

# MODEL FENTANYL TEST STRIP AND OTHER DRUG CHECKING EQUIPMENT ACT

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LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

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## SECTION I. SHORT TITLE.

This Act may be referred to as the “Model Fentanyl Test Strip and Other Drug Checking Equipment Act,” “the Act,” or “Model Act.”

## SECTION II. LEGISLATIVE FINDINGS AND PURPOSE.

(a) Legislative findings.—The [legislature]<sup>1</sup> finds that:

- (1) Drug overdoses, both fatal and non-fatal, remain a profoundly serious problem in the United States and [state]. More than 107,000 individuals in the United States died of a drug overdose during 2021. This number is 50 percent higher than the number of individuals who died from drug overdose just two years prior;<sup>2</sup> [Insert state-specific statistics, if preferred.]
- (2) An increasing percentage of U.S. drug overdose deaths involve synthetic opioids, particularly illicitly manufactured fentanyl and fentanyl analogs, and stimulants with abuse potential, such as methamphetamine.<sup>3</sup>
- (3) According to Centers for Disease Control and Prevention (CDC) statistics, from 2014 to 2021, the percentage of overdose deaths involving synthetic opioids increased from 12 percent to 66 percent, while the percentage of overdose deaths involving stimulants increased from 9 percent to 30 percent.<sup>4</sup> [Insert state-specific statistics, if preferred.]
- (4) There are several reasons for the increase in opioid- and stimulant-involved fatal overdoses. Synthetic opioids are highly potent and increasingly available within the U.S. These drugs are found in the supplies of other drugs, including as pills pressed to look like legitimate pharmaceuticals or in other drugs that a user has no reason to

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<sup>1</sup> 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.

<sup>2</sup> *Provisional Drug Overdose Death Counts*, CENTERS FOR DISEASE CONTROL & PREVENTION (Feb. 16, 2022), <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (comparing fatal drug overdoses for the year ending December 2019 (72,151) with the year ending December 2021 (107,622)).

<sup>3</sup> Christine L. Mattson et al., *Trends and Geographic Patterns in Drug and Synthetic Opioid Overdose Deaths — United States, 2013–2019*, CENTERS FOR DISEASE CONTROL & PREVENTION (Feb. 12, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7006a4.htm>.

<sup>4</sup> *Provisional Drug Overdose Death Counts*, *supra* note 2 (using the data dashboard on the webpage to: (1) determine the number of overdose deaths involving the two drug types during the 12-month periods ending January 31, 2015 (the earliest time period available) and December 31, 2021; and (2) compare those numbers to the total number of drug overdose deaths in the same 12-month periods). Note that a single overdose death may involve multiple drug types.

believe contain opioids. Additionally, there is increased potency, availability, and affordability of opioids and stimulants in recent years.<sup>5</sup>

- (5) Several factors play a role in whether ingesting a substance will lead to an overdose, including the type(s) of drugs present in the substance ingested, the dosage or concentration of the drug(s) present, and whether the substance contains unexpected drugs or adulterants in addition to, or in lieu of, the intended drug;<sup>6,7</sup>
- (6) An individual may be able to ingest drugs more safely, and with less risk of overdose, by using drug checking equipment to gather information about the factors identified in subsection (a)(5);
- (7) Studies show that drug checking may favorably influence an individual's intended and actual drug use behaviors, in the form of ingesting a smaller amount of drug or using more slowly, keeping naloxone nearby, changing the method of administration, using with someone else, or not using the drug at all at that time;<sup>8</sup>

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<sup>5</sup> Mattson, *supra* note 3. For example, in April 2022, the administrator of the Drug Enforcement Administration issued a notice describing seven mass overdose events between January 28 and March 10, 2022. In each instance, individuals unknowingly ingested fentanyl when intending only to ingest crack, cocaine, methamphetamine, or oxycodone pills. Memorandum from Anne Milgram to Local, State, and Federal Law Enforcement Partners (April 6, 2022), [https://www.dea.gov/sites/default/files/2022-04/DEA\\_Letter-Polydrug\\_Incidents-April\\_6\\_2022-Web\\_0.pdf](https://www.dea.gov/sites/default/files/2022-04/DEA_Letter-Polydrug_Incidents-April_6_2022-Web_0.pdf).

<sup>6</sup> Other factors playing a role include the user's tolerance for the drug(s) ingested, the use of multiple substances concurrently, the setting where the substance is used, and the way the user introduces the substance into the body (e.g., orally, nasally, intravenously, etc.).

<sup>7</sup> Regarding the presence of adulterants in drugs, *see, e.g.*, Vanila M. Singh et al., *The Emerging Role of Toxic Adulterants in Street Drugs in the US Illicit Opioid Crisis*, PUB. HEALTH REPORTS, Vol. 135(1) 6-10 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7119254/>. Additionally, the CDC states that newer adulterants include benzimidazole-opioids, para-fluorofentanyl, and xylazine, a non-opioid veterinary tranquilizer on which naloxone may not be effective. Jordan Trecki et al., *Notes from the Field: Increased Incidence of Fentanyl-Related Deaths Involving Para-fluorofentanyl or Metonitazene — Knox County, Tennessee, November 2020–August 2021*, CENTERS FOR DISEASE CONTROL & PREVENTION (Jan. 28, 2022), [https://www.cdc.gov/mmwr/volumes/71/wr/mm7104a3.htm?s\\_cid=mm7104a3\\_w](https://www.cdc.gov/mmwr/volumes/71/wr/mm7104a3.htm?s_cid=mm7104a3_w).

<sup>8</sup> Jia Pu et al., *Drug Checking Programs in the United States and Internationally: Environmental Scan Summary*, DEPT. OF HEALTH & HUM. SERVICES 6 (Sept. 17, 2021), <https://aspe.hhs.gov/reports/drug-checking-environmental-scan> (discussing results of studies about drug checking). *See also* Susan G. Sherman et al., *Fentanyl Overdose Reduction Checking Analysis Study*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Feb. 6, 2018), [https://www.btnx.com/files/Johns\\_Hopkins\\_Fentanyl\\_Executive\\_Summary.pdf](https://www.btnx.com/files/Johns_Hopkins_Fentanyl_Executive_Summary.pdf); Traci C. Green et al., *An Assessment of the Limits of Detection, Sensitivity and Specificity of Three Devices for Public Health-based Drug Checking of Fentanyl in Street-acquired Samples*, 77 INT'L J. OF DRUG POL'Y (March 2020), <https://www.sciencedirect.com/science/article/pii/S0955395920300025?via%3Dihub>; Nicholas C. Peiper et al., *Fentanyl Test Strips as an Opioid Overdose Prevention Strategy: Findings from a Syringe Services Program in the Southeastern United States*, 63 INT'L J. OF DRUG POL'Y 122-128 (2019), <https://www.sciencedirect.com/science/article/pii/S0955395918302135>; and Ju Nyeong Park et al., *Evaluation of Fentanyl Test Strip Distribution in Two Mid-Atlantic Syringe Services Programs*, INT'L J. DRUG POL'Y 94 (2021), <https://www.sciencedirect.com/science/article/abs/pii/S0955395921000943?via%3Dihub>.



