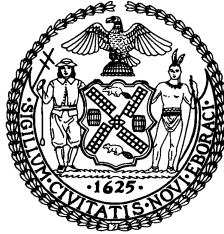


Public Safety Committee Staff:  
Carmine J. Guiga, Counsel  
Salvador Arrona, Policy Analyst



**THE COUNCIL OF THE CITY OF NEW YORK**

---

**REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION**  
Robert Newman, Legislative Director  
Alix Pustilnik, Deputy Director, Governmental Affairs

**COMMITTEE ON PUBLIC SAFETY**  
Hon. Peter F. Vallone, Jr., Chair

*April 25, 2012*

---

***Oversight: Finding a Cure: Examining Law Enforcement efforts to remedy the Prescription Drug Abuse Epidemic***

**PRE-CONSIDERED RES.:** By Council Member Vallone, Jr.

**TITLE:** Resolution calling upon the New York State Assembly to pass and the Governor to sign into law S.5260-C/A.7251-C, which would amend the Penal Law to establish the offense of fraudulent prescription, dispensing and procurement of non-controlled substance prescription medications and devices, and the offense of unlawful possession of non-controlled substance prescription medications and devices.

## **I. Introduction**

On April 25, 2012, the Committee on Public Safety, chaired by Peter F. Vallone, Jr., will hold a hearing entitled, “Finding a Cure: Examining Law Enforcement efforts to remedy the Prescription Drug Abuse Epidemic.” The committee will also hear a Pre-Considered Resolution that calls upon the New York State Assembly to pass and the Governor to sign into law S.5260-C/A.7251-C, which would amend the Penal Law to establish the offense of fraudulent prescription, dispensing and procurement of non-controlled substance prescription medications and devices, and the offense of unlawful possession of non-controlled substance prescription medications and devices. Those expected to testify at today’s hearing include, among others, Special Narcotics Prosecutor Bridget Brennan, Gregory Krakower, Senior Advisor to Attorney General Eric Schneiderman, Michael P. Flowers, Director, Mayor’s Financial Crimes Task Force, representatives from the Queens and Kings County District Attorneys’ Offices, and all other interested parties.

The issue of prescription drug abuse actually takes two forms – controlled prescription drugs and non-controlled prescription drugs – both of which, when misused and exploited, can have negative health and financial impacts on society. Certain prescription drugs, such as painkillers, are considered controlled substances and carry with them tighter regulations and stricter penalties for misuse. Alternatively, most of the prescription drugs in use are considered non-controlled substances and because of this classification they are less regulated and their misappropriation carries less severe penalties. However, the negative impacts of underground non-controlled prescription drug markets should not be overlooked. Therefore, to fully understand and appreciate the severity of the prescription drug abuse epidemic, today the committee will address both types of prescription drugs and the illegal markets surrounding each.

## II. The Prescription Drug Epidemic

Prescription drug abuse is now the Nation's fastest-growing drug problem and, in 2011, the U.S. Center for Disease Control and Prevention ("U.S. CDC") determined that prescription drug abuse had reached epidemic levels.<sup>1</sup> In fact, since 2003 more overdose deaths in the United States have involved opioid analgesics (known as "painkillers") than heroin and cocaine combined.<sup>2</sup> Additionally, according to preliminary data from the U.S. CDC, in 2009 fatal overdoses from prescription painkillers surpassed automobile accidents as the leading cause of death in the U.S., killing at least 37,485 people nationwide.<sup>3</sup> The nationwide problem is highlighted by the fact that overdoses of prescription painkillers alone more than tripled in the past 20 years, leading to 14,800 deaths in the United States in 2008.<sup>4</sup> Death is only part of the problem, however, as studies show that enough painkillers were prescribed in the United States in 2010 to medicate every American adult around-the-clock for a month.<sup>5</sup> For each death involving prescription painkillers there are ten treatment admissions for abuse,<sup>6</sup> 32 emergency department visits for misuse or abuse,<sup>7</sup> 130 people who abuse or are dependent<sup>8</sup> and 825 people who take prescription painkillers for nonmedical use.<sup>9</sup> Simple math, then, shows that nationwide, according to 2008 statistics, there were over 12.2 million people taking prescription painkillers for nonmedical use.

