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The Denial of Federal Benefits Under the Anti-Drug Abuse Act of 1988: Implementation Issues for State Courts



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**The Denial of Federal Benefits Under the Anti-Drug Abuse
Act of 1988:
Implementation Issues for State Courts,**

**H. Clifton Grandy
with
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State Judicial Participation in the Denial of Federal Benefits Project

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INTRODUCTION

In response to the rising tide of use and trafficking in illicit drugs and to the public's demand for a legislative response, the United States Congress, as part of the Anti-Drug Abuse Act of 1988, passed legislation that authorizes state court judges to include as part of a sentence for certain types of drug convictions a recommendation that the federal government deny applications for certain benefits by drug offenders. The intent behind the Denial of Federal Benefits to Drug Traffickers and Possessors statute was to create an atmosphere of "zero tolerance" of drug use in this society and "user accountability" by both deterring prospective and current college students from drug use and also punishing and rehabilitating middle-class drug abusers. This statute authorized a judge to require drug offenders to complete drug rehabilitation before they could receive access to federal programs. Thus, the denial of federal benefits statute enabled a state trial judge to fashion a sentence with a new mix of rehabilitation, punishment, and deterrence.

The denial statute provides that upon conviction for either possession or trafficking in most controlled substances, an offender may be declared ineligible to receive any one or all of 460 federal benefits, may be required to complete a drug treatment program, and may be required to take part in community service. Certain federal benefits, such as veterans' benefits, welfare, social security, health, disability, and public housing, are excluded from denial under the statute.

The first section of this manual is designed to familiarize judges and court managers with the provisions of the denial statute and regulations, including the types of federal benefits subject to denial, the definition of *possession* and *trafficking*, the effect of prior and subsequent drug offense convictions, and the defined exemptions from the statute. The second section treats the legal issues

and administrative implications of the statute. Case law concerning application of the statute has not yet risen to the appellate level. Nevertheless, anticipated legal issues and challenges are discussed in this section, particularly with regard to a state judge's authority to order a sanction against the eligibility of a defendant to receive federal benefits. Practical implementation issues are discussed in the third section, including the mechanics of information exchanges between the centralized denial of federal benefits clearinghouse, the several federal agencies that administer the benefits programs, and the state courts.

Given the unique approach of the denial of federal benefits statute and the statute's relative newness, state court judges and court managers would do well to familiarize themselves with all of its various provisions. Careful attention to the implementing details of the new statute and its policy implications are recommended before a jurisdiction attempts to deny drug offenders' federal benefits.

This manual is one volume of a two volume series by the NCSC's State Judicial Participation in the Denial of Federal Benefits Project. The other volume is a compendium of material related to the denial of federal benefits, such as the various regulations promulgated pursuant to the denials statute.

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CHAPTER I. OVERVIEW OF THE STATUTE

A. Summary

Under the Denial of Federal Benefits to Drug Traffickers and Possessors provisions of the Anti-Drug Abuse Act of 1988 (ADAA), a conviction for either possessing or trafficking in a controlled substance makes a drug offender ineligible to receive one or more federal benefits.¹ The period of ineligibility varies depending on whether the conviction was for trafficking or possession and upon the number of prior convictions. Under the statute, the state judge can also sentence a drug offender to participate in a drug treatment program or to perform community service. The state judge has the additional authority to include in the sentence any combination of ineligibility, treatment, and community service. Certain terms of an offender's sentence, such as community service or drug treatment, are not intended to be penal in nature, but the terms are intended to encourage rehabilitation.

