

11-8-2016

## HB 362 & HB 588 - Controlled Substances

William Fawcett

*Georgia State University College of Law*, wfawcett1@student.gsu.edu

April Meeks

*Georgia State University College of Law*, aprilmeeks13@gmail.com

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### Recommended Citation

Fawcett, William and Meeks, April (2016) "HB 362 & HB 588 - Controlled Substances," *Georgia State University Law Review*: Vol. 33 : Iss. 1 , Article 7.

Available at: <http://readingroom.law.gsu.edu/gsulr/vol33/iss1/7>

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## CRIMES AND OFFENSES

***Controlled Substances: Amend Article 2 of Chapter 13 of Title 16 of the Official Code of Georgia Annotated, Relating to Regulation of Controlled Substances, so as to Change Provisions Relating to Possession of Substances Containing Ephedrine, Pseudoephedrine, and Phenylpropanolamine and Restrictions on Sales of Products Containing Pseudoephedrine; Provide for Real-Time Tracking of Sales of Products Containing Ephedrine, Pseudoephedrine; Provide for Definitions; Revise Provisions Relating to Exceptions; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS:	O.C.G.A. § 16-13-30.3
BILL NUMBER:	HB 362; HB 588
ACT NUMBER:	392
GEORGIA LAWS:	2016 Ga Laws 273
SUMMARY:	The Act mandates the installation of real-time electronic tracking systems in all pharmacies that sell products containing ephedrine and pseudoephedrine, which are ingredients used in the manufacture of methamphetamine. When customers attempt to purchase more than the maximum amount of these products, the tracking system blocks the sale by issuing a stop sale alert.
EFFECTIVE DATE:	July 1, 2016

### *History*

Methamphetamine, also known as “meth” or “crystal meth,” is one of the most addictive controlled substances.<sup>1</sup> Methamphetamine

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1. *About Methamphetamine*, GA. METH PROJECT, <http://georgiamethproject.org/Meth-Info/index.php> (last visited Sep. 3, 2016).

dramatically affects the pleasure centers of the brain, and eventually leaves user incapable of deriving pleasure from anything other than the drug, driving abusers further into addiction.<sup>2</sup> Other side effects of the drug include extreme violence, anxiety, insomnia, paranoia, visual and auditory hallucinations, and delusions.<sup>3</sup>

While most methamphetamine is manufactured in “superlabs” across the United States and Mexico, the drug is also easily created in small, makeshift laboratories using inexpensive over-the-counter ingredients, such as pseudoephedrine and ephedrine.<sup>4</sup> Pseudoephedrine and ephedrine are commonly found in cold medicines.<sup>5</sup> In an effort to eliminate these smaller labs, thirty-two states have armed their pharmacies, supermarkets, and law enforcement agencies with advanced real-time electronic logging systems to track the purchase of products containing pseudoephedrine and ephedrine.<sup>6</sup>

For the past seven years, the Georgia House of Representatives has attempted to pass legislation mandating pharmacies and supermarkets to use electronic tracking systems.<sup>7</sup> Though CVS and other big-box pharmacies in Georgia already use electronic tracking systems, the high cost of implementation prevents many supermarkets and independent pharmacies from using these systems.<sup>8</sup> Consequently, many supermarkets and pharmacies in Georgia still use “paper logs and handwritten entries” to record the purchase of products containing pseudoephedrine and ephedrine.<sup>9</sup>

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2. *What Are the Long-Term Effects of Methamphetamine Abuse?*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/research-reports/methamphetamine/what-are-long-term-effects-methamphetamine-abuse> (last visited Sep. 3, 2016).

3. *Id.* A common delusion of abusers is the sensation of insects crawling under the skin. *Id.*

4. *DrugFacts: Methamphetamine*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/methamphetamine> (last updated Jan. 2014) [hereinafter *DrugFacts*]; *What’s in Meth*, THE METH PROJECT, <http://www.methproject.org/answers/what-is-meth.html#Whats-in-Meth> (last visited Sep. 3, 2016) (listing other common ingredients including acetone, lithium, toluene, hydrochloric acid, red phosphorus, sodium hydroxide, sulfuric acid, and anhydrous ammonia).

5. *DrugFacts*, supra note 4.