---

<sup>1</sup> See U.S. Center for Disease Control and Prevention, Press Release at

[http://www.cdc.gov/media/releases/2011/p1101\\_flu\\_pain\\_killer\\_overdose.html](http://www.cdc.gov/media/releases/2011/p1101_flu_pain_killer_overdose.html)

<sup>2</sup> CDC. Policy impact: prescription painkiller overdoses. Atlanta, GA: US Department of Health and Human Services, CDC; 2011. Available at <http://www.cdc.gov/homeandrecreationalafety/rxbrief/index.html>.

<sup>3</sup> U.S. Center for Disease Control and Prevention, *National Vital Statistics Reports*, Vol. 59, Number 4 at Table 2, available at: [http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59\\_04.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_04.pdf). The table shows that in 2009 there were 36,284 deaths related to motor vehicle accidents as compared to 37,485 deaths related to drug-induced deaths.

<sup>4</sup> See Centers for Disease Control and Prevention. Vital Signs: Overdoses of Prescription Opioid Pain Relievers—United States, 1999–2008, available at: <http://www.cdc.gov/mmwr/pdf/wk/mm61e0416.pdf>

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

These nationwide statistics correspond to the usage statistics in New York City. According to the New York City Department of Health and Mental Hygiene (“NYC DOHMH”) in 2008-2009, 4% of New Yorkers aged 12 and older reported non-medical use of prescription opioids either without a prescription or with a prescription in a manner other than prescribed within the past year.<sup>10</sup> The only drug more commonly reported in this same period was marijuana – even cocaine was reported to be used by only 3% of New Yorkers in 2008-2009.<sup>11</sup> Moreover, as compared to usage in 2002-2003, self-reported, non-medical prescription opioid use increased by 40% in 2008-2009. This massive spike in usage is highlighted by the fact that emergency room visits for painkiller-related misuse and abuse doubled between 2004 and 2009, rising from approximately 55 to 110 visits per 100,000 New Yorkers.<sup>12</sup> Also, the unintentional death rate from painkiller overdoses increased by 20% between 2005 and 2009 from 2.0 to 2.4 per 100,000 New Yorkers – in that same timeframe heroin poisoning death rate decreased by 24%.<sup>13</sup> While this epidemic is affecting all of New York City, certain areas are experiencing more dramatic upticks. For example, in Staten Island the rate of painkiller overdoses increased by 147% between 2005 and 2009 from 3.0 to 7.4 per 100,000 New Yorkers – more than double that of any other borough.<sup>14</sup> In fact, DOHMH statistics show that residents of medium- and high-income neighborhoods accounted for seven in 10 overdoses in 2009, an increase of 69%, from 2005.<sup>15</sup>

Unfortunately, these numbers are likely to continue to rise in New York City. According to the New York Office of the Special Narcotics Prosecutor (“OSNP”), nearly two million prescriptions for oxycodone and hydrocodone (only two types of painkillers) were filled in 2011

---

<sup>10</sup> New York City Department of Health and Mental Hygiene, EPI DATA BRIEF (August 2011), *available at*: <http://www.nyc.gov/html/doh/downloads/pdf/epi/databrief10.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* In 2004 there was 4,466 total emergency room visits for painkiller-related misuse and in 2009 there was a total of 9,254 emergency room visits for painkiller-related misuse.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

– or, approximately one for every four people in the City.<sup>16</sup> Oxycodone prescriptions alone increased by 13% from 2010 for a total of 1.2 million prescriptions of the potent painkiller citywide in 2011.<sup>17</sup>

### **III. Controlled Prescription Medication vs. Non-Controlled Prescription Medication**

As indicated above, the abuse of prescription painkillers is rampant nationwide and in New York City. Prescription painkillers, however, are only part of the problem. To fully comprehend the severity of the problem it is important to understand that prescription drugs actually come in two forms: (1) controlled prescription medications; and (2) non-controlled prescription medications.

#### ***“Controlled” Prescription Medications***

A controlled prescription medication is a drug that is technically declared by federal or state law to be illegal for sale or use, but may be dispensed under a physician's prescription. Both the federal government and state governments maintain controlled substances lists, which are divided into five schedules. The inclusion on such list means that usage of the drug is “controlled” by governing laws and regulations. The basis for control and regulation is twofold: (1) whether the drug possesses a currently accepted medical use in treatment in the United States; and (2) the relative abuse potential and likelihood of causing dependence, physical or mental harm (including death). Painkillers, medically known as opioids and available as OxyContin, Vicodin, and Demerol, are merely one type of controlled prescription medication. Other drugs that are also controlled and are also seeing widespread misuse are depressants, such as Xanax and Valium, and stimulants, such as Ritalin and Dexedrine.

