. Ellis, and Zachary A. Kasper, *Polysubstance Use: A Broader Understanding of Substance Use During the Opioid Crisis*, AM. J. OF PUB. HEALTH 110, 244, 249 (2020), https://ajph.aphapublications.org/doi/10.2105/AJPH.2019.305412.
[18] *Deaths from Excessive Alcohol Use in the U.S.*, CTR. FOR DISEASE CONTROL AND PREVENTION (last reviewed Jan. 14, 2021), https://www.cdc.gov/alcohol/features/excessive-alcohol-deaths.html.
[19] Marco E. Tori, Marc R. Larochelle, and Timothy S. Naimi, *Alcohol and Benzodiazepine Co-involvement with Opioid Overdose Deaths in the United States, 1999-2017*, JAMA NETWORK OPEN (Apr. 9, 2020), https://pubmed.ncbi.nlm.nih.gov/32271389/.

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including during and after pregnancy, rather than solely to those with an opioid use disorder. As such, this Act is drafted to ensure that settlement proceeds will be distributed to address opioid use disorder and other substance use disorders. The opioid litigation settlement proposal offered by major opioid distributors limited the use of proceeds to addressing opioid use disorders and co-occurring substance use and mental health disorders.[20] Under such an approach, services funded by settlement proceeds could be used to address stimulant use disorders, for example, only among people who also have opioid use disorders.

It is the intent of this Act to recognize that substance use disorder is a treatable condition from which individuals and families can recover. According to the 2019 National Survey of Drug Use and Health, among the 28.2 million adults in the U.S. in 2019 who perceived that they ever had a substance use problem, 75.5 percent (or 21.2 million people) considered themselves to be in recovery or to have recovered from their alcohol or other drug use problem.[21] A substantial, ongoing commitment from government is essential to support individuals, families, and communities in achieving long-term recovery and resilience.

Medicaid is an important resource in providing access to health care services that address substance use disorder prevention, treatment, recovery, and harm reduction. States that have expanded their Medicaid programs under the Affordable Care Act have had over a nine percent reduction in opioid-related hospitalizations as compared with non-expansion states.[22] Opioid litigation proceeds could provide states that have not expanded their Medicaid programs another opportunity to expand access to health care services. This opportunity may include a partial Medicaid expansion for substance use disorder services, even for a specific population, such as expanding postpartum coverage of substance use services from 60 days to one year.[23] Other opportunities related to Medicaid coverage may include using opioid litigation proceeds to help eligible people enroll for Medicaid coverage and to offset costs that Medicaid participants may incur to access substance use disorder services.

For all states, it will be important to take steps to ensure opioid litigation proceeds not duplicate or supplant services that Medicaid covers but to complement those services. Steps could include modeling the use of opioid litigation proceeds after the federal Ryan White HIV/AIDS Program, which provides HIV care and treatment services to low-income people with HIV who are

[20] *Distributor Settlement Agreement*, OFF. OF ATT'Y GEN. JOSH SHAPIRO (July 2021), https://www.attorneygeneral.gov/wp-content/uploads/2021/07/2021-07-21-Final-Distributor-Settlement-Agreement.pdf.
[21] SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., *supra* note 8, at 65.
[22] Hefei Wen et al., *Association Between Medicaid Expansion and Rates of Opioid-related Hospital Use*, 180 JAMA INTERNAL MED. 1-7 (May 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7091455/.
[23] Usha Ranji, Ivette Gomez, and Alina Salganicoff, *Expanding Postpartum Medicaid Coverage*, KAISER FAM. FOUND. (Mar. 9, 2021), https://www.kff.org/womens-health-policy/issue-brief/expanding-postpartum-medicaid-coverage/.

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uninsured or underserved.[24] All opioid litigation proceeds advisory councils should understand their state's Medicaid program so opioid litigation proceeds can complement Medicaid-covered services to improve the availability and quality of health care for people with substance use disorders, including when individuals may be especially vulnerable, such as during or after pregnancy, or upon release after incarceration.

SECTION III. DEFINITIONS.

[*States may already have definitions in place for some or all of the following listed terms.*]

As used in this Act, unless the context clearly indicates otherwise, the words and phrases listed below have the meanings given to them in this section:

(a) Act.—"Act" means the Model Opioid Litigation Proceeds Act;

(b) Conflict of interest.—"Conflict of interest" means a financial association involving a Council member or the member's immediate family that has the potential to influence a Council member's actions, recommendations, or decisions related to the disbursement of opioid litigation proceeds or other Council activity;

(c) Council.—"Council" means the [Opioid Litigation Proceeds] Council established pursuant to Section V of this Act;

(d) Evidence-based.—"Evidence-based" means an activity, practice, program, service, support, or strategy that meets one of the following evidentiary criteria: (1) meta-analyses or systematic reviews have found the strategy to be effective; (2) evidence from a scientifically rigorous experimental study, such as a randomized controlled trial, demonstrates the strategy is effective; or (3) multiple observational studies from U.S. settings indicate the strategy is effective.[25] As used in this definition, "effective" means an activity, practice, program, service, support, or strategy that helps individuals avoid the development and progression of substance use disorders and/or drug-related harms; reduces the adverse consequences of substance use among persons who use substances; or manages, slows the progression of, or supports recovery from a substance use disorder or co-occurring mental health disorder;

[24] HEALTH RES. & SERV. ADMIN., ABOUT THE RYAN WHITE HIV/AIDS PROGRAM, https://hab.hrsa.gov/about-ryan-white-hivaids-program/about-ryan-white-hivaids-program.

[25] Jennifer J. Carroll, Traci C. Green, and Rita K. Noonan, *Evidence-Based Strategies for Preventing Opioid Overdose: What's Working in the United States*, CTR. FOR DISEASE CONTROL AND PREVENTION (2018), http://www.cdc.gov/drugoverdose/pdf/pubs/2018-evidence-based-strategies.pdf.