6. Kristina Torres, *Georgia House Votes to Enforce Limits for Medicine Used to Make Meth*, ATLANTA J.-CONST. (Feb. 16, 2016, 1:56 PM), <http://www.ajc.com/news/news/state-regional-govt-politics/georgia-house-votes-to-enforce-limits-for-medicine/nqQ67/>; *NPLEx States*, APPRISS, <http://www.appriss.com/nplex.html> (last visited Sep. 3, 2016).

7. Telephone Interview with Rep. Valerie Clark (R-101st) (July 8, 2016) [hereinafter Clark Interview].

8. *Id.*

9. Laura Diaz, *Ga. Bill Would Enforce Limits on Purchases of Medicine Used in Meth*, ATLANTA

During Georgia's 2016 legislative session, the Georgia House made its eighth attempt to pass a bill requiring real-time tracking of products containing pseudoephedrine and ephedrine.<sup>10</sup> The bill, House Bill (HB) 588—later changed to HB 362—offers the electronic tracking system free of charge to supermarkets, pharmacies, and law enforcement agencies across Georgia.<sup>11</sup>

### *Bill Tracking of HB 588*

#### *Consideration by the House*

Representatives Valerie Clark (R-101st), Sharon Cooper (R-43rd), Bruce Broadrick (R-4th), E. Culver “Rusty” Kidd (I-145th), Ed Rynders (R-152nd), and Barbara Sims (R-123rd) sponsored HB 588.<sup>12</sup> The House read the bill for the first time on March 11, 2015 and recommitted it to the Health and Human Services committee.<sup>13</sup> The House Committee on Health and Human Services offered a substitute to the bill, which the House read on January 27, 2016.<sup>14</sup>

The Committee substitute reorganized much of the introduced bill's substantive inserts.<sup>15</sup> For example, the substitute removed the phrase “retail distributor” and the word “norpseudoephedrine.”<sup>16</sup> The substitute also significantly changed Section (c) by removing language that forced retailers to sell products containing only pseudoephedrine from behind a counter or similar barrier.<sup>17</sup>

Between March 13, 2015 and January 27, 2016, the Committee met separately with small pharmacies, grocery store pharmacies, the GBI, Director Rick Allen from the Georgia Drugs and Narcotics

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J.-CONST.: MYAJC (Jan. 29, 2016, 4:28 PM), <http://www.myajc.com/news/news/state-regional-govt-politics/ga-bill-would-enforce-limits-on-purchases-of-medic/nqFqh/>.

10. Torres, *supra* note 6.

11. Diaz, *supra* note 9.

12. Georgia General Assembly, HB 588, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/588>.

13. State of Georgia Final Composite Status Sheet, HB 588, May 5, 2016. The House read the bill again on March 13, 2015. *Id.*

14. *Id.*

15. Compare HB 588, as introduced, 2015 Ga. Gen. Assemb., with HB 588 (6327S), 2016 Ga. Gen. Assemb.

16. *Id.*

17. HB 588 (6327S), § 1, p. 3, ll. 63–65, 2016 Ga. Gen. Assemb.

Agency, and Attorney General Sam Olens.<sup>18</sup> They all suggested allowing the information to go the GBI first, instead of the national database, which would allow these regulations “to be better enforced.”<sup>19</sup> Representative Clark believes Mr. Clark’s and Mr. Olens’ changes “made a better bill.”<sup>20</sup>

The Rules Committee withdrew the bill and recommitted it to the Committee on Health and Human Services on February 4, 2016.<sup>21</sup> The new substitute kept all of the changes and phrasing of the previous substitute, except for a change in subsection (a)(4)(B).<sup>22</sup> This section specified retailers would not have to pay transaction fees for tracking software.<sup>23</sup>

The House Committee on Health and Human Services favorably reported the bill on February 10, 2016.<sup>24</sup> The House read the bill for the third time on February 16, 2016.<sup>25</sup> It passed the same day by a vote of 151 to 19.<sup>26</sup>

#### *Consideration by the Senate*

Senator Renee Unterman (R-45th) sponsored HB 588 in the Senate.<sup>27</sup> The Senate first read HB 588 on February 17, 2016, and assigned it to the Senate Health and Human Services Committee.<sup>28</sup> The Senate Health and Human Services Committee favorably reported the bill on March 7, 2016.<sup>29</sup> The Senate read the bill for the second time on March 8, 2016.<sup>30</sup>

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18. Clark Interview, at 7:40–9:18

19. *Id.*

20. *Id.*

21. State of Georgia Final Composite Status Sheet, HB 588, May 5, 2016.

22. *Compare* HB 588 (6327S), § 1, p. 2, l. 41, 2016 Ga. Gen. Assemb., *with* HB (6465S), § 1, p. 2, l. 41, 2016 Ga. Gen. Assemb.