---

<sup>16</sup> Testimony of the Special Narcotics Prosecutor before the Committee on Public Safety, March 15, 2012, *available at*: [http://www.nyc.gov/html/snp/downloads/pdf/fy2013\\_city\\_council.pdf](http://www.nyc.gov/html/snp/downloads/pdf/fy2013_city_council.pdf)

<sup>17</sup> *Id.* There was a 17% increase in Brooklyn, a 16% increase in Queens, a 13% increase in both Bronx and Manhattan, and a 3% increase in Staten Island. Although Staten Island leveled off a bit in 2011, the borough had a 21% increase in 2010 and remains the borough most affected since its rates of prescriptions filled per capita is highest citywide.

### ***“Non-Controlled” Prescription Medications***

Most drugs that require a prescription from a doctor are not on the controlled substances list.<sup>18</sup> Unlike those medications deemed to be dangerous enough to necessitate being included on federal and state controlled substances lists, non-controlled prescription medications are those used to treat chronic conditions such as HIV/AIDS, asthma, diabetes, high blood pressure, certain psychoses, sleep deprivation, erectile dysfunction, and bacterial infections. Some common examples include: Lopressor, used for high blood pressure; Augmentin, an antibiotic used to treat bacterial infections; Diprivan, a sleep-inducing anesthetic; Truvada, used for AIDS patients; and Viagra or Cialis, used to treat erectile dysfunction.<sup>19</sup> While the statistics above show that controlled prescription medications are being abused, there is an emerging trend of misuse and illicit sale of non-controlled prescription medications.

#### **IV. Regulating Prescription Drugs**

To regulate prescription drugs, both the federal government and the New York State Legislature implemented licensing schemes for pharmacists and doctors as well as certain regulations to be followed by both, such as record maintenance and pharmaceutical security measures. In addition, the U.S. Food and Drug Administration (“FDA”) regulates which drugs are necessary to be prescribed by a doctor and bought at a pharmacy as opposed to simply sold “over-the-counter.”<sup>20</sup> In New York State, licensed pharmacists may not dispense any of the FDA approved drugs to a person “except upon a prescription written by a person legally authorized to issue such prescription.”<sup>21</sup> Additionally, the law requires that all such drugs dispensed by a licensed pharmacist must include, affixed to the container, “a label bearing the name and address of the owner of the establishment in which it was dispensed, the date compounded,

---

<sup>18</sup> See Dispensing and Purchasing Controlled Substances over the Internet, 66 Fed. Reg. 82 (April 27, 2001).

<sup>19</sup> See New York State Department of Health website at <http://www.health.ny.gov/professionals/patients/medicines/>.

<sup>20</sup> See generally U.S. Food, Drug, and Cosmetics Act, 21 U.S.C. 351, *et. seq.*

<sup>21</sup> New York State Education Law §6810.

the number of the prescription under which it is recorded in the pharmacist's prescription files, the name of the prescriber, the name and address of the patient, and the directions for the use of the drug by the patient as given upon the prescription.”<sup>22</sup>

Drugs that are also included on the federal or state controlled substances list receive heightened prescription regulations. For instance, in New York there shall be no prescription made for “a quantity of controlled substances which would exceed a thirty day supply if the controlled substance were used in accordance with the directions for use specified on the prescription.” In addition, to promote regular doctor visits federal law does not allow prescriptions for any schedule II controlled substances to be refilled<sup>23</sup> and in New York this rule is expanded to include certain schedule III and schedule IV controlled substances as regulated by the Commissioner of the State Department of Health.<sup>24</sup>

### ***Prescription Drug Monitoring Programs***

Furthermore, many states attempt to further regulate prescription drugs through the implementation of prescription drug monitoring programs (“PDMPs”).<sup>25</sup> PDMPs are statewide electronic databases which collect designated data on substances dispensed in the state. The purpose of a PDMP is to support access to legitimate medical use of prescription medications, identify and prevent misuse, inform the public about use and abuse trends, and facilitate intervention of persons addicted to prescription drugs.<sup>26</sup> New York’s PDMP was implemented in 1972 as part of the state’s Controlled Substances Act and it requires dispensers of schedules II through V controlled substances to report this information pursuant to the rules established by the New York State Department of Health.<sup>27</sup> Specifically, New York’s PDMP requires every

---

<sup>22</sup> *Id.*

<sup>23</sup> 21 USC § 829(a).