The denial of federal benefits is only one of several user accountability proposals introduced in the 100th Congress in the fall of 1988. User accountability holds users criminally accountable for their illegal drug consumption. This approach was viewed as being supportive of the administration's philosophy of "zero tolerance," which was intended to shift society's attitude from one that tolerated the casual, recreational use of drugs by students, professionals, and the middle-class to one that condemned such drug use.²

The denial of federal benefits statute is only one of several titles of the ADAA. The other titles established the Office of National Drug Control Policy, imposed the

¹ Anti-Drug Abuse Act of 1988, as amended, § 5301 of P.L. 100-690, Title V - User Accountability, Subtitle G - Denial of Federal Benefits to Drug Traffickers and Possessors, 120 Stat. 4310, codified as 21 U.S.C. §853, subsequently recodified as 21 U.S.C. §862 by P.L. 101 647, Title X, § 1002 (d)(1); 104 Stat. 4827. The text of the statute can be found in Appendix A.

² *Understanding Drug Prevention*, Office of National Drug Control Policy, White House, May 1992.

death penalty for drug traffickers³, provided for drug treatment and drug abuse prevention,⁴ provided for drug education,⁵ increased penalties in the federal courts for drug convictions,⁶ expanded international drug control efforts,⁷ and expanded the provisions for the forfeiture of drug-related property.⁸

Whether a conviction is for "possession" or "trafficking" determines not only the maximum period of ineligibility for federal benefits, but also other sentencing options.

B. The Definition of *Federal Benefit*

The term *federal benefit* is defined as the issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States.⁹ Table 1 shows the federal benefits that qualify under the provisions of the denial statute.

Table 1: Types of Federal Benefits Subject to Denial	
SUBJECT TO DENIAL	NOT SUBJECT TO DENIAL
Grants	Retirement
Contracts	Welfare
Loans	Social security
Professional licenses	Health
Commercial licenses	Disability
	Public housing
	Benefits which require payment for eligibility
	Benefits which require service for eligibility
	Veterans' benefits

The term does not include any benefits provided to veterans, their families, or survivors by virtue of service in the Armed Forces of the United States, or any retirement, welfare, social security, health, disability, public housing, or other benefits

³ PL 100-690; Title VII, § 7001.

⁴ PL 100-690; Title II.

⁵ PL 100-690; Title III.

⁶ PL 100-690, Title VI, Subtitles K-M.

⁷ PL 100-690; Title VII.

⁸ PL 100-690, Title VI, Subtitle B.

⁹ 21 U.S.C. §862(d)(1).

for which payments or services are required for eligibility.¹⁰ The exclusion of public housing under ADAA should not be confused with the authority elsewhere in the statute to evict tenants who are involved in drug activity or use from public housing.¹¹

C. The Definition of *Controlled Substance*

The term *controlled substance* means a drug or other substance as defined in the federal Controlled Substances Act, including the controlled substances schedules and the analog provisions of the act.¹²

D. The Definition of *Trafficking Offense*

The term *trafficking offense* means any offense that includes manufacturing, distributing, importing, dispensing, cultivating, or creating a controlled or counterfeit substance. The definition does not specify any minimum amount of a controlled substance for the offense to qualify for treatment under the denial statute. This definition also includes possession with intent to manufacture, distribute, import, dispense, cultivate, or create a controlled or counterfeit substance.¹³ This definition is critical. Under state law there may be a possession offense such as "possession with intent to distribute," which, unless carefully analyzed, would be wrongly categorized as a trafficking offense. For example, the prosecutor and judges of one demonstration program, Imperial County, California, are of the opinion that the offense of possession of a certain controlled substance with the intent to distribute is a *possession* offense under the denial statute and not a trafficking offense. In Oregon's 13th Judicial District, the offense is considered a *trafficking offense* under the denial statute.

¹⁰ 21 U.S.C. § 862(d)(1)(B).

¹¹ See PL 100-690 §5101, 42 U.S.C. §1437(d)(1)(5)(1990).

¹² 21 U.S.C. §862(d); Guideline - "Denial of Federal Benefits for Certain Drug Offenders," §C, 55 F.R. 37424 (September 11, 1990); Controlled Substances Act, 21 U.S.C. 801, *et seq.*

¹³ Guideline, §D.

