

Scheduling of Controlled Substances

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Several months ago, an attorney contacted me to ask whether a particular drug was on one of controlled substance schedules, and if so, which one. I did the obvious: I looked at the schedules set forth in G.S. 90-89 *et seq.* I couldn't find the drug, so I concluded that it was not a controlled substance. When I got back in contact with the attorney, though, he told me about something he'd learned in the interim. Although the schedules appear in the General Statutes, they are not controlled exclusively by the legislature. Instead, the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services can *administratively* add drugs to the schedules "on its own motion." G.S. 90-88(a). The drugs added to each schedule administratively appear at 10A NCAC 26F.0102 *et seq.* And in fact, the Commission had added the particular drug about which the attorney had contacted me to one of the schedules. So it *was* a controlled substance, after all.

That little eye-opener got me looking more closely at Chapter 90 of the General Statutes. I learned a couple of other things along the way. On the theory that others might find them interesting, too, here they are.

First, the state controlled substance schedules aren't the necessarily the same as the federal controlled substance schedules, which can be found at 21 U.S.C. § 812 and 21 C.F.R. § 1308. Under G.S. 90-88(d), when a drug is scheduled or rescheduled by the federal authorities, the Commission must *consider* whether to take parallel action under state law, and should do so unless it "objects to such inclusion." I'm not aware of any instances in which the Commission has, in fact, objected, but if you are, please post a comment.

Second, "controlled substances" and "prescription-only drugs" are not coextensive categories. Most obviously, schedule I drugs, which by definition have no medical use, cannot be prescribed. But more generally, the decision to make a drug prescription-only is a separate decision from the decision to schedule a drug, and it is made by a separate agency -- the federal Food and Drug Administration. While non-prescription drugs generally cannot be scheduled per G.S. 90-88(e), the converse is not true, and many drugs that are not scheduled are nonetheless available only by prescription.

The latter point relates to my third, and final, tidbit. I've been asked several times whether it is a crime to sell a prescription-only drug without a prescription. As far as I can tell, it is *not* a state crime, but it *is* a federal crime. The state statute that seems like it would apply is G.S. 90-85.40(c), which makes it a Class 1 misdemeanor "for any person not licensed as a pharmacist to . . . dispense any prescription drug." But "dispense" is defined in G.S. 90-85.3(f) to mean "preparing and packaging a prescription drug . . . in a container and labeling the contained with information required by State and federal law." In the typical case of A selling his prescription drug to B on the street, A is not "preparing and packaging" the drug, and certainly -- unless A is *very* conscientious! -- A is not labeling the container as required by law. So I don't think that G.S. 90-85.3(f) fits, and I don't know of any other provision that does, either. I'm told that the Board of Pharmacy also takes the position that no state criminal law applies to selling a prescription drug without a prescription.

As I mentioned, though, such conduct does appear to be a federal crime, though it takes some statutory detective work to get there. Drugs are given prescription status under 21 U.S.C. § 353(b). "[D]ispensing a drug contrary to the provisions of this paragraph [i.e., dispensing a prescription drug without a prescription] shall be deemed to be an act

which results in the drug being misbranded while held for sale." 21 U.S.C. § 353(b)(1)(B)(iii). The "misbranding" of drugs is prohibited by 21 U.S.C. § 331. Finally, 21 U.S.C. § 333 says that violations of section 331 are punishable by up to a year in prison and up to a \$1000 fine.