<sup>24</sup> NYS Public Health Law §3339.

<sup>25</sup> See Alliance of States with Prescription Drug Monitoring Programs, available at: <http://www.pmpalliance.org/>

<sup>26</sup> *Id.*

<sup>27</sup> See 10 NYCRR 80.67—80.69; 10 NYCRR 80.7180.73; 10 NYCRR 80.108; and 10 NYCRR 80.123.

pharmacy licensed in New York State to transmit certain patient, doctor, and drug information<sup>28</sup> for all schedule II, III, IV, or V controlled substances that are dispensed. These transmissions must be sent by the 15<sup>th</sup> of the following month to the New York State Department of Health's Bureau of Narcotic Enforcement, who then analyzes the data. However, according to the New York State Attorney General, New York's current PDMP "does not require physicians to report the prescriptions that they issue in any manner whatsoever" and very few practitioners even use the system to access their patients' controlled substance history since it is not mandated.

#### The Internet System for Tracking Over-Prescribing (I-STOP)

To remedy some of the issues with the current PDMP in place, New York State Attorney General Eric T. Schneiderman introduced a bill in Albany known as I-STOP.<sup>29</sup> In short, I-STOP is an online, real-time, controlled substance reporting system that will require doctors and pharmacists to search and report a schedule II, III, IV, or V controlled substance prescription at the time it is issued and at the time it is dispensed.<sup>30</sup> Most notably, I-STOP would: (i) mandate that practitioners and pharmacists review patient history prior to prescribing or dispensing medications; (ii) require practitioners to report a prescription at the time it was issued; and (iii) remove the 45-day reporting timeframe for pharmacists and instead require that pharmacists report in real-time when the substance is dispensed.<sup>31</sup>

#### **V. Diversion of Prescription Drugs**

Notwithstanding the regulations in place for prescription medication, many of these drugs are still being deflected from their medical sources to the illegal market, a process known as

---

<sup>28</sup> The data must include: (1) the pharmacy identification; (2) patient information such as name, address, date of birth and gender; (3) prescription information such as number, data written and dispensed, drug type and quantity, and refill information; and (4) practitioner information.

<sup>29</sup> See A.8320-2011 and S.5720-2011.

<sup>30</sup> See New York State Office of the Attorney General, *Internet System for Tracking Over-Prescribing (I-STOP): A Proposal for Addressing New York's Prescription Drug Abuse and Drug Diversion Epidemic* (2012), available at: <http://www.ag.ny.gov/sites/default/files/press-releases/2012/ISTOP%20REPORT%20FINAL%201.10.12.pdf>

<sup>31</sup> See *id.*; see also A.8320-2011 and S.5720-2011.



“diversion.”<sup>32</sup> Diversion of pharmaceuticals takes place so that certain drugs can be used recreationally as opposed to in a medically prescribed manner and because these drugs carry heavy price-tags and therefore be resold at a profit. Diversion can occur in a variety of ways, such as through doctor shopping, illegal internet pharmacies, drug theft, prescription forgery, and illicit prescriptions by physicians.<sup>33</sup> Doctor shopping is one of the more popular methods and it involves an individual going to different doctors with varied complaints in order to obtain prescriptions.<sup>34</sup> Prescription forgeries happen either by making or stealing blank prescription pads or by altering legitimate prescriptions, typically to increase quantity.

Diversion of prescription drugs takes place for both controlled and non-controlled substances, though the reasons tend to be different. Controlled substances such as painkillers are often diverted from their prescribed medical use into the illegal market for recreational use. As described above, the impact of diverting these controlled substances is at epidemic proportions. There is also an emerging trend to divert non-controlled substances, however, though generally not for recreational purposes. Instead, non-controlled prescription medication is generally diverted as part of a money-making Medicaid fraud scheme.