E. The Definition of *Possession*

Neither the denial statute, the implementation plan of the president, nor the Department of Justice (DOJ) regulations define the term *possession*.

F. The Definition of Judicial *Statements*

The Denial of Federal Benefits Information Clearinghouse is notified of recommendations for denial, and termination of denial, by means of judicial *statements* submitted by state courts. The DOJ regulations define judicial *statements* as copies of a state court order or judgment, a denial of federal benefits form, or the "Judicial Notice of Restoration" form promulgated by the U.S. Administrative Office of the Courts.¹⁴ The denial of federal benefits form can be devised by the court, or the court can use the form devised by the DOJ. If the court devises its own form, that form should have all of the information requested by the DOJ's form.¹⁵

G. The Length of the Period of Ineligibility—Counting Prior Convictions

The maximum period of ineligibility from receiving federal benefits is generally at the discretion of the court and is determined by the judge. The length of the period of ineligibility depends upon two factors—1) the type of offense, i.e., whether the conviction was for a *trafficking offense* or for *possession*; and 2) whether this is the defendant's first or subsequent offense of that type. Table 2 shows the various maximum ineligibility periods.

Table 2: Maximum Periods of Ineligibility			
Offense Type	1st Conviction	2nd Conviction	3rd & Subsequent
Possession	1 year	5 years	5 years
Trafficking	5 years	10 years	Permanent

It is not required that all prior convictions for either trafficking in or possessing a controlled substance be from the same court. All prior convictions that predate the

¹⁴ Guideline, §§15, §§18-19.

¹⁵ Guideline, §§16-17.

effective date of the denial of federal benefits statute (September 1, 1989) are counted for purposes of determining the maximum period of ineligibility.¹⁶ This treatment does not raise the issue of the denial being *ex post facto*, and it is similar to the treatment given in most criminal, enhanced punishment statutes. These enhanced punishment statutes encompass offenses committed before the respective statute's effective date.

H. Persons Excluded from the Denial Statute

The penalties of the denial of federal benefits statute do not apply to any person who is in a government witness protection program. The statute's penalties also do not apply to any person who cooperates with or testifies for the government in the prosecution of a federal or state offense.¹⁷

The denial of federal benefits statute is not intended to affect the obligations of the United States under any treaty with Native Americans. Any federal program for Native Americans that is either a safety net program or earned benefit is excluded from the affected benefits.¹⁸

I. Period of Ineligibility and Sentencing Conditions for Possession

At the time of sentencing a defendant for his or her first possession conviction, the state court judge has the discretion to have the period of ineligibility to last as long as one year.¹⁹ For a defendant's second and subsequent convictions, the judge has the discretion to have the period of ineligibility last for up to five years.²⁰

¹⁶ See, for example, *Oregon v. Baez*, (92-988-CR) (the defendant received a permanent period of ineligibility based upon convictions dated May 8, 1989, May 24, 1989, and March 15, 1991) and *Oregon v. Avena-Canela* (91-2326-CR) (the period of ineligibility was based upon one prior trafficking conviction that was dated April 6, 1988).

¹⁷ 21 U.S.C. §862(e).

¹⁸ 21 U.S.C. §862(f).

¹⁹ For both offenses, possession and trafficking, and regardless of the number of prior convictions, the federal statute does not preclude recommending the period of ineligibility under the authority of the federal denial statute and ordering all other sentencing conditions under state law. This, in fact, was the sentence pattern observed at all the denial of federal benefits sites.

²⁰ 21 U.S.C. §862(b)(1).