(8) [State] law, however, currently hampers drug checking efforts because the state’s prohibition against using, possessing, delivering, or manufacturing drug paraphernalia [insert statutory reference(s)] [either classifies drug checking equipment as illegal drug paraphernalia or unnecessarily limits the types of allowable drug checking equipment; see footnote below].<sup>9</sup>

(b) Purpose.—The primary purposes of this Act are to:

- (1) Clearly and expressly authorize all persons in [state] to obtain, possess, purchase, sell, provide, transport, distribute, use, or request another person to use drug checking equipment;
- (2) Clearly and expressly authorize all persons in [state] to possess, transport, or deliver drug packaging and nominal amounts of substances that may contain illicit drugs for analysis by drug checking equipment;
- (3) Allow the use of state funds to obtain, possess, purchase, sell, provide, transport, distribute, use, or evaluate the use of drug checking equipment;
- (4) Provide a means for persons using drug checking equipment to report data about the distribution, use, and results of drug checking analyses; and
- (5) Prohibit local jurisdictions from enacting restrictions that conflict with this Act.

## Commentary

The less an individual knows about a substance the individual plans to ingest, the greater the risk of suffering harm from it. Drug checking enables an individual who uses a drug, or someone on the individual’s behalf, to analyze a substance for its drug composition, drug potency, and/or the presence of an unexpected substance. Using the additional information that drug checking provides, the individual may lower the risk of overdose—both to themselves or others—by adjusting drug use behavior or providing the results of a drug checking analysis to friends or acquaintances who obtain drugs from the same source.

The testing techniques and equipment used for drug checking (referred herein as the defined term “drug checking equipment”) vary in terms of both technological complexity and the types of information/results provided to the user. Simple testing methods include fentanyl test strips (FTS) and other rapid drug test strips (formally known as lateral flow chromatographic

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<sup>9</sup> The end of subsection (a)(8) is in brackets because, as set forth in commentary below, many states recently amended existing drug paraphernalia statutes to allow some form of drug checking equipment. Accordingly, in such states, the issue is not that all drug checking equipment is illegal, but that the type of drug checking equipment allowed by the state is limited in terms of: (1) technology (*e.g.*, only covers drug testing strips); (2) drugs covered (*e.g.*, only covers drug checking for fentanyl/fentanyl analogs); and/or (3) persons who may use the equipment (*e.g.*, only covers equipment in the hands of harm reduction organizations).

immunoassays), liquid reagent tests, and thin layer chromatography kits.<sup>10</sup> In general, these testing methods provide qualitative information about the presence of a particular drug/substance—or lack thereof—for which the test is designed, but do not shed light on the presence of substances beyond the scope of the test or quantitative information about potency. More complex and advanced drug checking equipment does provide added information about the composition of drugs and other adulterants within a tested substance as well as drug potency. Advanced drug checking equipment includes Fourier-transform infrared spectroscopy, gas chromatography/mass spectrometry, high-performance liquid chromatography, and nuclear magnetic resonance techniques.<sup>11</sup> Currently, FTS are the most predominant drug testing methodology used in the United States.<sup>12</sup> However, organizations providing harm reduction services use other drug checking equipment, such as cocaine reagent kits and infrared spectroscopy instruments, that offer insight into how much of a particular drug is present.<sup>13</sup>

During the past two years, federal health agencies placed an increased emphasis on developing and implementing harm reduction responses to prevent overdose deaths. The Biden-Harris administration's 2021 statement of drug policy priorities addresses harm reduction, as does the 2022 National Drug Control Strategy.<sup>14</sup> In October 2021, the U.S. Department of Health and Human Services (HHS) released an Overdose Prevention Strategy that included harm reduction as one of four strategic priority areas.<sup>15</sup> Even more germane to this Act, the Substance Abuse and Mental Health Services Administration (SAMHSA) and CDC announced in April 2021 that federal funding may be used to purchase FTS as long as purchasing FTS is “consistent with the purpose of the [federal grant] program.”<sup>16</sup> These federal agencies expressly identified the CDC's Overdose Data to Action and SAMHSA's State Opioid Response grants as “examples of overdose response programs that can now use program funds to purchase FTS.”<sup>17</sup>

Many state laws, however, hinder efforts to increase access to drug checking equipment. The primary problem is that criminal penalties apply—or potentially apply—to the use,

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<sup>10</sup> Examples of these in the marketplace include fentanyl test strips (FTS), amphetamine test strips, and cocaine reagent kits.

<sup>11</sup> Pu et al., *supra* note 8 at 1-2.

<sup>12</sup> *Id.*

<sup>13</sup> Martha Bebinger, *Boston Is Using a Chemical Warfare Device to Help Fight Fentanyl*, WBUR (Oct. 10, 2019), <https://www.wbur.org/news/2019/10/10/mx908-opioid-crisis-drug-testing> (discussing the use of the MX908 portable mass spectrometer for drug checking by the Boston Public Health Commission).

<sup>14</sup> Executive Office of the President, Office of National Drug Control Policy, *Biden-Harris Administration's Statement of Drug Policy Priorities for Year One*, WHITE HOUSE (April 1, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/03/BidenHarris-Statement-of-Drug-Policy-Priorities-April-1.pdf>; Executive Office of the President, Office of National Drug Control Policy, *National Drug Control Strategy*, WHITE HOUSE (April 21, 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/04/National-Drug-Control-2022Strategy.pdf>.

<sup>15</sup> Rebecca L. Haffajee et al., *Overdose Prevention Strategy*, U.S. DEPT. OF HEALTH & HUM. SERVICES (Oct. 27, 2021), <https://aspe.hhs.gov/reports/overdose-prevention-strategy>. The other three priority areas are: (1) primary prevention; (2) evidence-based treatment; and (3) recovery support.