Non-controlled prescription medications are very expensive and are typically Medicaid typically pays. These drugs, when stolen, are generally repackaged and re-sold for a fraction of the original price, often to unscrupulous pharmacies (domestic or international) and then ultimately re-dispensed to both legitimate and fraudulent patients. This type of diversion is rising nationwide, happening within the supply chain before the medication even reaches pharmacies. According to the New York State Law Enforcement Council, from 2006 to 2010

---

<sup>32</sup> Pilar Kraman, *Drug Abuse in America – Prescription Drug Diversion*, The Council of State Governments TrendsAlert (April 2004), available at: <http://www.csg.org/knowledgecenter/docs/TA0404DrugDiversion.pdf>.

<sup>33</sup> *Id.*

<sup>34</sup> U.S. Department of Justice, National Drug Intelligence Center, *Oxycontin Diversion and Abuse*, January 2001, available at: <http://www.justice.gov/ndic/pubs/651/>.

reported thefts of prescription drug shipments quadrupled. In 2009, as much as \$184 million worth of pharmaceuticals were stolen in the United States.<sup>35</sup> The New York City Human Resources Administration calculated more than \$35 million in identified Medicaid fraud dollars resulting from false prescriptions and other diversion schemes – 95% of which are the result of non-controlled prescription drug diversion.<sup>36</sup>

Like the diversion of controlled prescription medication, the diversion of non-controlled prescription medication carries serious health ramifications, even though the original motive was not to divert for recreational use. Since these non-controlled prescription drugs are valuable on the street, some Medicaid recipients either sell their legitimate drugs instead of taking them as prescribed by a doctor, or have their drugs stolen. Either way, these legitimate patients, who are at times chronically ill, are not taking their medications and risk developing serious, life threatening symptoms. Alternatively, because these non-controlled prescription drugs are being repackaged and re-sold to pharmacies there is potential for legitimate patients to unwittingly purchase these diverted drugs. According to the New York State Law Enforcement Council, this is problematic because diverted drugs may be tampered with during repackaging and stored without any quality control measures being taken. Accordingly, many of the drugs are being sold past their expiration dates or after having been stored in climates that alter their effectiveness.<sup>37</sup> Any of these scenarios can have detrimental health impacts on the legitimate patient. Additionally, there is a trend where some non-controlled prescription drugs are in fact being used recreationally in conjunction with controlled substances – for example, taking Viagra along with painkillers to aid with sexual performance while being high. This practice of mixing

---

<sup>35</sup> New York State Law Enforcement Council, *2012 Legislative Priorities*, at pages 39-50, available at: [http://www.nyslec.org/pdfs/2012/NYSLEC\\_booklet\\_2012.pdf](http://www.nyslec.org/pdfs/2012/NYSLEC_booklet_2012.pdf).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

controlled and non-controlled medications has the potential for prolonged health issues and even death.<sup>38</sup>

Diversion of both controlled and non-controlled prescription drugs also carries enormous social impacts. According to the U.S. CDC, nationwide nonmedical use of prescription painkillers costs more than \$72.5 billion each year in direct health care costs.<sup>39</sup> In New York, Medicaid spending increased by 38.4% from 2007 to 2010 as a result of a 47.5% increase in prescriptions written for controlled substances in this same timeframe.<sup>40</sup> Non-controlled prescription drug diversion also burdens the Medicaid system because pharmacies are selling street-bought drugs at a lower price and charging Medicaid the amount specified by the drug company, pocketing the difference. The problem is exacerbated by the fact that Medicaid may have already paid for this same medication when it was legitimately dispensed to a patient who then resold the drugs on the streets. Two recent cases in New York highlight the severity of the financial burden: (1) in April of 2012 four pharmacists from Brooklyn and Suffolk County were arrested for an HIV/AIDS prescription drug scam that allegedly bilked \$150 million from the Medicaid program;<sup>41</sup> and (2) in March 2012 Manhattan District Attorney Cyrus Vance announced the sentencing of pharmacist Patrick Alcindor who defrauded Medicaid of more than \$1.8 million in one year.<sup>42</sup> These two cases alone show how financially burdensome the diversion of non-controlled prescription drugs can be.