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(e) Fund.—"Fund" means the [Opioid Litigation Proceeds] Fund established pursuant to Section IV of this Act;

(f) General fund.—"General fund" means the primary operating fund of the [insert state] government. This fund receives revenue from general state revenue sources not otherwise accounted for in another fund;

(g) Harm reduction.—"Harm reduction" means a program, service, support, or resource that attempts to reduce the adverse consequences of substance use among persons who continue to use substances. Harm reduction addresses conditions that give rise to substance use, as well as the substance use itself, and may include, but is not limited to, syringe service programs, naloxone distribution, and education about Good Samaritan laws;

(h) Infrastructure.—"Infrastructure" means the resources (such as personnel, buildings, or equipment) required for [state] or a region, county, city, and locality thereof, or not-for-profit organizations therein, to provide substance use disorder prevention, treatment, recovery, and harm reduction programs, services, supports, and resources;

(i) Prevention.—"Prevention" means primary, secondary, and tertiary efforts to avoid the development and progression of substance use disorders and/or drug-related harms. Primary prevention involves promoting positive youth development and helping individuals avoid the risk factors for, and development of, addictive behaviors through both universal and individualized efforts. Primary prevention incorporates efforts in support of individualized health care, including the safe prescribing of opioid and other controlled medications. Primary prevention also encompasses efforts to avoid adverse childhood experiences and to avoid or delay the onset of substance use among persons under 21 years of age. Secondary prevention consists of uncovering potentially harmful substance use prior to the onset of problems or substance use disorder symptoms. Tertiary prevention entails treating the medical consequences of substance use and facilitating entry into substance use disorder treatment so further disability is minimized. Prevention

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strategies include continuing treatment and avoiding a return to substance use so that patients who have been treated successfully may remain in remission;[26]

(j) Proceeds.—"Proceeds" includes damages, penalties, attorneys' fees, costs, disbursements, refunds, rebates, or any other monetary payment made or paid by any defendant [manufacturer or distributor of prescription opioid analgesics, pharmacy that dispensed prescription opioid analgesics, or related party] to [state] by reason of any judgment, consent decree, or settlement, after payment of any costs or fees required by court order;

(k) Recovery.—"Recovery" means an active process of continual growth that addresses the biological, psychological, social, and spiritual disturbances inherent in addiction and includes the following factors:

(1) The goal of improved quality of life and enhanced wellness as identified by the individual;

(2) An individual's consistent pursuit of abstinence from the substances or behaviors towards which pathological pursuit had been previously directed or which could pose a risk for pathological pursuit in the future;

(3) Relief of an individual's symptoms, including substance craving;

(4) Improvement of an individual's own behavioral control;

(5) Enrichment of an individual's relationships, social connectedness, and interpersonal skills; and

(6) Improvement in an individual's emotional self-regulation;[27]

(l) Substance use disorder.—"Substance use disorder" means a pattern of use of alcohol or other substances that meets the applicable diagnostic criteria delineated in the Diagnostic and Statistical Manual of Mental Disorders (DSM–5) of the American Psychiatric Association, or in any subsequent editions;[28]

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[26] *Diagnosis and Treatment of Drug Abuse in Family Practice – American Family Physician Monograph*, NAT'L INST. ON DRUG ABUSE, https://archives.drugabuse.gov/publications/diagnosis-treatment-drug-abuse-in-family-practice-american-family-physician-monograph/prevention.

[27] *Public Policy Statement on the Role of Recovery in Addiction Care*, AM. SOC'Y OF ADDICTION MED. (Apr. 11, 2018), https://www.asam.org/advocacy/find-a-policy-statement/view-policy-statement/public-policy-statements/2018/04/24/the-role-of-recovery-in-addiction-care.

[28] *Model Recovery Residence Certification Act*, Legis. Analysis and Pub. Pol'y Ass'n 11 (Feb. 2021), http://legislativeanalysis.org/wp-content/uploads/2021/03/LAPPA-Model-Recovery-Residence-Certification-Act-1.pdf.

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(m) Supplement.—"Supplement" means to add funding, consistent with Section IV(e) of this Act, for substance use disorder abatement infrastructure or a substance use disorder abatement program, service, support, or resource to ensure current-year funding exceeds the sum of federal, state, and local funds allocated in the previous fiscal year enacted state budget for such substance use disorder abatement infrastructure, program, service, support, or resource; and

(n) Treatment.—"Treatment" means an evidence-based practice or service to intervene upon, care for, manage, slow progression of, or support recovery from a substance use disorder or co-occurring mental health disorder. Treatment is individualized to address each person's medical needs and includes, but is not limited to, screening for and diagnosing substance use disorders and co-occurring mental or physical health disorders, as well as pharmacological and non-pharmacological therapeutic interventions for substance use disorders and co-occurring mental health disorders.

SECTION IV. CREATION OF [OPIOID LITIGATION PROCEEDS] FUND.

(a) Fund established.—The [Opioid Litigation Proceeds] Fund is hereby established in the state treasury. The Fund shall operate as a dedicated fund to be administered by the [state treasurer]. Monies in the fund shall not revert to the general fund of the state treasury. The [department] is authorized to create sub-funds or sub-accounts as may be necessary or appropriate to implement the purposes of this Act.

(b) Credits to Fund.—There shall be credited to the Fund:

(1) Proceeds received by [state] in connection with legal claims made against [manufacturers and distributors of prescription opioid analgesics, pharmacies that dispensed prescription opioid analgesics, and related parties], regardless of whether such proceeds are received as a lump sum or series of payments to be made over a period of time;

(2) Monies appropriated by, or transferred to, the Fund by the [legislature];

(3) Gifts, donations, grants, bequests, and other monies received by [state] on the Fund's behalf; and

(4) Any interest on monies in the Fund.

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(c) Permissible expenditures.—Monies in the Fund shall be spent only for the following substance use disorder abatement purposes, upon the approval of the Council:

(1) **[Optional]**: Statewide or community substance use disorder needs assessments to identify structural gaps and needs to inform expenditures from the Fund;

(2) Infrastructure required for evidence-based substance use disorder prevention, treatment, recovery, or harm reduction programs, services, and supports;

(A) **[Optional]**: Infrastructure may include: [list];

(3) Programs, services, supports, and resources for evidence-based substance use disorder prevention, treatment, recovery, or harm reduction;

(A) **[Optional]**: Such uses may include: [list];

(4) Evidence-informed substance use disorder prevention, treatment, recovery, or harm reduction pilot programs or demonstration studies that are not evidence-based but are approved by the Council as an appropriate use of monies for a limited period of time as specified by the Council;

(A) In considering evidence-informed pilot programs and demonstration studies, the Council shall assess whether the emerging evidence supports distribution of monies for such uses, or otherwise whether there is a reasonable basis for funding such uses with the expectation of creating an evidence base for such uses;

(B) [**Optional**]: Such uses may include: [list];

(5) Evaluations of effectiveness and outcomes reporting for substance use disorder abatement infrastructure, programs, services, supports, and resources for which monies from the Fund were disbursed, such as impact on access to harm reduction services or treatment for substance use disorders, or reduction in drug-related mortality;

(6) One or more data interfaces managed by [state agency/department/division] to aggregate, track, and report, free of charge and available online to the public, data on substance use disorder, overdoses, and drug-related harms; spending recommendations, plans and reports; and outcomes of programs, services, supports, and resources for which monies from the Fund were disbursed;

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(7) Expenses incurred in administering and staffing the Fund and the Council, provided that such expenses shall not exceed [eight (8) percent] of the Fund's balance on an annual basis; and

(8) Expenses associated with managing, investing, and disbursing monies in the Fund, provided that such expenses shall not exceed [two (2) percent] of the Fund's balance on an annual basis;

(d) Fund balance.—For purposes of subsections (c)(7) and (c)(8) of this Section, the Fund balance shall be determined as of [date] each year;

(e) Prospective use.—Unless otherwise required by controlling court order to refund to the federal government a portion of the Proceeds, monies in the Fund shall be used for prospective purposes and shall not be used to reimburse expenditures incurred prior to the effective date of this Act;

(f) Allocation.—Proceeds derived from any state settlement of claims against a [manufacturer or distributor of prescription opioid analgesics, pharmacy that dispensed prescription opioid analgesics, or related party] shall be allocated and disbursed only to those counties, cities, and localities that execute an agreement to participate in such settlement and adhere to the terms of such agreement. This restriction shall not preclude nor limit the allocation and disbursement of such settlement proceeds for the benefit of persons within counties, cities, and localities that do not execute an agreement to participate in such settlement or do not adhere to the terms of such agreement; and

(g) Types of entities.—Monies in the Fund shall be disbursed to both governmental and not-for-profit non-governmental entities.