The court has the additional authority, regardless of the number of previous convictions for possession, to order the offender to complete successfully "an approved drug treatment program," which includes periodic testing for drug use.²¹ The court also has the authority to require the offender to perform appropriate community service.²² Finally, the court has the authority to order any combination of ineligibility, treatment, and community service.²³

J. Waiver of Penalties and Conditions for Certain Possession Defendants

A court *must* waive the "penalties and conditions" for possession defendants (i.e., period of ineligibility, drug treatment, and community service) if either of the two following conditions are met:

1. The defendant is "deemed to be rehabilitated" in accordance with the standards established by regulations promulgated by the Department of Health and Human Services (HHS); or
2. The defendant:
 - a. declares himself or herself to be a drug addict;
 - b. there is a "reasonable body of evidence" to substantiate the declaration of addiction; and
 - c. the defendant submits to a "long-term treatment program" for addiction.

Under the HHS regulations, in order to deem a person as rehabilitated, the court *must* find the following:

1. The defendant was drug free for 180 consecutive days before and on the day of sentencing;
2. The 180-day period of drug abstinence is documented by periodic urine testing; and
3. The periodic drug testing is conducted using either an immunoassay test approved by the Food and Drug Administration for commercial distribution, or pursuant to standards approved by the state.²⁴

²¹ 21 U.S.C. §862(b)(1)(A)(II).

²² 21 U.S.C. §862(b)(1)(A)(III).

²³ 21 U.S.C. §862(b)(1)(A)(IV).

²⁴ 21 U.S.C. §862(a)(2).

The HHS regulations define the term *long-term treatment program* used in the denial statute as "any drug abuse treatment program of 180 days or more where the provider has been accredited by the Joint Commission on Accreditation of Health Organizations, the Commission on Accreditation of Rehabilitation Facilities, or the Council on Accreditation of Services for Families and Children, or licensed or otherwise approved by the State to provide drug abuse treatment."²⁵

K. Period of Ineligibility for Trafficking—The First and Second Convictions

For trafficking a controlled dangerous substance, the period of ineligibility is up to five years for the first trafficking conviction and up to ten years for the second trafficking conviction.²⁶

L. The Third Conviction for Trafficking—Permanent Ineligibility for Federal Benefits

A person is permanently ineligible for federal benefits upon being convicted for trafficking for the third time.²⁷ Upon receiving information about an offender's third conviction, the DOJ's Denial of Federal Benefits Clearinghouse will make a notation in its database that the individual is permanently ineligible for federal benefits. This action will be taken even if the sentence for the first, second, or third conviction does not include a period of ineligibility.²⁸ The third trafficking conviction has another distinction, the statute expressly provides that the offender is ineligible to receive *all* federal benefits.

M. Long-term Treatment Exempted from Denial Under Certain Conditions for Traffickers

A trafficker cannot be sentenced to ineligibility for any federal benefit relating to a

²⁵ 45 C.F.R. §78.2.

²⁶ 21 U.S.C. §862(a)(1).

²⁷ 21 U.S.C. §862(a)(1)(C).

²⁸ 21 U.S.C. §862(a)(1)(C).

"long-term drug treatment program" for addiction if either of two conditions are met. The first condition is that the offender is "deemed to be rehabilitated." Under HHS regulations, this means that the offender has abstained from the illicit use of a controlled substance for at least 180 days immediately before (and including the) date of sentencing. The "deemed to be rehabilitated" standard here is the same standard used in determining whether a waiver will be granted to a possession offender.²⁹

The second instance in which a trafficker cannot be denied long-term treatment is if the offender declares himself or herself to be a drug addict, there is a "reasonable body of evidence" to substantiate the declaration, and the offender submits to a treatment program for addiction of 180 days or more. The program must have been licensed or approved by certain organizations.³⁰

N. Suspension of the Period of Ineligibility for Possession and Trafficking Offenders

Following a sentence that imposes a period of ineligibility, a court *must* waive or suspend a trafficker or possession offender's period of ineligibility if any one of the three following conditions are met:

1. The offender completes a "supervised drug rehabilitation program" after having been sentenced to a period of ineligibility.
2. The offender has otherwise been rehabilitated.
3. The offender has made a good-faith effort to gain admission to a "supervised drug rehabilitation program," but is unable to gain admission because:
 - a. the program is inaccessible;
 - b. the program is unavailable; or
 - c. the offender is not able to pay for the program.³¹

The terminology "has otherwise been rehabilitated," as used here, is different from "deemed to have been rehabilitated" in the waiver of penalties and conditions (see

²⁹ See Final Rule – "Conditions for Waiver of Denial of Federal Benefits," Response to Comments, 56 F.R. 29591 (June 28, 1992).