---

<sup>38</sup> Columbia University National Center on Addiction and Substance Abuse, *Under the Counter: The Diversion and Abuse of Controlled Prescription Drugs in the U.S.* (July 2005), at page 21, available at:

<http://www.casacolumbia.org/download.aspx?path=/UploadedFiles/tt3bl4lk.pdf>.

<sup>39</sup> See U.S. Center for Disease Control and Prevention, *Prescription Painkiller Overdoses in the U.S.*, available at:

<http://www.cdc.gov/Features/VitalSigns/PainkillerOverdoses/>

<sup>40</sup> See New York State Office of the Attorney General, *Internet System for Tracking Over-Prescribing (I-STOP): A Proposal for Addressing New York's Prescription Drug Abuse and Drug Diversion Epidemic* (2012), at page 15, available at:

<http://www.ag.ny.gov/sites/default/files/press-releases/2012/ISTOP%20REPORT%20FINAL%201.10.12.pdf>

<sup>41</sup> See Carl Campanile, *Four busted in \$150M HIV/AIDS-Medicaid drug scam*, NY POST, April 4, 2012.

<sup>42</sup> See

## VI. Current New York State Laws Available to Law Enforcement

There is a robust framework in the New York Penal Law to handle the sale and possession of all controlled substances, as determined by federal and state laws. In New York it is a class C felony for a practitioner to knowingly and unlawfully sell a prescription for a controlled substance.<sup>43</sup> It is also illegal to sell or possess the controlled substance itself, without proper proof of it being properly prescribed by a medical professional.<sup>44</sup> Penalties associated with criminal possession of a controlled substance range from a class A misdemeanor to a class A-I felony, with the determining factor being things such as quantity possessed and intentions associated with the possession.<sup>45</sup> Similarly, the penalties for criminal sale of a controlled substance range from a class D felony to a class A-I felony with determining factors being the aggregate weight sold and the location of the sales.<sup>46</sup>

The Penal Law also provides penalties for forging prescriptions or using prescriptions to defraud. Specifically, a person is guilty of forgery in the second degree – a class D felony – when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a prescription of a duly licensed physician or other person authorized to issue the same for any drug or any device for which a prescription is required by law.<sup>47</sup> A person would also be guilty of criminal possession of a forged instrument in the second degree if he or she merely possessed a forged prescription.<sup>48</sup> A person could also be guilty of scheming to defraud the state by unlawfully selling prescriptions.<sup>49</sup> These laws, designed to combat the illicit sale of drugs and

---

<sup>43</sup> New York State Penal Law §220.65

<sup>44</sup> *See generally* New York State Penal Law Article 220.

<sup>45</sup> *See* New York State Penal Law §§220.03—220.21.

<sup>46</sup> *See* New York State Penal Law §§220.31—220.44.

<sup>47</sup> New York State Penal Law §170.10.

<sup>48</sup> New York State Penal Law §170.25.

<sup>49</sup> *See* New York State Penal Law §190.70. A person is guilty of a scheme to defraud the state by unlawfully selling prescriptions when he or she engages, with intent to defraud the state, in a scheme constituting a systematic, ongoing course of conduct to make, sell, deliver for sale or offer for sale one or more prescriptions and so obtains goods or

forgeries of prescriptions, apply to all types of drugs so long as the drug is one in which a prescription is required by law, thereby covering both non-controlled and controlled prescription drugs.

However, the Penal Law does not adequately address the issue of sale or possession of non-controlled prescription drugs. Instead, the Penal Law creates a penalty for criminal diversion of prescription drugs.<sup>50</sup> Specifically it is unlawful to engage in a "criminal diversion act," which is an act where a person knowingly:

“(a) transfers or delivers, in exchange for anything of pecuniary value, a prescription medication or device with knowledge or reasonable grounds to know that the recipient has no medical need for it; or

(b) receives, in exchange for anything of pecuniary value, a prescription medication or device with knowledge or reasonable grounds to know that the seller or transferor is not authorized by law to sell or transfer such prescription medication or device; or

(c) transfers or delivers a prescription in exchange for anything of pecuniary value; or

(d) receives a prescription in exchange for anything of pecuniary value.”<sup>51</sup>

The level of penalty imposed for criminal diversion of a prescription drug is determined by the value of the benefit exchanged for the criminal diversion act.<sup>52</sup> Prosecutors contend that this rubric is insufficient to punish those who: (i) repeatedly purchase non-controlled prescription drugs without a medical need for the medication (i.e. those that buy to supply the underground market); and (ii) merely possess large quantities of non-controlled prescription drugs without a lawful basis (i.e. those who own “stash houses”). Prosecutors also note that there are no heightened penalties for doctors who prescribe such drugs for patients with no medical need or for pharmacists who sell re-packaged non-controlled drugs from the underground market.