(h) Disbursements.—Fund disbursements shall be made by the [Treasurer] upon the approval of the Council. The [Treasurer] shall not make or refuse to make any disbursement allowable under this subsection without the approval of the Council. The [Treasurer] shall adhere to the Council's decisions regarding disbursement of monies from the Fund so long as such disbursement is a permissible expenditure under subsection (c). The [Treasurer's] role in the distribution of monies as approved by the Council shall be ministerial and not discretionary.

(i) Expenditures supplementary.—Monies expended from the Fund for the purposes set forth in subsection (c) shall be supplemental to, and shall not supplant or take the place of, any

other funds, including insurance benefits or local, state, or federal funding, that would otherwise have been expended for such purposes. The [Treasurer] shall not disburse monies from the Fund during any [state] fiscal year unless the Governor and the leaders of the legislative chambers transmit to the Council a letter verifying that funds appropriated and allocated in such fiscal year's state budget for substance use disorder abatement infrastructure, programs, services, supports, and resources for prevention, treatment, recovery, and harm reduction are no less than the sum of the funds for such purposes appropriated and allocated in the previous fiscal year's state budget. All funds appropriated for substance use disorder abatement infrastructure, programs, services, supports, and resources for prevention, treatment, recovery, and harm reduction shall be made available for disbursement during the fiscal year for which they are appropriated and if not fully expended, shall be made available in each subsequent fiscal year until fully expended.

(j) Investment.—The [Treasurer] shall have the responsibility for the investment and reinvestment of monies in the Fund. On or before [date] each year, the [Treasurer] shall issue a public report, free of charge and available online, specifying:

(1) An inventory of Fund investments as of [date];

(2) The net income the Fund earned for the [prior fiscal year];

(3) The dollar amount and the percentage of the Fund balance incurred for expenses of administering and staffing the Fund and the Council during the [prior fiscal year]; and

(4) The dollar amount and the percentage of the Fund balance incurred for expenses associated with managing, investing, and disbursing monies in the Fund during the [prior fiscal year].

Commentary

The purpose of Section IV of the Act is to transfer state opioid litigation proceeds to a dedicated fund to separate those monies from the general treasury and increase the likelihood of use for substance use disorder prevention, treatment, recovery, or harm reduction.

Opioid litigation defendants are expected to offer lower settlement compensation to states whose counties and municipalities do not join the state in settling their claims against the defendants. To maximize settlement proceeds, state attorneys general have drafted, and are encouraging their

local governments to execute, joint settlement agreements. These agreements lay out how settlement proceeds would be allocated among the state and local governments and, in some cases, resource-sharing regions. For example, Colorado's proposed agreement between the state and local governments would allocate monies from the Fund among the state, participating local governments, and 19 regions.[29]

This Act encourages counties, cities, and localities to participate in state settlements by permitting the proceeds of such settlements to be allocated and disbursed only to those counties, cities, and localities that execute an agreement to participate in such settlement and adhere to the terms of such agreement, or for the benefit of residents in those counties, cities, and localities that execute an agreement to participate in such settlement and adhere to the terms of such agreement.

The role of the treasurer in disbursing monies from the fund is exclusively ministerial. That is, the treasurer follows directions and does not exercise discretion in performing such duty. As discussed in greater detail below, the Council will approve the discretionary decisions of the behavioral health agency on Fund administration.

Other states that introduced legislation or passed laws similar to this Act have taken different approaches to fund characterization. These approaches vary widely with respect to who is responsible for fund administration and oversight, who decides how the monies are spent, and the mechanism for spending. For example, monies in the Oklahoma fund may be expended by the attorney general to provide opioid-related grants authorized in the law.[30]

The Act permits opioid litigation proceeds to be spent on evidence-based and evidence-informed substance use disorder prevention, treatment, recovery, or harm reduction programs, services, supports, and resources. "Evidence-based" is defined in Section III of the Act. Evidence-based practices are specific approaches that have undergone rigorous scientific evaluation to statistically confirm that the intervention group has benefited more than the control group.[31] Once designated as evidence-based, a practice must be applied with fidelity, *i.e.*, to a similarly situated group in the same or a very similar way for the same duration as the intervention group in the scientific evaluation.[32] Gaining evidenced-based designation can be expensive. Implementing evidence-based approaches with fidelity can also be costly. Therefore, it may be important to allow monies to be spent on evidence-informed practices (also called emerging

[29] Phil Weiser, Att'y Gen., and Heidi Williams, Dir. of Opioid Response, Colorado Dep't of Law, Presentation on Opioid Response (Apr. 26, 2021).
[30] OKLA. STATE. ANN. tit. 74, §§ 30.1 to 30.8 (West 2021).
[31] *Evidence-based Programming: What Does it Actually Mean?*, CORNELL UNIV. (May 4, 2010), https://evidencebasedliving.human.cornell.edu/2010/05/04/evidence-based-programming-what-does-it-actually-mean/.
[32] *Implementing an Evidence-based Program with Fidelity*, CMTY. RSCH. CTR. FOR SENIOR HEALTH, https://www.evidencetoprograms.com/section-4-0.

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practices).[33] These programs are premised upon information and research, including evidence-based studies, and seek to develop and inform approaches that can be used with broader populations than the evidence base supports.[34]

Examples of evidence-based approaches include treating opioid use disorder with methadone, buprenorphine, or naltrexone; preventing HIV transmission among persons with opioid use disorder through syringe service programs; and providing peer recovery support services to persons in substance use disorder recovery.[35] Examples of evidence-informed approaches include using a mobile app to help increase retention in outpatient treatment for opioid use disorder and enrolling students in recovery high schools to help them sustain the therapeutic benefits they gained from their substance use disorder treatment experiences.[36]

Optional subsection (c)(1) allows a state that does not have a current state or community needs assessment surrounding substance use disorder, overdose, and drug-related harms to use the opioid litigation proceeds to conduct evaluations to inform future expenditures from the fund. An up-to-date assessment of a state's youth substance use prevention efforts may be especially advisable in light of the teen vaping epidemic, the availability of counterfeit pills adulterated with illicit fentanyl, and the lethality of illicit fentanyl.[37] Optional subsections (c)(2)(A) and (c)(3)(A) enable a state to enumerate the types of infrastructure, programs, services, supports, and resources deemed permissible expenditures of monies in their fund. For example, recently enacted Virginia legislation includes a list of activities that would qualify for financial support from the fund.[38]

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[33] *About the Evidence-based Practices Resource Center*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. (last updated Jan. 15, 2021), https://www.samhsa.gov/ebp-resource-center/about.