23. HB 588 (6465S), § 1, p. 2, l. 41, 2016 Ga. Gen. Assemb.

24. State of Georgia Final Composite Status Sheet, HB 588, May 5, 2016.

25. *Id.*

26. Georgia House of Representatives Voting Record, HB 588, Vote #542 (Feb. 16, 2016).

27. Georgia General Assembly, HB 588, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/588>.

28. State of Georgia Final Composite Status Sheet, HB 588, May 5, 2016.

29. *Id.*

30. *Id.*

On March 15, 2016, the Senate read HB 588 for the third time.<sup>31</sup> After the third reading, Senators Unterman (R-45th), Rick Jeffares (R-17th), Bill Jackson (R-24th), and Chuck Hufstetler (R-52nd) proposed a floor amendment to the bill.<sup>32</sup> The amendment recommended revising paragraph (e.1)(1) and adding subparagraph (e.1)(1)(B) to Code section 43-34-103.<sup>33</sup> The recommended revisions would allow physician assistants to write prescription drug orders for hydrocodone compounds.<sup>34</sup> Physician assistants had lost the power to prescribe such drugs in 2014 when the Drug Enforcement Agency (DEA) moved several Schedule III drugs, such as hydrocodone based compounds, up to Schedule II.<sup>35</sup>

The Senate adopted the amendment by a vote of 22 to 3.<sup>36</sup> It then passed HB 588 as amended on March 15, 2016, by a vote of 39 to 1.<sup>37</sup> The bill was then set aside to be resolved in a conference committee with the House.<sup>38</sup>

*Reconsideration of HB 588 by the House and its Transformation into HB 362*

The Chairwoman of Health and Human Services, Representative Cooper, and other members of the House took issue with the Senate's amendments to HB 588, granting physician assistants the ability to prescribe Schedule II drugs.<sup>39</sup> Representative Cooper and others expressed serious concern that the amendment would ease access to highly addictive drugs, thereby furthering opioid abuse in Georgia.<sup>40</sup> Opponents of the Senate amendments fears are bolstered by statistics showing that prescription drug abuse in Georgia has declined since

31. *Id.*

32. Video Recording of Senate Proceedings, Mar. 15, 2016 at 5 min., 5 sec. (remarks by Sen. Jeffares (R-17th)), <http://www.gpb.org/lawmakers/2016/day-37> [hereinafter Senate Video].

33. HB 588 (SFA), p. 1, l. 8, 2016 Ga. Gen. Assemb.

34. Senate Video, *supra* note 32, at 5 min., 5 sec. (remarks by Sen. Jeffares (R-17th)).

35. Diane Wagner, *Sen. Chuck Hufstetler at Work on Health Bills for Action in January*, ROME NEWS-TRIB. (Nov. 30, 2015, 9:00 AM), [http://www.northwestgeorgianews.com/rome/news/local/sen-chuck-hufstetler-at-work-on-health-bills-for-action/article\\_f4c37316-973f-11e5-a7e7-8b72936e0914.html](http://www.northwestgeorgianews.com/rome/news/local/sen-chuck-hufstetler-at-work-on-health-bills-for-action/article_f4c37316-973f-11e5-a7e7-8b72936e0914.html).