<sup>16</sup> *Federal Grantees May Now Use Funds to Purchase Fentanyl Test Strips*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (April 7, 2021), <https://www.samhsa.gov/newsroom/press-announcements/202104070200>; *Federal Grantees May Now Use Funds to Purchase Fentanyl Test Strips*, CENTERS FOR DISEASE CONTROL & PREVENTION (April 7, 2021), <https://www.cdc.gov/media/releases/2021/p0407-Fentanyl-Test-Strips.html>.

<sup>17</sup> SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 16.



possession, and/or distribution of drug checking equipment itself, as well as the drugs and drug packaging used by individuals when ingesting drugs that serve as samples for drug checking analysis. The purpose of this Model Act is to remove these obstacles.

State drug paraphernalia laws date back over 40 years. When Congress first enacted the Federal Controlled Substances Act in 1970,<sup>18</sup> the Act did not criminalize selling devices involved in the illicit use of controlled substances.<sup>19</sup> As sales of drug paraphernalia grew in the 1970s, states and localities enacted laws to prevent the sale and use of those devices. Many courts, however, found early legislative attempts to prevent such sales and use unconstitutionally vague. In response, the Drug Enforcement Administration (DEA) drafted a Model Drug Paraphernalia Act in August 1979 (the 1979 Act) for states to use and then pressured states to adopt it.<sup>20</sup> By December 1987, 38 states and the District of Columbia had enacted the 1979 Act.

The definition of “drug paraphernalia” in the 1979 Act—and, thus, the definition used in most state laws—is very broad. Drug paraphernalia includes “all equipment, products and materials of any kind which are used . . . in . . . testing, analyzing . . . a controlled substance in violation of [the state’s controlled substance act].” Along with this general prohibition, the 1979 Act listed numerous categories of items, including “[t]esting equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances.”<sup>21</sup> Under the 1979 Act, it is illegal for a person “to use, or to possess with intent to use” or “deliver, possess with intent to deliver, or manufacture with intent to deliver” drug paraphernalia.<sup>22</sup> Accordingly, in any state whose law tracks the 1979 Act without amendment, drug checking equipment and drug packaging are illegal drug paraphernalia. Moreover, even if present-day local law enforcement and prosecutors do not actively enforce a state’s prohibition against drug checking equipment, the existence of the prohibition continues to chill drug checking efforts.

Many groups advocate that the most straightforward solution to the problem posed by drug paraphernalia laws is for legislators to consider repealing state drug paraphernalia laws altogether.<sup>23</sup> This Model Act proposes language that would keep a state’s drug paraphernalia law as is but make a clear allowance of all drug checking equipment and items to be tested.

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<sup>18</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §801, et seq.).

<sup>19</sup> See *Importation of Certain Drug Paraphernalia into the United States*, USITC Publication 2223, U.S. INT’L. TRADE COMM. (Sept. 1989), <https://www.usitc.gov/publications/332/pub2223.pdf>; Michael J. Barbour, *Virginia’s Drug Paraphernalia Law*, 16 UNIV. OF RICH. L. REV. 161 (1981), <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1560&context=lawreview>; and Michael D. Guinan, *Constitutionality of Anti-drug Paraphernalia Laws—The Smoke Clears*, 58 U. OF NOTRE DAME L. REV. 833 (1983), <https://scholarship.law.nd.edu/ndlr/vol58/iss4/5/>.

<sup>20</sup> U.S. INT’L. TRADE COMM., *supra* note 19, at 2.

<sup>21</sup> *Id.* at C-2 (within Appendix C).

<sup>22</sup> *Id.* at C-3 (within Appendix C).

<sup>23</sup> See, e.g., Jeffrey A. Singer and Sophia Heimowitz, *Drug Paraphernalia Laws Undermine Harm Reduction: To Reduce Overdoses and Disease, States Should Emulate Alaska*, CATO INST. (June 7, 2022), <https://www.cato.org/policy-analysis/drug-paraphernalia-laws-undermine-harm-reduction-reduce-overdoses-disease-states> (“State-level drug paraphernalia laws prevent individuals from protecting themselves against many of the risks of using drugs obtained on the black market.”); Corey Davis et al., *Paraphernalia Laws, Criminalizing*

Given the increased emphasis on policy that focuses on using harm reduction strategies to stem the overdose crisis, the hurdle to using drug checking equipment posed by state laws has not gone unnoticed by policymakers and the media. Several recent news articles delineate the problem.<sup>24</sup> Additionally, between January 2018 and June 2022, nearly two dozen states and the District of Columbia amended their laws to allow for the use or possession of some or all types of drug checking equipment.<sup>25</sup> Despite these advancements, however, the use or possession of drug checking equipment remains illegal in most states. Moreover, of the jurisdictions that allow drug checking equipment in some form, the authorization often contains limitations. This is because the authorization for drug checking equipment applies only to: (1) equipment designed to test for fentanyl or fentanyl analogs; or (2) individuals who either provide or receive certain types of harm reduction services.

This Model Act provides a guide for states to introduce legislation to authorize the use and possession of drug checking equipment comprehensively, regardless of whether the state currently prohibits such use or possession or allows it in part. Compared to state laws enacted since January 2018, this Act differs in two ways. First, the Act covers all drug checking equipment (as defined in Section III), rather than just FTS or even drug testing strips generally. Although addressing FTS is certainly important, limiting the scope of the Act in that manner is short-sighted, as it invites the need for subsequent legislation to adjust to changing trends and new technologies. At this time, it is impossible to know what drug checking equipment will prove most useful in the coming years. Drug testing strips have limitations, in that they provide only binary yes/no results, do not quantify results, and do not identify the presence of other drugs or analogs that can cause harm or death. Moreover, drugs of concern may change in the future. Recent statistics reflecting increases in methamphetamine, xylazine, and polysubstance-involved overdose deaths demonstrate this.<sup>26</sup>

Second, this Act presents a more comprehensive piece of legislation on which states may rely than those enacted or proposed to date. Recently proposed state legislation tackling this issue largely falls into only one of three categories: (1) removing references to “testing” and “analyzing” controlled substances from the drug paraphernalia definition;<sup>27</sup> (2) keeping

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*Possession and Distribution of Items Used to Consume Illicit Drugs, and Injection-Related Harm*, 109 AM. J. PUB. HEALTH 1564 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6775926/> (“State paraphernalia laws, which criminalize the possession and distribution of items used to consume illicit drugs, are perhaps the most indefensible of these unnecessary and harmful legal barriers.”).