[34] M. Gail Woodbury and Janet Lynn Kuhnke, *Evidence-based Practice vs. Evidence-informed Practice: What's the Difference?*, 12 Wound Care Canada 18-21 (Spring 2014), https://www.researchgate.net/publication/260793333_Evidence-based_Practice_vs_Evidence-informed_Practice_What's_the_Difference.

[35] *See Principles of Drug Addiction Treatment: A Research-based Guide,* NAT'L INST. ON DRUG ABUSE (Jan. 2018), https://www.drugabuse.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/evidence-based-approaches-to-drug-addiction-treatment/pharmacotherapies/opioid; *Treatment, Recovery, and Harm Reduction*, ASTHO, https://my.astho.org/opioids/strategies/treatment#; and *What are Peer Recovery Support Services?*, U.S. DEP'T OF HEALTH AND HUMAN SERV. (2009), https://store.samhsa.gov/sites/default/files/d7/priv/sma09-4454.pdf#:~:text=The%20peer%20recovery%20support%20services%20developed%20by%20the,of%20those%20seeking%20to%20achieve%20or%20sustain%20recovery.

[36] *See Emerging Practices*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. (last updated Apr. 23, 2020), https://www.samhsa.gov/ebp-resource-center/emerging-practices; and D. Paul Moberg and Andrew J. Finch, *Recovery High Schools: A Descriptive Study of School Programs and Students*, 2 J. OF GROUPS IN ADDICTION & RECOVERY 128-161 (Oct. 11 2008), https://pubmed.ncbi.nlm.nih.gov/19165348/.

[37] *FDA calls teen vaping an "epidemic," threatens to pull products off the market*, CBS NEWS (Sept. 12, 2018), https://www.cbsnews.com/news/fda-warns-juul-e-cigarettes-teen-vaping-epidemic/; *DEA Issues Warning over Counterfeit Pills*, DRUG ENFORCEMENT ADMIN. (May 21, 2021), https://www.dea.gov/press-releases/2021/05/21/dea-issues-warning-over-counterfeit-pills.

[38] VA. CODE ANN. § 2.2-2370 (West 2021).

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Virginia's list includes, "Support people in recovery from opioid use disorder and any co-occurring substance use disorder or mental health conditions through evidence-based or evidence-informed methods, programs, or strategies." Examples of recovery-specific infrastructure, programs, services, supports, and resources supported by emerging evidence include recovery community organizations and centers, collegiate recovery programs, recovery-supportive housing, and rural recovery services, which include digital programming and transportation.

Likewise, the settlement agreement proposed by three major opioid distributors contains a list of priority strategies and a secondary, non-exclusive list of approved uses of the settlement proceeds.[39] Appendix B to North Carolina's memorandum of agreement with local governments provides a thorough and detailed list of prevention, treatment, recovery, and harm reduction strategies to address opioid use disorder and co-occurring substance use and/or mental health disorders. North Carolina's list of activities includes infrastructure and staffing, data collection and evaluation, and workforce development.[40]

The Act limits Council administration and staffing costs to eight percent of the Fund's balance on an annual basis. This percentage is consistent with the indirect cost limitations set forth in certain federal grants.[41] The Act also limits expenses associated with managing, investing, and disbursing monies in the Fund to two percent of the Fund's balance on an annual basis. This percentage is significantly higher than the average expense ratios in 2019 for U.S. exchange-traded funds and mutual funds (0.45 percent).[42] In addition to covering investment fees, it provides a budget for the treasurer to perform the duties required in the Act. These administrative and investment cost limitations ensure that 90 percent of the Fund's balance during a specific year remains invested for future use or available for direct expenditure during that year to support infrastructure, programs, services, supports, and resources for substance use disorder prevention, treatment, recovery, and harm reduction.

The dollar value of opioid litigation proceeds is expected to be high. Florida, for example, expects to receive $1.6 billion over a term of 18 years as part of its settlements with one opioid manufacturer and three distributors.[43] Under the Act, an opioid litigation proceeds fund with a

[39] OFF. OF ATT'Y GEN. JOSH SHAPIRO, *supra* note 20.
[40] STATE OF N. C., MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF NORTH CAROLINA AND LOCAL GOVERNMENTS ON PROCEEDS RELATING TO THE SETTLEMENT OF OPIOID LITIGATION – FINAL DRAFT (Apr. 27, 2021), https://ncdoj.gov/wp-content/uploads/2021/04/Opioid-MOA.pdf.
[41] *FY 2021 Grants to Prevent Prescription Drug/Opioid Overdose-related Deaths*, U.S. DEP'T OF HEALTH AND HUMAN SERV., SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. (2021), https://www.samhsa.gov/sites/default/files/grants/pdf/fy-2021-pdo-foa.pdf.
[42] E. Napoletano and Benjamin Curry, *Expense Ratio: The Fee You Pay for Funds*, FORBES ADVISOR (July 23, 2021, 1:06 p.m.), https://www.forbes.com/advisor/investing/what-is-expense-ratio/.
[43] *See* Dave Dunwoody, *Florida to Get $1.6B in Opioid Settlement*, WUWF 88.1 (Sept. 10, 2021, 1:56 PM), https://www.wuwf.org/florida-news/2021-09-10/florida-to-get-1-6b-in-opioid-settlement; *Distributor Settlement*

balance of $500 million would be permitted to expend up to eight percent, which equates to $40 million, in one year on fund administration and staffing expenses. These administrative costs would divert monies away from lifesaving infrastructure, programs, services, supports, and resources for substance use disorder prevention, treatment, recovery, and harm reduction. To better optimize the public health impacts of the opioid litigation proceeds, it may be advisable to limit administration and staffing expenses to a specific dollar figure that reflects the actual or anticipated additional costs of implementing the opioid litigation proceeds statute. This cap could increase annually in an amount not to exceed the past-year rise in the regional Consumer Price Index.

SECTION V. CREATION OF [OPIOID LITIGATION PROCEEDS] COUNCIL.

(a) Council established.—There is established an [Opioid Litigation Proceeds] Council.

(b) Purpose.—The purpose of the [Opioid Litigation Proceeds] Council is to ensure that proceeds received by this state pursuant to Section IV(b) of this Act are allocated and spent on [state] substance use disorder abatement infrastructure, programs, services, supports, and resources for prevention, treatment, recovery, and harm reduction; and to ensure robust public involvement, accountability, and transparency in allocating and accounting for the monies in the Fund.