³⁰ See 21 U.S.C. §862(a)(2); Final Rule – "Conditions for Waiver of Denial of Federal Benefits," 45 C.F.R. 7813, 56 F.R. 29591 (June 28, 1992).

³¹ 21 U.S.C. §862(c).

Section H). This suggests that they are intended to be different standards. However, HHS regulations imply that the two phrases are the same standard in that they require 180 consecutive days of abstinence from drug use; they differ only to the extent that a hearing to terminate a period of ineligibility will be a post-sentencing hearing, thus dropping the requirement of no drug use on the date of sentencing.³²

The term "supervised drug rehabilitation program" is not defined by HHS regulations, but rather by regulations promulgated by the Department of Justice.³³ This DOJ definition is nonbinding on the courts and is offered "for informational purposes so that the courts may take judicial notice thereof."³⁴

O. Denial of Federal Benefits Information Clearinghouse

The Information Clearinghouse, maintained by the Bureau of Justice Assistance of the Department of Justice, administers the denial of federal benefits program. The Information Clearinghouse receives the information provided by state and federal courts concerning convictions, screens the information for obvious errors or noncompliance with the law, acknowledges receipt of the judicial notices, enters the information into a database, disseminates data, and serves as the point of contact for agencies administering the affected benefits, prosecutor and probation offices, and the courts.

The Information Clearinghouse views the judicial statement as a mere recommendation by a state judge that federal benefits should be denied, rather than an order of denial. Under this interpretation, the decision to deny any federal benefit remains an executive branch decision at the federal level and is not delegated to the state judiciary. The state court judge also retains the discretion to invoke or not to

³² See Final Rule – "Conditions for Waiver of Denial of Federal Benefits," Response to Comments, 56 F.R. 29591 (June 28, 1992).

³³ Notice—"Guideline: Denial of Federal Benefits for Certain Drug Offenders," Office of Justice Programs, Department of Justice, 55 F.R. 37424 (September 11, 1990) ("Guideline").

³⁴ Guideline, §F(2).

invoke the authority he or she has under the denial statute. Thus, the DOJ avoids the federalism, separation of powers, and the illegal delegation of federal authority issues. The denial decision is made by the federal agency that administers the particular benefit program. In the case of a denial based upon a conviction for a third or subsequent trafficking conviction, the DOJ interprets the denial statute as giving it the authority to deny the receipt of all benefits.³⁵

In regards to maintaining the privacy of individuals and disclosing information in its database, the Information Clearinghouse must comply with the Privacy Act, the Freedom of Information Act, and DOJ regulations promulgated pursuant to these acts.³⁶

P. Appealing the Denial of a Federal Benefit

The federal denial statute and regulations do not address the procedure for appealing a judicial decision to recommend the denial of federal benefits. Most denial recommendations, however, are in cases in which the defendant pleads guilty, so there is no appeal. The appellate provision in the DOJ regulation addresses the appeal of a decision by an agency to deny an application for a benefit or an application for the renewal of a benefit. The bases of appeal are 1) false identification of an individual; and 2) the reason for the denial is no longer valid.³⁷

Appeals are made in accordance with the statute and regulations governing the administration of the benefit, the pertinent federal agency's rules of procedure, or the DOJ regulation. If an appeal is filed with the DOJ the Information Clearinghouse will send the federal agency denying the benefit any pertinent information and documentation regarding the basis for the denial.

³⁵ See U.S.C. §862(a)(1)(C).

³⁶ 28 C.F.R. §20.30.