<sup>24</sup> See, e.g., Madelyn Beck, *Fentanyl Tests Strips Could Prevent Overdoses, but They’re Often not Allowed To*, BOISE STATE PUB. RADIO (Jan. 25, 2022), <https://www.boisestatepublicradio.org/health/2022-01-25/fentanyl-tests-strips-could-prevent-overdoses-but-theyre-often-not-allowed-to>; McKenna Schueler, *The Fight to Legalize Life-saving Fentanyl Test Strips in Southern States*, FACING SOUTH (Jan. 24, 2022), <https://www.facingsouth.org/2022/01/fight-legalize-life-saving-fentanyl-test-strips-southern-states>.

<sup>25</sup> See *Drug Paraphernalia: Summary of State Laws*, LEG. ANALYSIS & PUB. POL’Y ASS’N (April 2022), <https://legislativeanalysis.org/drug-paraphernalia-summary-of-state-laws/> (using the “Substantive amendment(s) to law(s)” information for each state to determine dates when laws changed). These jurisdictions include: Alabama, Arizona, Colorado, Delaware, District of Columbia, Georgia, Illinois, Louisiana, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Rhode Island, Tennessee, Virginia, West Virginia, Washington, and Wisconsin.

<sup>26</sup> See, e.g., Section II(a)(2) regarding the increase in stimulant-involved overdose deaths.

<sup>27</sup> See H.P. 732, 130<sup>th</sup> Legis, 1<sup>st</sup> Spec. Sess. (Me. 2021) (enacted into law effective October 18, 2021).

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references to “testing” and “analyzing” in the definition but adding language specifying that certain drug checking equipment does not fall within the definition;<sup>28</sup> or (3) keeping the drug paraphernalia definition the same (and, therefore, keeping drug checking equipment as a subset of drug paraphernalia) but amending criminal penalty provisions to allow for the use and possession of certain testing equipment without criminal penalty.<sup>29</sup> Each of these changes lands short of clearly and unambiguously authorizing the use, possession, and distribution of drug checking equipment.

Moreover, unlike this Model Act, legislation proposed in states to date does not clearly authorize individuals to handle or transport drug packaging or nominal amounts of substances (as each of those terms is defined in Section III) for the purpose of providing samples for drug checking analysis. Members of the working group of subject matter experts who provided valuable input about this model law (“working group”) expressed concern that failing to include such authorization would limit the usage of—and thus the effectiveness of—drug programs providing drug checking services and could subject individuals who use drugs and workers providing harm reduction services to criminal penalties despite legalizing drug checking equipment. Additionally, this Act contains certain novel provisions related to funding and data collection that are not found in any legislation proposed or enacted to date.

Finally, although the Model Act covers all types of drug checking equipment, for purposes of naming the law, the drafters chose to specifically reference both FTS in the title in and the broader term drug checking equipment. The reason for this is that much of the recent general media coverage about drug checking focuses almost exclusively on FTS, rather than on additional types of drug checking equipment. State policymakers who are unfamiliar with drug checking generally might not realize an act titled “Model Drug Checking Equipment Act” addresses FTS. Accordingly, the drafters chose to utilize the “name recognition” of FTS within the title of the Act.

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<sup>28</sup> See S.B. 1486, 55<sup>th</sup> Legis., 1<sup>st</sup> Reg. Sess. (Az. 2021) (enacted into law effective September 29, 2021).

<sup>29</sup> See H.B. 325, 2019 Gen. Assemb., 1<sup>st</sup> Sess. (N.C. 2019) (enacted into law effective July 22, 2019).

**SECTION III. DEFINITIONS.**

*[States may already have definitions in place for some or all of the following terms. In such case, states may use the existing definitions in place of those listed below.]*

For purposes of this Act, unless the context clearly indicates otherwise, the words and phrases listed below have the meanings given to them in this section:<sup>30</sup>

- (a) Controlled substance.—“Controlled substance” means a drug, substance, or immediate precursor included in Schedules I, II, III, IV, or V of the federal Controlled Substances Act, 21 U.S.C. § 812 or 21 C.F.R. § 1308, or the [state] Controlled Substances Act [statutory reference];<sup>31</sup>
- (b) Controlled substance analog.—“Controlled substance analog” means a controlled substance analog as that term is defined in 21 U.S.C. § 802(32);
- (c) Department.—“Department” means the [State and/or local] Department of [Health/Health and Human Services];
- (d) Drug.—“Drug” means any of the following:
  - (1) Any substance recognized as a drug, medicine, or medicinal chemical in the official United States Pharmacopoeia, official National Formulary, official Homeopathic Pharmacopoeia, or official Veterinary Medicine Compendium, or other official drug compendium or supplements thereto;
  - (2) Any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animal;
  - (3) Any chemical substance, other than food, intended to affect the structure or any function of the body of man or other animal; or
  - (4) Any substance intended for use as a component of any items specified in paragraphs (1), (2), or (3) of this subsection, but does not include medical devices or their components, parts, or accessories;<sup>32</sup>

<sup>30</sup> Where a definition is based on, adapted from, or directly pulled from, language from enacted statute, proposed legislation, or other research material, the footnote referenced at the end of the definition provides that source. Additional information about the reasoning for certain definitions is included in the Section III commentary.

<sup>31</sup> Taken from WASH. REV. CODE ANN. § 69.50.101 (West 2022).

<sup>32</sup> Taken from WASH. REV. CODE ANN. § 69.04.009 (West 2022).

- (e) Drug checking.—“Drug checking” means the process of identifying, analyzing, or detecting the composition of a drug or the presence or composition of an adulterant within the drug;
- (f) Drug checking equipment.—“Drug checking equipment” means equipment, products, or materials used, designed for use, or intended for use to perform drug checking, including materials and items used by the person(s) operating the equipment or products to store, measure, or process samples for analysis. Drug checking equipment does not include the substances being analyzed or drug packaging. [**Optional added language after the first sentence:** Drug checking equipment includes, but is not limited to, fentanyl test strips, other immunoassay drug testing strips, colorimetric reagents, spectrometers such as Fourier Transform Infrared and Raman spectrometers, and equipment that uses high-performance liquid chromatography, gas chromatography, mass spectrometry, and nuclear magnetic resonance techniques.]
- (g) Drug packaging.—“Drug packaging” means the materials or items used by persons selling, buying, or ingesting drugs to store, contain, cover, or transport small amounts of one or more controlled substances or controlled substance analogs.
- (h) Eligible activities.—“Eligible activities” means:
  - (1) Purchasing, obtaining, possessing, providing, transporting, distributing, using, or evaluating the use of drug checking equipment;
  - (2) Training, both initial and ongoing, about drug checking equipment, the process of drug checking, and the purpose of drug checking;
  - (3) Technical assistance concerning drug checking equipment, the process of drug checking, and the purpose of drug checking;
  - (4) Data collection and reporting as described in Section VI; and
  - (5) Any other activity that furthers drug checking.
- (i) Harm reduction.—“Harm reduction” means a program, service, support, or resource that attempts to reduce the adverse consequences of substance use among people who 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, drug checking, syringe

service programs, naloxone distribution, and education about Good Samaritan fatal overdose prevention laws;<sup>33</sup>