36. Senate Video, *supra* note 32, at 5 min., 53 sec. (remarks by LG Casey Cagle).

37. Georgia Senate Voting Record, HB 588, Vote #604 (Mar. 15, 2016).

38. Senate Video, *supra* note 32, at 5 min., 25 sec. (remarks by Sen. Unterman (R-45th)).

39. Clark Interview, *supra* note 7, at 4 min., 10 sec.

40. *Id.*

the DEA moved hydrocodone compounds and other Schedule II drugs above the prescription authority of physician assistants.<sup>41</sup>

Even though the House and Senate remained in agreement about the importance of HB 588's initial purpose—installing electronic tracking systems in drug stores to track the sale of pseudoephedrine—the House refused to pass the bill as amended.<sup>42</sup> As a solution, the House and Senate decided to proceed without the amendment and added HB 588 to HB 362.<sup>43</sup> Both the House and the Senate passed HB 362 on March 24, 2016.<sup>44</sup>

### *The Act (HB 362)*

The Act creates Code section 16-13-30.3 of Article 2 of Chapter 13 of Title 16.<sup>45</sup> This section defines several different terms related to the electronic tracking system, outlines the requirements of the tracking system, and sets out the punishment for anyone in violation of the code section.<sup>46</sup> Code section 16-13-30.3(a)(1) defines ephedrine and pseudoephedrine as “any drug product containing ephedrine or pseudoephedrine, or any other of their salts, isomers, or salts of isomers, alone or in a mixture.”<sup>47</sup>

### *Real-Time Tracking System*

Code section 16-13-30.3 mandates all pharmacies to install electronic logging systems that operate in real time and generate stop sale alerts to notify pharmacists when someone has purchased more than the maximum amount of ephedrine or pseudoephedrine.<sup>48</sup> To ensure pharmacist safety, however, every system must also be equipped with a safety override. The safety override function allows pharmacists to complete a sale in violation of Code section

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41. *Id.* at 5 min., 5 sec.

42. *Id.*

43. *Id.*

44. State of Georgia Final Composite Status Sheet, HB 362, May 5, 2016.

45. O.C.G.A. § 16-13-30.3 (Supp. 2016).

46. *Id.*

47. O.C.G.A. § 16-13-30.3(a)(1).

48. O.C.G.A. § 16-13-30.3(a)(4), (c)(4)(A).

16-13-30.3 when he or she is in reasonable fear of imminent bodily harm as a consequence of not completing the sale.<sup>49</sup>

When an individual buys any product containing ephedrine or pseudoephedrine for the first time, he or she is required to give the pharmacist his or her full name, address, and present a government issued identification card.<sup>50</sup> The pharmacist must input this information into the tracking system, along with a description of the nonprescription ephedrine or pseudoephedrine product, including the number of grams of ephedrine or pseudoephedrine contained in the product, and the time and date of purchase.<sup>51</sup> The pharmacy must keep records of all sales for a period of two years from the date of each transaction.<sup>52</sup> The records are accessible to Georgia law enforcement agencies through an online portal maintained by the Georgia Bureau of Investigation.<sup>53</sup>

Every logging system must be approved by the Georgia Bureau of Investigation and must be accessible to the state, pharmacies, and law enforcement completely free of charge.<sup>54</sup>

While such systems must have real-time interstate communicability with similar systems in other states, the records maintained by a pharmacy shall not be disclosed to anyone other than Georgia law enforcement agencies.<sup>55</sup>

*Criminalizing Possession of Products Containing Ephedrine or Pseudoephedrine*

Code section 16-13-30.3 (b)(1) states that any person who possess more than 300 pills, tablets, gelcaps, or capsules that contain ephedrine or pseudoephedrine or more than nine grams of ephedrine shall be guilty of a felony punishable by imprisonment for not less than one year but no more than ten.<sup>56</sup> The same punishment applies to someone who possesses any amount of ephedrine- or

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49. O.C.G.A. § 16-13-30.3(a)(4).

50. O.C.G.A. § 16-13-30.3(a)(5), (c)(3).

51. O.C.G.A. § 16-13-30.3(a)(5), (c)(3).

52. O.C.G.A. § 16-13-30.3(e)(3).

53. O.C.G.A. § 16-13-30.3(c)(4)(D).

54. O.C.G.A. § 16-13-30.3(a)(4).

55. O.C.G.A. § 16-13-30.3(e)(3).

56. O.C.G.A. § 16-13-30.3(b)(1), (3).



pseudoephedrine-based products with the intent to manufacture amphetamine or methamphetamine, or anyone who possesses, with the intent to distribute, any product containing any amounts of ephedrine or pseudoephedrine that have been crushed, powdered, liquefied, or altered in any other manner.<sup>57</sup> A person may legally purchase or sell 3.6 grams of ephedrine or pseudoephedrine per day.<sup>58</sup> However, this amount cannot reach more than nine grams per thirty-day period.<sup>59</sup>