³⁷ Guideline, §25.

Q. The Federal Agency Administering the Federal Benefit

The burden is on the affected federal agency to consult the *List of Parties Excluded from Federal Procurement or Non-Procurement Programs* before approving new and renewal applications for federal benefits. Nevertheless, some federal agencies have promulgated regulations requiring applicants to certify either that they (in the case of business entities, its principals, or other parties to the application) are not "subject to denial of federal benefits" or that they have not been convicted of drug possession or trafficking.³⁸

³⁸ See "GSA 'Debarment List' FCC Implements Provisions of Federal Drug Abuse Act," *Communications Daily*, December 20, 1991; *Communications Daily*, February 26, 1992; "Your Part in the War on Drugs," *Electronic Media*, June 4, 1990; *Communications Daily*, April 2, 1992; 49 CFR 1103.3 – "Persons Not Attorney-at-Law – Qualification and Requirements for Practice Before the Commission," 49 C.F.R. 1103.3.

CHAPTER II. LEGAL ISSUES

A. Introduction

This chapter provides a legal analysis of some of the constitutional and other legal issues of the denial of federal benefits statute. The issues included in this chapter were selected because they were made evident by the demonstration projects, were raised by participants in three focus groups sessions conducted by the NCSC, or were raised by court officials seeking technical assistance from the project staff.

These questions are 1) whether there is any constitutional authority for federal legislation to authorize state judges to impose denial of federal benefits as a sentence if denial is not authorized by state law; 2) whether the "additional penalties" language of a state's controlled substance act is authority to impose denial of federal benefits as a civil penalty in addition to the criminal sanctions; 3) whether the language in a state's controlled substances act that authorizes the court to cancel a license is authority for implementing the penalties and remedies under the denial statute; 4) whether a judge's authority to sentence under the denial statute diminishes as the state's sentencing scheme becomes more comprehensive; 5) whether the deferral of adjudication of guilt affects the court's ability to sanction an offender under the denial statute; and finally, 6) whether a jury has the authority to include the denial of federal benefits in its sentence.

B. What Is the Authority, in the U.S. Constitution, for Federal Legislation Authorizing State Judges to Impose a Sentence Not Authorized by State Law?

Any court contemplating sentencing under the denial of federal benefits statute should consider the constitutional doctrine of federalism. In *U.S. v. Constantine*, 296 U.S. 287 (1935), the Supreme Court struck down as beyond the limits of federal power a federal law imposing a penalty for violation of state liquor laws. The Court said that the law was not relying on the power to tax, as was argued, but instead was "meant as a penalty imposed in addition to any the state may decree for violation of a state law."

According to the Supreme Court, the federal government could not impose cumulative penalties "above and beyond" those specified by state law. "The right to impose sanctions for violations of the state's laws inheres in the body of its citizens speaking through their representatives. . . ." The Supreme Court cited the *Constantine* decision favorably in *Ashton v. Cameron Co. Water Improvement District No. 1*, 298 U.S. 513 (1936), stating, "Neither consent nor submission by the states can enlarge the powers of Congress; none can exist except those which are granted. . . . The sovereignty of the state essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation." A cursory review indicates that *Constantine* has never been overruled or significantly modified and, therefore, remains controlling. Although it is possible that the Supreme Court would overrule it, it is also possible that it would not, given the views of many of the justices concerning states' rights and deference to state legislative authority.

In addition to federalism, any state court contemplating sentencing under the denial statute should also consider whether the denial statute represents an incursion by the federal government into an area traditionally reserved to the states—criminal sentencing. State courts should also understand that under the Department of Justice's interpretation, in the early 1990s, of the denial of federal benefits statute, a state court judge who includes a period of ineligibility as part of a sentence is merely making a recommendation to the federal government and is not actually making the decision to deny an individual's application for a federal benefit. That decision is made by the relevant federal agency.