- (j) Nominal amount.—“Nominal amount” means an amount of a substance containing one or more controlled substances or controlled substance analogs that is insufficient to trigger a charge under [state] law exceeding [the state’s lowest level charge for possession of a controlled substance]; and
- (k) Person.— “Person” means any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal, commercial, or informal entity or group.<sup>34</sup>

## Commentary

In Section IV, this Act authorizes all individuals and entities in the state, whether such entities are formally or informally organized, to engage in drug checking activities. As is common in state codes, the drafters use the broadly defined term “person” (subsection (k)) to encompass the entire universe of individuals and entities. Virginia’s definition of “person” serves as the basis for the Act’s definition, although other state definitions are likely similar. In earlier drafts of this Act, the drafters expressly identified and defined organizations and groups falling under the drug checking equipment authorization.<sup>35</sup> Ultimately, however, based on comments from working group members, the drafters chose to simplify the definitions section by using only the term “person.” Even though the organizations and groups listed in footnote 35 are no longer expressly identified, the intent of the Act is to include them as well as all other individuals in the state.

The actions authorized by this Act pertain to three different, but related, categories of things: (1) the use and distribution of “drug checking equipment;” (2) the possession and transport of “drug packaging” for analysis by drug checking equipment; and (3) the possession and transport of a “nominal amount” of substances containing controlled substances or controlled substance analogs for analysis by drug checking equipment. The definitions for the four quoted terms above are novel and not directly taken from enacted or proposed legislation.

The definition of “drug checking equipment” (subsection (f)) includes all types of testing devices used for drug checking analysis, beyond FTS or rapid drug testing strips. The Act’s drafters adapted this definition from the description of drug checking equipment types in the sources listed in footnote 8 (within Section II’s commentary). The optional additional language

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<sup>33</sup> See *Model Opioid Litigation Proceeds Act*, LEGIS. ANALYSIS & PUB. POL’Y ASS’N 10 (Oct. 2021), <https://legislativeanalysis.org/model-opioid-litigation-proceeds-act/> (definition created by model law working group).

<sup>34</sup> See VA. CODE. ANN. § § 1-230 (West 2022).

<sup>35</sup> These identified organizations and groups included community-based organizations, first responders, harm reduction organizations, hospitals, rural health clinics, federally qualified health centers, HIV/AIDS service organizations, corrections settings, housing service providers, treatment providers, and syringe services programs.



lists the types of testing devices that the definition covers.<sup>36</sup> In addition to testing devices, “drug checking equipment” includes materials and items used by the person(s) operating the testing device(s) to store, measure, and process samples for analysis. This is done so that the Act does not create a loophole whereby a testing device itself is authorized, but the other items needed by a person to perform the drug checking analysis are not. The purpose of the second sentence of the definition is to eliminate any overlap between drug checking equipment and the items to be tested, namely drugs and drug packaging.

In addition to drug checking equipment, a sample (or samples) for analysis must be provided to/possessed by the person operating the testing device. Testing samples can be taken from “drug packaging” (subsection (g)) or a “nominal amount” of a substance (subsection (j)) potentially containing controlled substances or controlled substance analogs. Section IV grants all individuals the authority to possess or provide these items. As above, this is done so that the Act does not create a loophole whereby a drug checking device itself is authorized, but the items serving as the tested samples for drug checking analysis are not.

A nominal amount is the small amount of a substance potentially or believed to be containing one or more controlled substances or controlled substance analogs that may be possessed, transported, or provided for drug checking analysis. Subsection (j) defines this small amount as an amount less than or equal to the upper limit of a state’s simple possession of controlled substance charge, which may vary by type of substance. The drafters’ goal is to balance the need to possess some amount of a controlled substance to provide a testing sample while not unintentionally allowing larger scale possession to masquerade as drug checking.

“Eligible activities” (subsection (h)) are those drug checking-related activities for which federal, state, and other funds may be used. The definition is used to avoid repeating the listed activities in several spots throughout the Act.

The definition of “department” (subsection (c)) contains bracketed terms, indicating that individual states may change the designated agency at their discretion. The drafters realize that there may be one or more state agencies besides a state department of health for which the duties assigned, and actions described, in this Act are appropriate. These duties and actions involve the distribution of money appropriated by the legislature to fund the activities authorized by this Act. Also, pursuant to Section VI, the department receives data from people who wish to report it and publishes a publicly available annual report regarding such data.

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<sup>36</sup> The drafters made this list optional because, while it is instructive about the scope of the definition of drug checking equipment, it is not necessary.

**SECTION IV. AUTHORIZATION.**

*[See the commentary to this section below for an explanation of the use of ~~strikethrough~~ and quoted text in subsection (a).]*

- (a) Amendment to paraphernalia definition.—The definition of drug paraphernalia in [insert statutory reference(s) to definition] is amended by:
- (1) Deleting the following words and phrases:
    - (A) “~~Testing~~”;
    - (B) “~~Analyzing~~”; and
    - (C) “~~Testing equipment for identifying, or analyzing the strength, effectiveness, or purity of controlled substances~~”; and
  - (2) Including a new phrase at the end of the definition of drug paraphernalia that states “Notwithstanding the definition above, drug paraphernalia does not include drug checking equipment.”
- (b) Authorized actions.—Notwithstanding any other law or regulation to the contrary, any person may:
- (1) Obtain, possess, purchase, sell, provide, transport, distribute, use, or request another person to use drug checking equipment;
  - (2) Possess, transport, deliver, or provide drug packaging or a nominal amount of one or more controlled substances or controlled substance analogs for, or during, analysis by drug checking equipment; or
  - (3) Possess, provide, or communicate the results of the drug checking analysis in paper, electronic, or verbal form.
- (c) Use of state funds.—Any person may use state funds, including, but not limited to, funds in the [state opioid litigation settlement proceeds fund] for eligible activities.
- (d) Use of federal funds.—No person may prohibit another person from using federal funds for eligible activities, so long as the use of the federal funds is consistent with federal law and any rules governing use of the funds.
- (e) No penalty.—No person may be:
- (1) Arrested;
  - (2) Charged;
  - (3) Prosecuted;

- (4) Subject to revocation of probation, parole, or pre-trial release;
- (5) Subject to civil, disciplinary, or administrative action;
- (6) Subject to the loss of one or more dependents;
- (7) Subject to the loss of housing; or
- (8) Penalized in any other way

for any actions authorized by this Act.