(c) Appointment.—

(1) The Council shall be composed of [eleven (11] voting members and one non-voting ex-officio member. The [Secretary of Health] shall serve as the non-voting ex-officio member;

(2) Voting members must be residents of this state;

(3) A Council chair shall be appointed by the Governor;

(4) The Council shall be appointed as follows:

(A) [One (1)] by the Attorney General;

(B) [One (1)] by the [President] of the Senate;

(C) [One (1)] by the Speaker of the [House of Representatives];

(D) [Two (2)] by the [Association of Counties]; and

Agreement, OFF. OF ATT'Y GEN. JOSH SHAPIRO (July 2021), https://www.attorneygeneral.gov/wp-content/uploads/2021/07/2021-07-21-Final-Distributor-Settlement-Agreement.pdf; *Janssen Settlement Agreement*, OFF. OF ATT'Y GEN. & REPORTER HERBERT H. SLATERY III (July 2021), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/opioids-settlements/janssen-settlement.pdf.

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(E) [Five (5)] upon application to, and approval by, the [director of the state agency/department/division].

(d) Membership.—

(1) Council membership shall include persons who have experience in providing substance use disorder prevention, treatment, recovery, and harm reduction services;

(2) Council membership shall include persons, to the extent practicable, who have expertise, experience, or education in public health policy or research; medicine; mental health services; or public budgeting;

(3) Council membership shall also include individuals with lived experience with substance use disorder recovery; family members of persons who have, or decedents who had, a substance use disorder; and representatives of communities that have been disproportionately impacted by substance use and disparities in access to care or health outcomes; and

(4) Council membership shall represent the geographic regions of the state and shall include persons who reflect the racial and ethnic diversity of the state.

(e) Term of membership.—

(1) Upon creation of the Council, the members appointed under subsections (c)(4)(B) and (c)(4)(E) shall serve an initial two-year term, and the members appointed under subsections (c)(4)(C) and (c)(4)(D) shall serve an initial one-year term to enable the staggering of terms.

(2) With the exception of the initial terms established in subsection (e)(1), each appointed member of the Council shall serve a three-year term, with terms ending on [date] of each year. The beginning of an initial term shall be deemed to be [date] of the calendar year in which the appointment occurs, regardless of whether the actual appointment date occurs before or after [date] of that year.

(f) Vacancy.—In the event of a vacancy in the Council membership, the vacancy shall be filled in the manner of the original appointment for the remainder of the term. For the purposes of reappointment, any partial term filled after a vacancy shall be considered a full term.

(g) Term limits.—A Council member shall serve no more than two terms.

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(h) Removal.—Any member who is appointed may be removed by the appointing authority for failure to attend at least one-half (1/2) of the scheduled meetings in any one-year period, or for unethical, dishonest, or bad faith conduct.

(i) Council duties and powers.—

(1) The Council shall have the following duties and powers:

(A) Recommend and approve policies and procedures for administration of the Council and for the application, awarding, and disbursement of monies from the Fund, to be used for the purposes set forth in Section IV(c);

(B) Recommend and approve goals, objectives and their rationales, sustainability plans, and performance indicators relating to:

(i) Substance use disorder prevention, treatment, recovery, and harm reduction efforts;

(ii) Reducing disparities in access to prevention, treatment, recovery, and harm reduction programs, services, supports, and resources; and

(iii) Improving health outcomes in traditionally underserved populations, including, but not limited to, those who live in rural or tribal communities, persons of color, and formerly incarcerated individuals.

(C) Approve awards of monies from the Fund exclusively for permissible expenditures set forth in Section IV(c); and

(D) Approve suspensions of allocations of monies from the Fund to recipients found by the Council or the [state agency/department/division] to be substantially out of compliance with Council policies or procedures; or the policies, procedures, rules, or regulations of the [state agency/department/division]; or to have used such awards for a purpose other than an approved purpose. The Council may resume approval of such allocations once the Council or the [state agency/department/division] has determined the recipient has adequately remedied the cause of such suspension;

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(2) The Council shall approve allocations of monies from the Fund across the [geographic regions] of the state, considering the following criteria, among others:

(A) The number of people per capita with a substance use disorder in a [geographic region];

(B) Disparities in access to care in a [geographic region] that may preclude persons with a substance use disorder from obtaining a diagnosis or receiving evidence-based treatment;

(C) The number of overdose deaths per capita in a [geographic region];

(D) The infrastructure, programs, services, supports, or other resources currently available to individuals with substance use disorders in a [geographic region]; and

(E) Disparities in access to care and health outcomes in a [geographic region].

(j) Staff and administration.—The [state agency/department/division] shall:

(1) Employ a full-time executive director of the Council to plan and support the meetings and functions of the Council and direct the day-to-day activities required to ensure that Proceeds received by this state pursuant to Section IV(b) of this Act are allocated and spent on [state] substance use disorder abatement infrastructure, programs, services, supports, and resources for prevention, treatment, recovery, and harm reduction; and to ensure robust public involvement, accountability, and transparency in allocating and accounting for the monies in the Fund;

(2) Provide public health research and policy expertise, support staff, facilities, technical assistance, and other resources to assist the executive director of the Council with the meetings and functions of the Council and the day-to-day activities required to ensure that proceeds received by this state pursuant to Section IV(b) of this Act are allocated and spent on [state] substance use disorder abatement infrastructure, programs, services, supports, and resources for prevention, treatment, recovery, and harm reduction; and to ensure robust public involvement, accountability, and transparency in allocating and accounting for the monies in the Fund;

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(3) Utilize, where feasible, appropriations from the general fund and existing infrastructure, programs, services, supports, or other resources to address substance use disorders, overdoses, and drug-related harms in [state];

(4) Prepare for review and approval by the Council goals, objectives and their rationales, sustainability plans, and performance indicators relating to substance use disorder prevention, treatment, recovery, and harm reduction efforts and reducing disparities in access to prevention, treatment, recovery, and harm reduction programs, services, supports, and resources;

(5) Evaluate applications and recommend to the Council awards and disbursements of monies from the Fund exclusively for permissible expenditures set forth Section IV(c);

(6) Maintain oversight over the expenditure of monies from the Fund to ensure monies are used exclusively for the purposes set forth in the Section IV(c);

(7) Recommend to the Council suspensions of allocations of monies from the Fund to recipients found by the [state agency/department/division] to be out of compliance with Council policies or procedures; the policies, procedures, rules, or regulations of the [state agency/department/division]; or to have used such awards for a purpose other than an approved purpose;

(8) Require recipients of monies from the Fund to provide an annual report to the Council detailing the effectiveness of infrastructure, programs, services, supports, and/or resources funded, including, at a minimum:

(A) How the recipient used the monies for their intended purposes;

(B) The number of individuals served by race, age, gender, and/or other demographic factor reported in a de-identified manner;

(C) A specific analysis of whether the infrastructure, program, service, support, or resources reduced mortality and/or improved prevention, treatment, harm reduction, or recovery outcomes; and

(D) If a plan to ensure the sustainability of the infrastructure, program, service, support, or resources funded exists, a summary of such plan.