After considering the constitutional implications of sentencing under the authority of the federal denial statute, the state judge must consider whether state law, either explicitly or otherwise, permits sentencing under the federal denial statute.

C. What Is a State Judge's Authority Under the "Additional Penalties" Provision of the State's Controlled Substances Act?

Thirty-four jurisdictions (30 states, plus the District of Columbia, Guam, Puerto Rico, and the Virgin Islands) have the following provision (with minor variations in wording) in their respective controlled substances acts:

Additional Penalties. A penalty imposed for violation of this chapter is in addition to, and not in lieu of, any other civil or administrative penalty or sanction otherwise authorized by law. ¹

Table 3 shows the states with an additional penalty provision in their controlled substances act.

This provision is based upon a virtually identical provision in the federal law, 21 U.S.C. Section 847. There is, to date, no federal or state case law interpreting it. Thus, it is open to argument (particularly in light of *Constantine* and *Ashton*) whether this section authorizes state judges to include the denial of federal benefits as part of a sentence imposed for a state crime. On the face of them, the wording in the statutes of all the jurisdictions, except Puerto Rico, may encompass such authority. Denial of federal benefits is certainly a civil or administrative sanction authorized by the federal anti-drug law. None of the statutes specifies that the penalty or sanction must be authorized by the law of the particular state.

The existence of the additional penalties clause in so many state controlled substances statutes does raise basic questions: What is its purpose if it does not empower judges to take action such as that authorized by the federal denial of federal benefits statute? If legislatures intended to restrict the authority of judges to impose only civil or administrative penalties specified under state law, why didn't they say so?²

¹ Puerto Rico's statute has a significant variation, which reads: "Any penalty imposed for violation of this chapter shall be in addition to, and not in lieu of any administrative fine, except as otherwise provided by this chapter."

² The argument could be raised, however, that the legislatures could not have had the denial of federal benefits in mind since the federal law was not in existence at the time the additional penalties provisions were adopted. This same argument could be made with regard to the civil penalties provisions

Table 3: States with Additional Penalties Provision in Controlled Substances Act			
State		State	
Alabama		Nebraska	•
Alaska	•	New Hampshire	•
Arizona		New Jersey	•
Arkansas	•	New Mexico	•
California		New York	
Colorado		Nevada	•
Connecticut		North Carolina	•
Delaware	•	North Dakota	•
District of Columbia	•	Ohio	
Florida		Oklahoma	
Georgia		Oregon	•
Guam	•	Pennsylvania	•
Hawaii	•	Puerto Rico	• ¹
Idaho	•	Rhode Island	•
Illinois	•	South Carolina	•
Indiana		South Dakota	•
Iowa	•	Tennessee	•
Kansas	•	Texas	•
Kentucky		Utah	
Louisiana	•	Vermont	
Maine		Virginia	
Maryland	•	Virgin Islands	•
Massachusetts		Washington	•
Michigan	•	West Virginia	•
Minnesota	•	Wisconsin	•
Missouri		Wyoming	•
Montana			
¹ Restricted to administrative fines.			

In addition to considering the general sentencing authority and any additional sentencing authority under the state's controlled substances statutes, the state judge who is considering including denial recommendations in drug sentences needs to consider whether making recommendations for the denial of federal benefits is permissible or prohibited under state statute, which allows the imposition a civil penalty in addition to the criminal sentence. The next section discusses this issue.

discussed later in this chapter. This argument in turn could be countered by noting the legislature did not, subsequent to the enactment of the denial statute, amend the additional penalties clause to exclude its application to the denial of federal benefits.