(f) Probable cause.—The fact that a person engages in any action authorized by this Act may not:

- (1) Serve as the basis, in whole or in part, for a determination by a law enforcement officer or any court, of probable cause or reasonable suspicion to stop, search, seize, or arrest the person or the person’s property, including but not limited to cell phones and computers;
- (2) Be used as evidence in a criminal case or administrative action against the person; or
- (3) Result in—
  - (A) Revocation of the person’s probation, parole, or pre-trial release;
  - (B) Administrative action taken against the person; or
  - (C) Any other punitive action or penalty taken against the person;

(g) Use of results.—The results from a drug checking analysis may not be used by any person for a treatment or other clinical decision, in any criminal investigation, or as evidence in a criminal case or administrative action.

## Commentary

Subsection (a)(1) contains ~~striketrough~~ text, while subsection (a)(2) contains “quoted” text. That represents a conscious choice by the drafters since the changes proposed by subsection (a) involve amending already existing statutory language (that is, a state’s definition of “drug paraphernalia”). Accordingly, ~~striketrough~~ emphasizes that the Act proposes deleting already-enacted statutory language, while “quote” emphasizes adding language to an already-enacted provision.

As noted in the commentary to Section II above, recently proposed state legislation authorizing the use of drug checking equipment falls into only one of three categories in terms of how it amends currently-in-force state law:

- (1) Removes references to “testing” and “analyzing” controlled substances and “testing equipment” from the drug paraphernalia definition, but does not add any express provision allowing drug checking equipment;<sup>37</sup>
- (2) Adds language to the definition of drug paraphernalia that specifies that certain drug checking equipment does not fall within the definition, but keeps the references to “testing” and “analyzing” in the definition;<sup>38</sup> or
- (3) Makes no change to the definition of drug paraphernalia but amends criminal penalty provisions to allow for the use and possession of certain testing equipment without penalty.<sup>39</sup>

Under a category (1) change, one might reasonably infer that drug checking equipment of all types is no longer considered “drug paraphernalia.” However, without an express authorization for that use inserted into statutory text, the remaining text is left open to interpretation. Should an individual interpreting the law for criminal justice purposes (*e.g.*, law enforcement officer, prosecutor, judge) later conclude that what remains of the drug paraphernalia definition still covers drug checking equipment, in whole or in part, then the inferred allowance disappears. Under a category (2) change, the specified items are no longer drug paraphernalia. However, any drug checking equipment that does not fall within the specific provision remains drug paraphernalia subject to penalty. Under a category (3) change, all drug checking equipment remains drug paraphernalia, but such paraphernalia is not subject to criminal penalty, as long as the actual testing equipment, and how it is used or distributed, falls under the penalty exception.

The Model Act combines all three of these approaches. Compared to the “implicit approaches” used in some states, working group members preferred the express nature of this Act, for fear that laws implicitly allowing drug checking equipment could still be misused to punish people who use drugs.

Subsection (a) encompasses the category (1) and (2) changes described above.

The initial inspiration behind subsection (b) is a provision in North Carolina law which specifically authorizes certain individuals and entities—people who use drugs and a “governmental or nongovernmental organization that promotes scientifically proven ways of mitigating health risks associated with drug use and other high-risk behaviors”—to use, possess, and distribute certain drug checking equipment.<sup>40</sup> The Model Act takes this idea further, however, by allowing any person to obtain, possess, purchase, sell, provide, transport, distribute, use, or request another person to use drug checking equipment. It may be the case that a family member or friend of a person who uses drugs needs to be the person who distributes, possesses, or even uses the drug checking equipment for that individual. This type of distribution, possession, or use should be overtly allowed. Similarly, because person is defined to include formal entities and informal organizations, the actions authorized by subsection (b) apply to all

<sup>37</sup> See ME. REV. STAT. ANN. tit. 17-A, § 1111-A (West 2021) (as amended effective October 18, 2021).

<sup>38</sup> See ARIZ. REV. STAT. ANN. § 13-3415 (West 2021) (as amended effective September 29, 2021).

<sup>39</sup> See N.C. GEN. STAT. ANN. § 90-113.22 (West 202) (as amended effective July 22, 2019).

<sup>40</sup> N.C. GEN. STAT. ANN. § 90-113.22(d) (West 2021).

entities within a state that provide harm reduction services (as well as their employees and volunteers). Finally, in response to a suggestion from a working group member, the language in subsection (a) is broad enough to cover the secondary distribution of drug checking equipment, such as FTS, where one individual receives several FTS from an organization providing harm reduction services and then passes some of those on to others.

Many working group members sought allowance for the actions authorized by subsections (b)(2) and (b)(3) to allow necessary aspects of the drug checking process that are not clearly covered by an authorization of drug checking equipment only. People who use drugs must travel to/from drug checking sites with small amounts of drugs and drug packaging to provide samples for testing. In addition, individuals working for the entities doing drug checking must handle, store, and transport those same small samples and items to properly perform the testing. Working group members expressed concern that failing to include such authorization would limit the usage and effectiveness of programs providing drug checking services. Similarly, individuals' possession and handling of the results of drug checking should also be authorized.

Subsection (c) is a novel provision not found to date in enacted or proposed language related to drug checking equipment. It seeks to avoid potential obstacles with respect to drug checking equipment access by affirmatively allowing state funds to be used. Moreover, the express reference to a state's opioid litigation settlement proceeds fund serves to highlight drug checking equipment as an appropriate use of that money, depending on any state law(s) governing the use of such funds. For more information about opioid litigation settlement proceeds funds generally and a model law designed to allow the funds to be used for a broad range of substance use disorder services, see [LAPPA's Model Opioid Litigation Proceeds Act](#).

Subsection (d) is also novel. The drafters included it to prevent state or local policymakers from prohibiting the use of federal funds for drug testing equipment (*e.g.*, CDC and SAMHSA grants that may go toward FTS), so long as the drug checking entity using the funds follows all federal restrictions on the funds' use.