(9) Implement and publish on the Council or [state agency/department/division] website, policies and procedures for administration of the Council and for the

application, awarding, and disbursement of monies from the Fund, to be used for the purposes set forth in Section IV(c); and

(10) Publish on the Council or [state agency/department/division] website an annual report, free of charge and available online to the public, of the Council's activities and effectiveness pursuant to Section VII of this Act.

(k) Meetings.—

(1) The Council shall hold at least [four] public meetings per year. A meeting may be called by the chair or by a majority of the Council's members. Members may attend meetings in person, remotely by audiovisual means, or, upon approval by the chair, by audio-only means;

(2) Meetings shall be publicized and held in a manner reasonably designed to facilitate in-person and live-stream attendance by residents throughout the state. The Council shall function in a manner consistent with [statutory reference to state's open meetings law] and with the federal Americans with Disabilities Act, as amended.

(l) Voting.—For each meeting of the Council, a majority of the appointed voting members shall constitute a quorum for the transaction of business. If there is a quorum, then all actions of the Council shall be taken by an affirmative vote of a majority of the members present at the meeting. Each voting member shall have one vote.

(m) Compensation.—Each member of the Council who is not an officer or employee of this state is entitled to receive a stipend of not more than [$] for each day or portion of a day spent on the meetings of the Council. Additionally, members may be reimbursed for their actual and necessary expenses incurred in carrying out their duties as members of the Council pursuant to [statutory reference].

(n) Conflicts of interest.—Members must disclose to the Council, refrain from participating in discussions, and recuse themselves from voting on any matter before the Council if members have a conflict of interest.

(o) Termination.—The Council will terminate when all monies received pursuant to Section IV(b) have been received and disbursed unless the [attorney general] certifies that additional monies are anticipated.

(p) Website.—[State agency/department/division] shall create and maintain a website, free of charge and available to the public, which shall include, at a minimum, Council meeting

attendance rolls and minutes, including, but not limited to, records of all votes on expenditures of monies from the Fund; recipient agreements and reports required under subsection (j)(8); policies and procedures approved by the Council; Council-related policies, procedures, rules, or regulations adopted by [state agency/department/division]; and the Council's annual reports.

Commentary

Council member appointments are made across multiple branches of government to ensure that no single branch has sole control over the selection of Council members. Additionally, an association of counties is also granted the power to appoint members to ensure that counties are adequately represented when determining how monies from the Fund are distributed.[44] Some states may choose to insert alternative language (*e.g.*, municipal league) or take a different approach, given that not all states are made up of counties or have associations of counties.[45] An application process enables residents who are interested in serving on the Council to apply for selection by the state agency staffing the Council.

Some states place control of spending opioid litigation proceeds at the county or regional level.[46] This approach allows for more localized input and decision-making on the use of proceeds. It entails administrative processes and expenses within each of the counties or regions to establish and fulfill the duties of the regional advisory or oversight councils. The creation of new regions that are distinct from existing state behavioral health or Medicaid regions could yield difficulties in coordination and planning. Regardless of the approach, enacting legislatures should consider ways to include individuals on the Council who represent counties or other political subdivisions in a way that limits administrative expenses and the risk of the majority of funding being allocated within a state's population centers.

The Council is also made up of members who represent stakeholders and others who can monitor, review, and evaluate programs and services and advocate for individuals with substance use disorders across the state. Substance use disorders have far-reaching impacts on society, and viewpoints on how to best mitigate their effects can vary widely. As such, this Act requires that the Council be composed of a diverse body of individuals with varying expertise and experiences. The intent of this requirement is to ensure inclusion so that differing perspectives are considered by the Council when assessing and voting on distribution of monies. Moreover, substance use disorders can disproportionately affect certain communities within a state (*e.g.*, communities of color, rural communities), and therefore, the Act also requires that the Council be representative of the geographic regions and include those who reflect the racial and ethnic

[44] State associations of counties are professional organizations that support county officials and represent, promote, and protect the interests of counties within their state.
[45] COUNTY EXECUTIVES OF AMERICA, https://www.countyexecutives.org/state-associations (last visited July 7, 2021).
[46] Phil Weiser et al., *supra* note 29.

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diversity of the state. Coordination among the state, tribes, regions, counties, and other localities will be necessary to optimize the statewide benefits of expenditures from the Fund.

The size of the councils or similar bodies provided for in proposed and enacted state opioid litigation proceeds legislation, laws, and agreements generally ranges between 11[47] and 15[48] members, although some states provide for larger councils.[49] Of 10 states surveyed, the mean membership size is 14.[50] This Act establishes a 12-person council, eleven of whom may vote on council matters. Membership size should be sufficient to satisfy the Act's diversity requirements. However, states should bear in mind that very large groups could create a situation where there is significant disagreement among members leading to stalemates, lack of efficiency, or a high rate of membership turnover.

Similarly, proposed and enacted state opioid litigation proceeds legislation, laws, and agreements vary widely regarding the length and structure of membership terms. Proposed legislation in Kansas does not define the length of the term but provides that each member serves "at the pleasure of the appointing authority."[51] Multiple states propose or establish two-year terms.[52] Other states set forth more complex term structures, including staggering of terms, different initial term lengths, or varying term lengths based on the type of member appointed.[53]

The Act establishes three-year membership terms and a two-term limit. Certain initial members serve one-year terms, while other initial members serve two-year terms.[54] This staggering of terms ensures that the entire Council membership does not turn over at once. A term length of three years is likely long enough not to create a burden on the appointing parties, but not so long as to prevent adequate turnover and the appointment of new members with unique expertise, experiences, and perspectives not previously represented on the Council.

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[47] Tori et al., *supra* note 19.

[48] *See* OKLA. STAT. ANN. tit. 74, §§ 30.1 to 30.8 (West 2021); VA. CODE ANN. §§ 2.2-212, 2.2-507.3, 2.2-2365 to -2376, and 51.1-124.40 (West 2021); 2021 Ky. Acts Ch. 113; S.B. 264, 2021-2022 Leg. Sess. (Kan. 2021); S. 1827, 87th Leg., 1st Called Sess. (Tex. 2021); S.C. Res. 12, 1st Extra. Sess. (La. 2020); H.P. 1277, 130th Leg., 1st Spec. Sess. (Me. 2021); TENN. CODE ANN. §§ 9-4-6001 and 33-11-101 to 33-11-106 (West 2021).

[49] *See* COLO. REV. STAT. ANN. § 27-81-118 (West 2021); S.B. 390, 81st Sess. (Nev. 2021); N.Y. STATE FIN. § 99-nn (McKinney 2021) and N.Y. MENTAL HYG. § 25.18 (McKinney 2021); OHIO ATT'Y GEN., ONE OHIO MEMORANDUM OF UNDERSTANDING, https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/One-Ohio-MOU-Signed-by-AG-and-Gov.aspx.