#### *Products Containing Pure Ephedrine or Pseudoephedrine*

Code section 16-13-30.3(c)(1) states that any products whose sole active ingredient is pseudoephedrine must be sold in blister packaging.<sup>60</sup> Any nonprescription products whose sole active ingredient is ephedrine or pseudoephedrine must comply with Code section 16-13-29.2.<sup>61</sup>

#### *Liability of Pharmacies*

Starting January 1, 2017, pharmacies that do not use a real time tracking system will not be permitted to sell products containing ephedrine or pseudoephedrine.<sup>62</sup> If, for some reason, the system malfunctions, the pharmacy must record any sales in either a written or an electronic log.<sup>63</sup> Pharmacies are also prohibited from selling any non-prescription product that contains more than 3.6 grams of ephedrine or pseudoephedrine per day dosage or more than 9 grams per a 30 day period dosage to an individual.<sup>64</sup> And as noted above, if the sole active ingredient is pseudoephedrine it must be sold in blister packaging.<sup>65</sup> Any pharmacy or pharmacist who fails to comply with any of the above requirements or fails to record sales shall be guilty

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57. O.C.G.A. § 16-13-30.3(b)(2), (e).

58. O.C.G.A. § 16-13-30.3(e)(2).

59. *Id.*

60. O.C.G.A. § 16-13-30.3(c)(1).

61. *Id.*

62. O.C.G.A. § 16-13-30.3(c)(4).

63. O.C.G.A. § 16-13-30.3(c)(4)(B).

64. O.C.G.A. § 16-13-30.3(e)(1), (2).

65. O.C.G.A. § 16-13-30.3(c)(1).

of a misdemeanor punishable of a fine no more than \$500 upon first conviction and upon second conviction no more than six months imprisonment, a \$1000 fine, or both.<sup>66</sup>

If a pharmacy buys products containing ephedrine or pseudoephedrine from anyone other than a manufacturer or distributor licensed by the State Board of Pharmacy, it shall be guilty of a misdemeanor and upon the second conviction shall be guilty of a high and aggravated misdemeanor.<sup>67</sup>

It shall be a defense to any of the above criminal allegations, if all employees of the pharmacy completed training that complied with the standards established by Georgia Meth Watch as of June 30, 2016, and the pharmacy actually complied with the procedures developed by Georgia Meth Watch.<sup>68</sup> Except in cases of negligence, wantonness, recklessness, or deliberate misconduct, pharmacies using the real-time tracking system cannot be held civilly liable for any act or omission in carrying out the duties required by Code section 16-13-30.3.<sup>69</sup> Pharmacies are also immune from liability to any third party unless the pharmacy violates Code section 16-13-30.3.<sup>70</sup>

### *Analysis*

#### *Comparison With Other States*

By adopting HB 362, Georgia joins the several other states that have passed legislation requiring drug tracking programs.<sup>71</sup> In particular, Georgia's neighboring states have adopted such legislation because the drug tracking system leads investigators "to meth labs [they] otherwise wouldn't know about."<sup>72</sup> Mississippi is the only other state in the southeast that has not implemented a requirement

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66. O.C.G.A. § 16-13-30.3(c)(7)(A).

67. O.C.G.A. § 16-13-30.3(c)(7)(B).

68. O.C.G.A. § 16-13-30.3(c)(7)(C).

69. O.C.G.A. § 16-13-30.3(c)(4)(C).

70. *Id.*

71. Torres, *supra* note 6; see *NPLEX States*, APPRISS (2015), <http://www.appriss.com/nplex.html> (last visited Sep. 3, 2016).

72. Press Release, N.C. Dep't of Just., Technology leads to record number of meth lab busts in NC (Jan. 19, 2014), <http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Technology-leads-to-record-number-of-meth-lab-bust.aspx>.

for pharmacies to join a real-time electronic logging system.<sup>73</sup> With the passage of HB 588, Georgia has joined the majority of its neighbors in taking steps to curb meth production.