While subsections (b)-(d) detail authorized activities, subsections (e), (f), and (g) make clear that no individual or entity should face repercussions for engaging in those activities, regardless of whether the individual or entity seeks a drug checking analysis, performs a drug checking analysis, or distributes drug checking equipment. Subsections (e) and (g) are novel provisions. A working group member suggested the inclusion of subsection (g) in part to address the (real world) situation where doctors/clinicians seek out drug checking services for materials that a patient provides to them in the hopes that emergency medical services could transport the materials for drug checking analysis. In such cases, subsection (g) places strict limits on how the results of the analysis can be used.

Subsection (f) stems from an Indiana law pertaining to SSPs that prohibits law enforcement from using an individual's association with an SSP, either as an employee, volunteer, or participant, as the basis for either a stop and frisk or probable cause for the issuance of a warrant.<sup>41</sup>

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<sup>41</sup> See IND. CODE ANN. § 16-41-7.5-9 (West 2021).

Working group members brought up two other issues associated with the authorization and use of drug checking equipment that warrant mentioning here. In both cases, statutory/regulatory changes might need to flow from the federal level rather than through state legislation. First, some group members expressed concern that federal prosecutors could seek to apply 21 U.S.C. § 856, colloquially known as the “crack house statute”<sup>42</sup> to prosecute drug checking entities and/or individuals using those services. That statute makes it a felony to “knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance.”<sup>43</sup> Second, several group members suggested that laws and regulations governing U.S. mail be changed to allow delivery of drug packaging and nominal amounts of substances so that individuals who use drugs do not have to travel to obtain drug checking services. Alternatively, instead of changing federal law, states could amend their respective forensic laboratory rules to permit existing certified forensic labs to receive and test samples submitted by either the state or the general public for non-criminal, public health purposes (*i.e.*, drug checking). These labs already legally receive samples by mail, but they are not authorized presently to receive and test samples directly from the public.

## SECTION V. LOCAL JURISDICTIONS

No city, county, town, or other political subdivision within [state] may enact any [ordinance/regulation] that prohibits a person from engaging in an action allowed by this Act.

### Commentary

This section bars any political subdivision of a state, whether it is a city, county, or town, from adopting any ordinance or rule that would prohibit a person, drug checking entity, or employee/volunteer of such entity from using, possessing, or distributing drug checking equipment. The drafters included this provision to avoid the practice currently taking place with SSPs in several localities across the country—state laws authorizing SSPs but localities subsequently prohibiting them.<sup>44</sup> This subsection is based on Section IV(d) of LAPP’s recently published [Model Syringe Services Program Act](#).<sup>45</sup>

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<sup>42</sup> The statute’s formal title is “Maintaining drug-involved premises.”

<sup>43</sup> 21 U.S.C. § 856(a)(1).

<sup>44</sup> See, e.g., BUTTE CNTY., CAL., CODE §§ 15-170 to 15-174 (2021); PARADISE, CAL., CODE §§ 17.32.1.100 to 17.32.1.300 (2021); SANTA ANNA, CAL., CODE §§ 18-653 to 18-656 (2021); YUBA CITY, CAL., CODE §§ 5-24-01 to 5-24-04 (2021); Joe Atmonavage, *Atlantic City Votes to Close State’s Largest Needle Exchange Program, Drawing Outrage*, NJ.COM (July 21, 2021, 10:11 PM), <https://www.nj.com/news/2021/07/atlantic-city-votes-to-close-states-largestneedle-exchange-program-drawing-outrage.html>.

<sup>45</sup> *Model Syringe Services Program Act*, LEG. ANALYSIS & PUB. POL’Y ASS’N 13 (Dec. 2021), <https://legislativeanalysis.org/model-syringe-services-program-act/>.



**SECTION VI. DATA COLLECTION AND REPORTING.**

- (a) Voluntary reporting.—Any person using, providing, or distributing drug checking equipment may collect the following information and provide it to the department, in a form and manner set out by the department by rule:
- (1) The amount and type(s) of drug checking equipment used, provided, or distributed by the person;
  - (2) The county(ies) and ZIP code(s) where the person used, provided, or distributed drug checking equipment;
  - (3) The number of encounters with individuals seeking drug checking services where a person used, provided, or distributed drug checking equipment;
  - (4) For each encounter with an individual seeking drug checking services where a person used drug checking equipment to analyze one or more substances:
    - (A) The number of samples analyzed;
    - (B) The identity of the drug(s) detected within each sample;
    - (C) The mass, volume, concentration, or relative amount of each drug detected;and
    - (D) What drug(s) the submitting individual believed the analyzed substance to contain, at the time the individual acquired the substance;
  - (5) Whether or not the individual seeking drug checking services changed or plans to change drug use behavior based on either information provided by the person using the drug checking equipment or from receipt of the drug checking results;
  - (6) Demographic information regarding the individual seeking drug checking services including, but not limited to, age, gender, race, ethnicity, general area of residence, types of drugs used, methods of drug use, length of drug use, frequency of drug use, and date of first seeking drug checking services;
  - (7) Information about any encounter with law enforcement where the individual seeking drug checking services faced arrest, criminal charge, or prosecution for possession of a controlled substance or other illicit drug due to the use of drug checking services or traveling to or from such service; and
  - (8) Any other data identified by the department by rule.

- (b) Confidentiality of data.—All data collected and provided to the department pursuant to subsection (a) shall have personal or other identifying information removed and shall not be subject to subpoena in any civil, criminal, or administrative proceeding.
- (c) Annual report.—Starting twelve (12) months after the effective date of this Act, and every twelve (12) months thereafter, the department shall publish a report on its public website that describes and explains the aggregate data received pursuant to this section.

## Commentary

This section is a novel provision not found to date in enacted or proposed language related to drug checking equipment. It is, however, modeled on a data collection provision contained in LAPP's recent *Model Syringe Services Program Act*.<sup>46</sup> In the context of SSPs, the CDC states that “[d]ata collection is a critical aspect of [SSP] planning and evaluation,” but recommended that “data collection should neither distract from the primary mission of syringe distribution for participants nor act as a barrier to ... participation” and “[d]ata collection should be minimal to reduce participant and administrative burden and should never be a barrier to care.”<sup>47</sup> Similar concerns are present with respect to drug checking equipment. Accordingly, the data collection is voluntary.