[50] *See* OKLA. STAT. ANN. tit. 74, §§ 30.1 to 30.8 (West 2021); VA. CODE ANN. §§ 2.2-212, 2.2-507.3, 2.2-2365 to -2376, and 51.1-124.40 (West 2021); 2021 Ky. Acts Ch. 113; S.B. 264, 2021-2022 Leg. Sess. (Kan. 2021); S. 1827, 87th Leg., 1st Called Sess. (Tex. 2021); S.C. Res. 12, 1st Extra. Sess. (La. 2020); H.P. 1277, 130th Leg., 1st Spec. Sess. (Me. 2021); TENN. CODE ANN. §§ 9-4-6001 and 33-11-101 to 33-11-106 (West 2021); S.B. 390, 81st Sess. (Nev. 2021); N.Y. STATE FIN. § 99-nn (McKinney 2021) and N.Y. MENTAL HYG. § 25.18 (McKinney 2021).

[51] S.B. 264, 2021-2022 Leg. Sess. (Kan. 2021).

[52] *See* 2021 MASS. ACTS CH. 309; S. 390, 81st Sess. (Nev. 2021); and 2021 Ky. Acts Ch. 113.

[53] *See* H.P. 1277, 130th Leg., 1st Spec. Sess. (Me. 2021) and TENN. CODE ANN. §§ 9-4-6001 and 33-11-101 to 33-11-106 (West 2021).

[54] TENN. CODE ANN. §§ 9-4-6001 and 33-11-101 to 33-11-106 (West 2021).

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State opioid litigation proceeds legislation, laws, and agreements that establish councils or similar bodies are split between: (1) granting the body the authority to decide how monies are spent; and (2) placing the body in an advisory role (*i.e.*, providing recommendations) to the state legislature or a state agency ultimately responsible for deciding how the monies are distributed. When the body plays an advisory role, the body meets, deliberates, votes, and establishes a list of recommendations. It then provides the recommendations to a completely different body that then has its own process for deciding how the monies are spent.

This Act grants the Council decision-making and approval authority versus placing it in an advisory capacity. This approach is intended to streamline the process and prevent undue delays in deciding how monies are distributed. If states choose to make the Council advisory in nature, they should ensure that the administrative process is not so complicated that the actual spending of the monies is unduly delayed. It may be necessary for states, counties, or other localities that have enacted restrictions on the availability of evidence-based substance use disorder treatment or harm reduction services, such as certificate of need requirements for opioid treatment programs, to reconsider such restrictions if the Council provides conflicting recommendations or approvals.

State opioid litigation proceeds legislation, laws, and agreements establish varying requirements with respect to how often a council or similar body must meet each year. Some states do not require a minimum number of meetings and merely require that the council "meet as necessary"[55] or "throughout the year" as called by the council chair.[56] Other states require a minimum number of meetings, with some allowing the flexibility to call more meetings as necessary. In these states, the minimum number of annual meetings ranged from one to four times per year (*e.g.*, "annually or more frequently at the call of the chairman"[57]; "at least twice within each calendar year"[58]; "at least four times annually"[59]; and "quarterly"[60]).

The minimum number of meetings required should be frequent enough to adapt to changing needs or circumstances. For example, New York's law provides that "[t]he board shall meet quarterly, to ensure that recommendations are updated and consistent with the needs of the state."[61] Any such requirement should not be burdensome to the individuals who have agreed to be members. The Act seeks to balance the need to adapt to changing circumstances with potential burdens on the membership by establishing a minimum of four meetings per year with the flexibility to call additional meetings as necessary.

[55] IDAHO CODE ANN. § 57-825 (West 2021).
[56] S.B. 390, 81st Sess. (Nev. 2021).
[57] VA. CODE ANN. §§ 2.2-212, 2.2-507.3, 2.2-2365 to -2376, and 51.1-124.40 (West 2021).
[58] 2021 Ky. Acts Ch. 113; H.P. 1277, 130th Leg., 1st Spec. Sess. (Me. 2021).
[59] H. 5129, 191st Gen. Ct. (Mass. 2019-2020) and TENN. CODE ANN. §§ 9-4-6001 and 33-11-101 to 33-11-106 (West 2021).
[60] N.Y. STATE FIN. § 99-nn (McKinney 2021) and N.Y. MENTAL HYG. § 25.18 (McKinney 2021).
[61] *Id*.

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As a result of the COVID-19 pandemic, group meetings in 2020 were generally held virtually or at alternative locations from usual meeting places. This Act provides the flexibility to attend meetings in-person or remotely by audiovisual means. The Act grants the Council chair the authority to permit member participation in Council meetings by audio-only means recognizing that broadband access required for audiovisual participation may be limited in some rural areas. Additionally, states may choose to include additional provisions regarding in-person meeting locations to ensure that members do not have to travel far distances for every meeting throughout the year. For example, Minnesota's law states: "The chair shall convene meetings at different locations in the state to provide geographic access and shall ensure that at least one-half of the meetings are held at locations outside of the seven-county metropolitan area."[62] Similarly, Tennessee's law provides: "The council shall meet at the call of the chair and not less than four (4) times per year. The meeting location shall rotate among locations in each of the three (3) grand divisions. Members may attend meetings in person or remotely by audiovisual means."[63]

Additionally, all states have open meeting laws that provide transparency to the public regarding regulatory meetings and decisions.[64] These laws guarantee access by the public to meetings of governing bodies, including public records for their decisions and records.[65] The Act requires that the Council's meetings be open to residents of the state. For additional transparency, the Act requires the agency staffing the Council to create and maintain a public website, which shall include Council minutes, attendance rolls, and votes, including records of all votes on funding requests, funding awards, and grantee agreements and reports.

Most states that have introduced or passed opioid litigation proceeds legislation establishing an advisory council or similar body prohibit compensation of members while allowing for reimbursement of expenses.[66] A ban on compensation potentially serves as a barrier to diversifying membership by discouraging participation by individuals whose expertise is their lived experience, are from lower socio-economic backgrounds, or represent a community disproportionately impacted by substance use disorders. For instance, community members who were supposed to serve on various councils and taskforces during the COVID-19 pandemic were not able to do so because they did not possess the equipment to virtually attend meetings, could not afford internet access, or could not afford to take time off from work to fulfill their membership duties. Additionally, under the Act, the Council is granted a significant amount of responsibility. Therefore, states should consider providing compensation for time spent preparing for, and participating in, Council meetings. This provision of the Act is based on Nevada's law, which provides that, "Each member of the Advisory Committee who is not an officer or employee of this State is entitled to receive a salary of not more than $80, as fixed by the

[62] MINN. STAT. ANN. § 256.042 (West 2021).
[63] TENN. CODE ANN. §§ 9-4-6001 and 33-11-101 to 33-11-106 (West 2021).
[64] Alex Aichinger, *Open Meeting Laws and Freedom of Speech*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1214/open-meeting-laws-and-freedom-of-speech.
[65] *Id*.
[66] *See* N.Y. STATE FIN. § 99-nn (McKinney 2021) and N.Y. MENTAL HYG. § 25.18 (McKinney 2021); 2021 Ky. Acts Ch. 113; and S.B. 264, 2021-2022 Leg. Sess. (Kan. 2021).