### *Intended Consequences*

At its core, this law aims to further restrict methamphetamine makers' ability to obtain the necessary supplies.<sup>74</sup> Yet, the law also allows consumers to more easily obtain allergy medications by taking them to the shelves instead of placing them behind pharmacy counters.<sup>75</sup> To combat the concern that this would create an easier avenue for methamphetamine producers to gather the requisite ingredients, the Act requires all pharmacies to have a real-time electronic logging system.<sup>76</sup>

First, this Act prevents methamphetamine producers from taking advantage of small pharmacies by going to multiple pharmacies in a single day and purchasing more than the maximum amount of the drugs.<sup>77</sup> Without a real-time system to inform a pharmacy that a purchaser recently bought the same drug somewhere else, purchasers were able to get around the legal limit.<sup>78</sup> This Act prevents that from occurring because of its real-time logging component.<sup>79</sup> The real-time technology allows pharmacies to track the amount of a drug purchased by an individual at any pharmacy in the state.<sup>80</sup>

### *Mild Opposition*

The Act initially had some opposition.<sup>81</sup> The most notable concern dealt with the vesting of power in physician assistant's to prescribe

73. See NPLEX, *supra* note 6.

74. Torres, Kristina, *Georgia Senate Backs Bill Limiting Medicine Used to Make Meth*, ATLANTA J.-CONST. (Mar. 15, 2016 1:41 PM), <http://www.ajc.com/news/news/state-regional-govt-politics/georgia-senate-backs-bill-limiting-medicine-used-t/nqk4J/>.

75. Diaz, *supra* note 9.

76. *Id.*

77. FINAL REPORT OF THE SENATE STUDY COMMITTEE ON THE CREATION OF A GEORGIA METHCHECK DATABASE, S. 150, Reg. Sess., at 8 (2009).

78. *Id.* at 6.

79. O.C.G.A. § 16-13-30.3(c)(4)(A) (Supp. 2016).

80. See Diaz, *supra* note 9.

81. Georgia House Voting Record, HB 588, Vote #542 (Feb. 16, 2016) (passing the House by a vote of 151-19); Georgia Senate Voting Record, HB 588, Vote #604 (Mar. 15, 2016) (passing the Senate by a

painkillers.<sup>82</sup> However, support from the GBI, attorney general, and director of the Georgia Drugs and Narcotics Agency in favor of the tracking implementation apparently outweighed the detractors' original concerns.<sup>83</sup> The bill also directly addressed any potential opposition—although none materialized—from pharmacies, who could have been concerned about liability in situations out of their control, such as system outages, by carving out protections for pharmacies that attempt to comply with the system.<sup>84</sup> Further, the pharmaceutical companies that backed the Act offered to pay for the logging system.<sup>85</sup> Thus, pharmacies that might fear increased costs will incur no extra expense from implementation of the real-time monitoring system.<sup>86</sup>

This Act does not hurt pharmacies, because it does not require them to pay for the monitoring expense.<sup>87</sup> At the same time, this Act will make it more difficult for meth producers to acquire the necessary supplies, because it requires every pharmacy to utilize the real-time tracking system.<sup>88</sup> Other states that have adopted the system have seen a substantial increase in the amount of blocked sales of pseudoephedrine.<sup>89</sup> For example, Arkansas began using the tracking system in 2015, and within the first year blocked 3,873 sales of banned ingredients; from January through June of 2016, Arkansas blocked 3,722 sales.<sup>90</sup> North Carolina found the system helped in setting a record for meth lab busts.<sup>91</sup> Finally, the Act makes it easier for consumers to obtain necessary allergy medications by moving these medications from behind the counter back onto the shelves.<sup>92</sup>

*William Fawcett & April Meeks*

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vote of 39-1); Clark Interview *supra* note 7, at 9:15.

82. *Id.*

83. *Id.*

84. O.C.G.A. § 16-13-30.3(c)(4) (Supp. 2016).

85. Torres, *supra* note 74.

86. *Id.*

87. *Id.*

88. O.C.G.A. § 16-13-30.3(a)(4), (c)(4)(A) (Supp. 2016).

89. See generally Appriss tables, *infra* note 91.

90. Compare Appriss 2015 year end table (<http://www.appriss.com/actionable/NPLEx/EOY2015.htm>), with Appriss 2016 2Q table (<http://www.appriss.com/actionable/NPLEx/2Q2016Stats.htm>).

91. N.C. Dep't Just., *supra* note 72.

92. See Diaz, *supra* note 9.