An earlier draft of this Act contained a more limited list of data elements for voluntary collection and reporting. These elements focused on the types of drug checking equipment distributed and the number of drug checking services provided within a state. Although this information may be all that a simple organization that distributes only FTS can provide, one working group member suggested that for comprehensive drug checking programs, setting the bar for data collection too low is “irresponsible.” In the member’s opinion, both the department and individuals within the state need to know what substances are in the drug supply across geographies. Accordingly, the group member recommended that data reports to the department include as many compounds and contents as possible. As a result of this suggestion, the drafters added subsections (a)(2) and (a)(4), as well as components to several other data elements in subsection (a).

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<sup>46</sup> *Id.*, at 21-24.

<sup>47</sup> Zulqarnain Javed et al., *Syringe Services Programs: A Technical Package of Effective Strategies and Approaches for Planning, Design, and Implementation*, CENTERS FOR DISEASE CONTROL & PREVENTION 18 (2020), <https://www.cdc.gov/ssp/docs/SSP-Technical-Package.pdf>.

**SECTION VII. GRANT PROGRAM AND FUNDING.**

- (a) Grant program.—The department may establish a grant program for the purpose of funding, in whole or in part, eligible activities. Grant funding should prioritize persons serving individuals who actively use drugs, including those individuals with an increased risk of overdose-related complications.
- (b) Budget allocation.—The legislature may appropriate [\$ \_\_\_\_] to the department for the purpose of funding, in whole or in part, eligible activities. Appropriated funding may include funds from the [state opioid litigation settlement proceeds fund].
- (c) Pursuit of funding.—The department may pursue all federal funding, matching funds, and foundation or other charitable funding for use in funding, in whole or in part, eligible activities.
- (d) Receipt of funding.—The department may receive such gifts, grants, and endowments from public or private sources as may be made from time to time, in trust or otherwise, for the use and benefit of the purposes of this Act and expend the same or any income derived from it according to the term of the gifts, grants, or endowments.

**Commentary**

Obtaining funding for harm reduction activities, in general, is often met with challenges. Considering this, this section allows the state department of health to establish a grant program for the purpose of funding, in whole or in part, the purchase and distribution of drug checking equipment, training, and other technical assistance by entities that provide this service. There are numerous examples of grant or budget allocation-funded programs to distribute drug checking equipment. Two such examples are the Police Assisted Addiction & Recovery Initiative (P.A.A.R.I.) receiving a \$150,000 grant to allow police officers and community partners to distribute FTS and the Washington legislature appropriating \$100,000 for SSPs to distribute FTS.<sup>48</sup>

There are two emergent sources of funding for harm reduction activities. First, in terms of federal money, as mentioned above, in April 2021, SAMHSA and the CDC announced that

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<sup>48</sup> See, e.g., *P.A.A.R.I. Receives \$150,000 Grant to Support Continued Fatal Overdose Prevention Efforts in Massachusetts and Maine*, THE POLICE ASSISTED ADDICTION & RECOVERY INITIATIVE (Dec. 22, 2020), <https://paariusa.org/2020/12/22/p-a-a-r-i-receives-150000-grant-to-support-continued-fatal-overdose-prevention-efforts-in-massachusetts-and-maine/> (describing a \$149,173 grant from the Washington/Baltimore HIDTA, the University of Baltimore and the Centers for Disease Control and Prevention’s Combating Opioid Overdose through Community-Level Intervention (COOCLI) grant program); *Fentanyl Test Strip Project*, WASH. STATE DEPT. OF HEALTH (last visited April 12, 2022), <https://doh.wa.gov/you-and-your-family/drug-user-health/overdose-education-naloxone-distribution/fentanyl-test-strip-project> (noting that “in 2019, the WA legislature set aside \$101,000 for SSPs to distribute more fentanyl test strips”).

federal funding may be used to purchase FTS as long as purchasing FTS is “consistent with the purpose of the [federal grant] program.”<sup>49</sup> SAMHSA and the CDC expressly identified Overdose Data to Action and State Opioid Response grants, as “examples of overdose response programs that can now use program funds to purchase FTS.”<sup>50</sup>

Second, many states are on the cusp of receiving significant funds from opioid drug manufacturers and distributors from settlements or judgments as the result of ongoing litigation. Proceeds from opioid litigation present an opportunity for government leaders to remedy the public health and societal harms caused by the overdose epidemic and many states have recently enacted legislation placing restrictions on the use of the funds to guarantee that the money is spent on addressing the overdose epidemic. If spent properly, these funds will support essential interventions to counter the devastating public health and societal consequences of the opioid crisis.<sup>51</sup> Not surprisingly, commentators encourage states to allow and use litigation proceeds to finance and expand the reach of harm reduction programs.<sup>52</sup> Accordingly, to the extent that a state’s law allows for such funds to go toward harm reduction activities, the funds can be put toward encouraging and expanding the use of drug checking equipment. For more information about opioid litigation settlement proceeds laws, please see LAPP’s [summary of state legislation](#) and [model law](#).<sup>53</sup>

## SECTION VIII. RULES AND REGULATIONS.

The department shall promulgate such rules and regulations as are necessary to effectuate this Act.

## SECTION IX. SEVERABILITY.

If any provision of this Act or application thereof to any individual or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provisions or applications, and to this end, the provisions of this Act are severable.

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<sup>49</sup>SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., *supra* note 16.

<sup>50</sup> *Id.*

<sup>51</sup> Shelly Weizman et al., *Maximizing the Impact of Opioid Litigation to Address the Overdose Epidemic*, O’NEIL INST. FOR NAT’L & GLOBAL HEALTH LAW (March 14, 2022), <https://oneill.law.georgetown.edu/publications/maximizing-the-impact-of-opioid-litigation-to-address-the-overdose-epidemic/>.

<sup>52</sup> *Prioritizing the Funding of Harm Reduction Efforts Using Opioid Litigation Proceeds: A Tool to Support Viral Hepatitis Elimination in the United States 2*, O’NEIL INST. FOR NAT’L & GLOBAL HEALTH LAW (June 2022), <https://oneill.law.georgetown.edu/wp-content/uploads/2022/07/FInal-Issue-brief-.pdf>.

<sup>53</sup> LAPP issued the model law in partnership with the O’Neill Institute for National & Global Health Law at Georgetown University Law Center, the Center for U.S. Policy, and Brown & Weinraub, PLLC.

**SECTION X. EFFECTIVE DATE.**

This Act shall be effective on [specific date or reference to normal state method of determination of the effective date].

## 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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