---

services from the state with a value in excess of one thousand dollars or causes the state to reimburse another in excess of one thousand dollars for the delivery of such goods or services.

<sup>50</sup> See New York State Penal Law Article 178.

<sup>51</sup> New York State Penal Law §178.00.

<sup>52</sup> See *id.*

## **VII. Pre-Considered Resolution**

The pre-considered Resolution being heard by the Committee today calls upon the New York State Assembly to pass and the Governor to sign into law S.5260-C/A.7251-C, which would amend the Penal Law to establish the offense of fraudulent prescription, dispensing and procurement of non-controlled substance prescription medications and devices, and the offense of unlawful possession of non-controlled substance prescription medications and devices.

In an attempt to provide law enforcement with the tools to crack down on the non-controlled prescription drug diversion phenomenon, State Senator Kemp Hannon and Assembly Member Daniel O'Donnell introduced legislation, S.5260-C and A.7251-C, respectively, which would address the large-scale underground market for non-controlled prescription drugs. The New York State Senate passed S.5260-C and delivered it to the New York State Assembly for consideration on February 13, 2012. To combat the health and financial problems associated with diversion of non-controlled prescription medications and to fill the gap in the current law, the bills seek to amend the Penal Law by: (1) restructuring the existing crime of criminal diversion of prescription medications and prescriptions; and (2) creating the crimes of fraudulent prescription, dispensing and procurement of non-controlled substance prescription medications and devices, and the offense of unlawful possession of non-controlled substance prescription medications and devices.

Specifically, the bills supported by this pre-considered Resolution would enhance the penalties for those individuals who commit criminal diversion acts repeatedly within a specific time period, and when such acts are committed by a physician, pharmacist, or other individual authorized to dispense or prescribe medications and devices. Furthermore, the bills create the offense of fraudulent prescription, dispensing, and procurement of non-controlled substance prescription medications and devices. This would occur when an unauthorized individual issues

a prescription for a non-controlled substance, or when an individual (either a physician or pharmacist) dispenses a non-controlled substance prescription medication to someone who does not need it, or when an individual presents or submits a forged prescription for a non-controlled substance. Additionally, the bills would make it unlawful for an individual to possess large quantities of non-controlled substance prescription medications without having a lawful basis for such possession. All of these proposed amendments to the Penal Law were recommended by, and therefore supported by, the New York State Law Enforcement Council.

Passage of these bills would ensure that law enforcement authorities in New York State are equipped to handle the relatively new category of non-controlled prescription drug diversion, which grew exponentially in the past few years.

### **VIII. Conclusion**

The Committee on Public Safety looks forward to engaging in a robust discussion on the overall issue of prescription drug abuse and its effects on society. The diversion and misuse of both controlled and non-controlled prescription drugs carries far reaching implications. The misuse of prescription drugs and the re-selling of needed prescription drugs can cause severe health problems as it reaches epidemic proportions nationwide, as well as here in New York City. In addition, the underground market created around these substances burdens our economy as it results in large losses to the Medicaid system.

Preconsidered Res.

Resolution calling upon the New York State Assembly to pass and the Governor to sign into law S.5260-C/A.7251-C, which would amend the Penal Law to establish the offense of fraudulent prescription, dispensing and procurement of non-controlled substance prescription medications and devices, and the offense of unlawful possession of non-controlled substance prescription medications and devices.