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Department [of Health and Human Services], for each day or portion of a day spent on the business of the Advisory Committee."[67]

Councils and similar bodies often consist of appointed individuals who do not hold public office and do not have established office spaces or support staffs. Therefore, many states require certain government offices, such as the state department of health and human services, to provide the council with the support staff, office space, or other resources that they might need to perform their duties. For example, the law in Minnesota provides that, "[t]he commissioner of human services shall provide staff and administrative services for the advisory council."[68] Whereas New York requires "any . . . relevant agency that provides or regulates eligible expenditures shall provide any necessary staff, resources and technical assistance to assist with the functions of the advisory board."[69] Likewise, this Act allows for the provision of support staff, facilities, technical assistance, and other resources to assist with the functions of the Council.

SECTION VI. COURT ORDER.

(a) In general.—The Council shall disburse monies from the Fund in a manner consistent with the limitations on uses of litigation proceeds set forth in any controlling court order.

(b) Exceptions.—

(1) In the event a controlling court order permits expenditures other than or in excess of expenditures authorized under Section IV(c), the Council shall adhere to the limitations on use of monies set forth in Section IV(c).

(2) In the event Section IV(c) permits expenditures other than or in excess of those authorized in a controlling court order, the Council shall adhere to the limitations on use of monies set forth in the court order.

(3) In the event a controlling court order allocates litigation proceeds among [geographic regions], Section V(i)(2) of this Act shall not apply, and the Council shall disburse monies from the Fund according to the allocations set forth in the court order.

Commentary

State attorneys general have instituted and control states' civil lawsuits against prescription opioid analgesic manufacturers and distributors, pharmacies that dispensed prescription opioid analgesics, and related parties. As the state officials authorized to institute and control civil litigation on behalf of the state, attorneys general direct settlement negotiations and execute

[67] S.B. 390, 81st Sess. (Nev. 2021).
[68] H.F. 400, 91st Leg. (Minn. 2019).
[69] S.B. 7194, 2020-2021 Leg. Sess. (N.Y. 2021).

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settlement agreements. Upon settlement, court orders incorporate the terms of settlement agreements.

This Act establishes the priorities of the legislature regarding the use and allocation of opioid litigation proceeds. It is reasonable to expect that, if this Act were enacted, the state attorney general would strive to model a settlement agreement that reflects the will of the legislature. State attorneys general are expected to follow state law, but a law setting the terms of a civil litigation settlement agreement could result in intra-governmental or constitutional conflicts.

Therefore, this section clarifies how conflicts between the legislature's intentions and a controlling court order should be resolved. Specifically, in light of the overarching objective of ensuring that state opioid litigation proceeds address opioid and other substance use disorders, overdoses, and drug-related harms, the fundamental principle for resolving differences between the Act and a controlling court order is to follow the terms of the court order unless it exceeds the bounds of the Act. Some local governments have filed separate lawsuits against the same defendants involved in state litigation. This Act creates a Fund to separate from the general fund, for proceeds of state -- but not local -- lawsuits against opioid supply chain defendants.

SECTION VII. REPORTING.

(a) Annual report.—Not later than [date] of each year, beginning one year after the initial deposit of proceeds into the Fund, [state agency/department/division] shall provide a written report to the [governor, speaker of the assembly, president of the senate, and attorney general] detailing the Council's activities during the prior calendar year. The report shall be published on the Council or [state agency/department/division] website.

(b) Required elements.—The written annual report on the Council's activities shall include, at a minimum:

(1) The opening and closing balance of the Fund for the calendar year;

(2) An accounting of all credits to, and expenditures from, the Fund;

(3) The name and a description of each recipient of monies from the Fund, and the amount awarded to such recipient;

(4) A description of each award's intended use, including the specific program, service, or resource funded, the population served, and the measures that the recipient will use to assess the impact of the award;

(5) The primary criteria used to determine each recipient and its respective award amount;

(6) A summary of information included in the recipient report required under Section V(j)(8);

(7) All applications for an award of monies from the Fund received during the calendar year;

(8) A description of any finding or concern as to whether all monies disbursed from the Fund, other than expenses authorized under Section IV(c)(7) and Section IV(c)(8), supplemented, and did not supplant or replace, any existing or future local, state, or federal government funding; and

(9) The performance indicators and progress toward achieving the goals and objectives developed under Section V(i)(1)(B) of this Act, including metrics on improving outcomes and reducing mortality and other harms related to substance use disorders.

SECTION VIII. RULES AND REGULATIONS.

Within [four (4)] months from the date of enactment of this Act, the [state agency/department/division], shall promulgate rules and regulations necessary to implement its responsibilities under this Act, including but not limited to, guidelines and requirements related to providing staff, facilities, technical assistance, and other resources to assist with the meetings and functions of the Council.

Commentary

The Act provides four months for the state agency that staffs and assists the Council to promulgate rules and regulations necessary to implement agency responsibilities under the Act. The urgent need to address high rates of overdoses supports expediting the regulatory timeline to enable the Council to distribute opioid litigation proceeds as soon as possible to establish, sustain, and expand infrastructure, programs, services, supports, and resources for substance use disorder prevention, treatment, recovery, and harm reduction.

SECTION IX. SEVERABILITY.

If any provision of this Act or application thereof to any circumstance is held invalid, the remaining provisions of this Act shall not be affected nor diminished.

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SECTION X. EFFECTIVE DATE.

This Act shall be effective on [specific date or reference to normal state method of determination of the effective date] and shall apply to any judgment, consent decree, or settlement finalized on or after [date].

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ABOUT THE LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

Based in Washington D.C., and led by and comprised of experienced attorneys, the Legislative Analysis and Public Policy Association is a 501(c)(3) nonprofit organization whose mission is to conduct legal and legislative research and analysis and draft legislation on effective law and policy in the areas of public safety and health, substance use disorders, and the criminal justice system.

LAPPA produces timely model laws and policies that can be used by national, state, and local public health, public safety, and substance use disorder practitioners who want the latest comprehensive information on law and policy as well as up-to-the-minute comparative analyses, publications, educational brochures, and other tools ranging from podcasts to fact sheets. Examples of topics on which LAPPA has assisted stakeholders include naloxone laws, law enforcement/community engagement, alternatives to incarceration for those with substance use disorders, medication-assisted treatment in correctional settings, and the involuntary commitment and guardianship of individuals with alcohol or substance use disorders.


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