By Council Member Vallone

Whereas, There is a rapidly expanding underground market in non-controlled prescription medications; and

Whereas, Unlike psychotropic drugs and opioid pain relievers, which are considered “controlled” prescription drugs under state law and can be abused and lead to addiction, non-controlled prescription drugs are generally not used recreationally; and

Whereas, Non-controlled prescription drugs are used to treat those suffering from chronic medical conditions such as AIDS, asthma, high blood pressure, diabetes, bacterial infections and certain psychoses; and

Whereas, In order to pay for the exorbitant price of these non-controlled prescription medications, some individuals use Medicaid to cover these costs; and

Whereas, While most individuals obtain these drugs in a lawful manner and use them for legitimate purposes, news reports show that some individuals are selling their non-controlled prescription drugs in the underground market, a scheme known as “diversion”; and

Whereas, When diversion occurs, non-controlled prescription drugs are often repackaged by the original recipient and sold to unscrupulous pharmacies, overseas distributors, and online distributors for personal financial gain; and

Whereas, Non-controlled prescription drug diversion has many consequences, ranging from financial impacts on society to severe public health risks; and



Whereas, The New York City Human Resources Administration approximates that more than \$35 million in identified Medicaid fraud results from false prescriptions and prescription drug diversion schemes; and

Whereas, There is potential for detrimental health impacts on patients who unwittingly purchase diverted non-controlled prescription drugs because these drugs can be stored without quality control measures and could be sold well past their expiration dates; and

Whereas, Non-controlled prescription drug diversion is a new form of drug dealing and it did not exist when the New York State Prescription Drug Diversion laws were enacted in 1995; and

Whereas, Accordingly, article 178 of the Penal Law, which criminalizes drug diversion, applies only to the sale of prescription narcotics and not the possession; and

Whereas, Under the current law, an individual who is caught in the act of illegally buying one or two bottles of non-controlled prescription drugs can be charged, at most, with the misdemeanor crime of Attempted Criminal Diversion of Prescription Medications and Prescriptions in the Fourth Degree; and

Whereas, In contrast, it is a class C felony for someone to sell a prescription for a controlled substance; this disparity in penalties creates an incentive to for drug dealers to deal exclusively in non-controlled prescription drugs because there is little or no risk of criminal sanctions if caught; and

Whereas, In order to curb this practice, Senator Kemp Hannon and Assembly Member Daniel O'Donnell introduced legislation, S.5260-C and A.7251-C, respectively, which would address the large-scale underground market for non-controlled prescription drugs; and

Whereas, Some key components of S.5260-C/A.7251-C include punishing those individuals who commit criminal diversion acts on multiple occasions within a given period of

time, penalizing pharmacists and physicians for providing a fraudulent prescription to someone who does not medically need it, and punishing those who possess large quantities of non-controlled substance prescription medication without a valid prescription; and

Whereas, S.5260-C/A.7251-C would amend the definition of criminal diversion of prescription medications and prescriptions in order to punish those individuals who do not have a medical need for a non-controlled medication and who repeatedly purchase non-controlled substance prescription medication; and

Whereas, S.5260-C/A.7251-C would also criminalize the purchasing or dispensing of medications by pharmacists who have obtained the medication through the underground market; and

Whereas, S.5260-C/A.7251-C would amend the Penal Law by adding articles 179 and 219, entitled “fraudulent prescription, dispensing and procurement of non-controlled substance prescription medications and devices” and “unlawful possession of non-controlled substance prescription medications and devices,” respectively; and

Whereas, S.5260-C/A.7251-C would criminalize the writing of fraudulent prescriptions by physicians for patients with no medical need for the medication and pharmacists who dispense medication to those who do not need it; and

Whereas, S.5260-C/A.7251-C would criminalize possession of large quantities of non-controlled substance prescription medications by someone with no lawful basis for such possession; and

Whereas, Additionally, S.5260-C/A.7251-C would establish penalties for those convicted of unlawful possession of non-controlled substance prescription medications and devices, which range from a class A misdemeanor to a class B felony as determined by factors such as quantity and aggregate value; and

Whereas, The New York State Senate passed S.5260-C and delivered it to the New York State Assembly for consideration on February 13, 2012; and

Whereas, By passing this legislation the New York State Legislature would ensure that individuals who repeatedly purchase drugs in the underground market, pharmacists and physicians who provide prescriptions to individuals who do not need them, and those who illegally possess large quantities of prescription drugs are properly punished; now, therefore, be it

Resolved, That the Council of the City of New York calls upon the New York State Assembly to pass and the Governor to sign into law S.5260-C/A.7251-C, which would amend the Penal Law to establish the offense of fraudulent prescription, dispensing and procurement of non-controlled substance prescription medications and devices, and the offense of unlawful possession of non-controlled substance prescription medications and devices.

SA  
4/18/12  
LS # 3550