D. Is Denial Authorized as Part of the Sentence, as a Cancellation, or Other Civil Penalty?

In determining whether exercising the authority granted by the denial of federal benefits statute is authorized under state law, the state judge must determine whether the denial of federal benefits can be made part of the criminal sentence under the authority of a state statute that authorizes forfeiture, license cancellation, and civil penalties as part of a sentence. Which states have a sentencing statute that authorizes the imposition of a civil penalty? The general sentencing statutes of 13 states, set out in Table 4, provide (with minor variation in wording) as follows:

This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.³

Three other states' statutes have similar sections, but are more restrictive. The Alabama statute explicitly states that the section is not applicable to drug offenses. In Arizona and Kansas, the court's authority to take such action is expressly limited to that conferred by the law of the state.

As with the additional penalties provision, this section would seem on its face to give courts in those 13 states the power to deny federal benefits as part of a sentence. Clearly, the Alabama, Arizona, and Kansas statutes would not encompass such authority since they are specifically limited. (The Kansas controlled substances act, however, contains an additional penalties provision that is not restricted to Kansas law.)

³ In Illinois, the court may take such action "in other proceedings." Montana does not have such an express provision in its law, but does infer that the judge has such authority: "No person shall suffer any civil or constitutional disability not specifically included by the sentencing judge in his order of sentence."

**Table 4: Authority Under Sentencing Law to Impose
Forfeiture, Cancellation, or Civil Penalties**

State		State	
Alabama	• ¹	Nebraska	
Alaska	•	New Hampshire	•
Arizona	• ²	New Jersey	•
Arkansas		New Mexico	
California		New York	•
Colorado		Nevada	
Connecticut		North Carolina	
Delaware		North Dakota	
District of Columbia		Ohio	
Florida	•	Oklahoma	
Georgia		Oregon	•
Guam		Pennsylvania	
Hawaii	•	Puerto Rico	
Idaho		Rhode Island	
Illinois	•	South Carolina	
Indiana		South Dakota	
Iowa		Tennessee	•
Kansas	• ³	Texas	•
Kentucky		Utah	•
Louisiana		Vermont	
Maine	•	Virginia	
Maryland		Virgin Islands	
Massachusetts		Washington	
Michigan		West Virginia	
Minnesota		Wisconsin	
Missouri		Wyoming	
Montana	•		
¹ Not applicable to drug offenses.			
² Restricted to the law of the state.			
³ First offender/drug addict/ deferred adjudication provisions are in the statute.			

The degree of comprehensiveness of sentencing schemes and the resulting degree of latitude or discretion available to the sentencing judge vary among the states. Thus, the question arises, whether the comprehensiveness of the state sentencing scheme vitiates judicial authority to recommend a period of ineligibility for federal benefits in a drug offender's sentence. The next section addresses this issue.

E. Does the Comprehensiveness of State Sentencing Schemes Affect Judicial Authority Under the Denial of Federal Benefits Statute?

It is necessary to consider the argument that the comprehensive nature of a state's sentencing schemes, which in many cases seek to provide for uniformity and proportionality in sentencing, vitiates judicial authority to make recommendations under the federal denial statute. This argument is difficult to maintain because in the 13 states discussed in the previous section, the sentencing statutes themselves seem to indicate that the legislature intended the court to have such authority as part of the overall sentencing scheme. The argument may have more weight, however, in five of the states that have adopted strict sentencing guidelines in recent years (Florida, New York, Oregon, Tennessee, and Utah).⁴ This is a very complicated area that would require far more research and analysis than was possible for this manual. However, it should be noted that in Oregon, the section of the general sentencing law specifically states that for felonies committed on or after November 1, 1989, the court must sentence in accordance with the rules of the State Sentencing Guidelines Board. Another section of the sentencing law states that the guidelines, which were approved by the legislature, "shall control the sentences for all crimes committed after the effective date of such guidelines," which "shall be mandatory and constitute presumptive sentences." According to still another section, "the court may impose a sentence outside the presumptive sentence or sentence range made presumptive . . .

⁴ As discussed later in this chapter, 12 states have adopted such guidelines. Several others have adopted sentencing rules incorporating presumptive sentences that do not appear to be as strict or comprehensive as the sentencing guidelines referred to here.

for a specific offense if it finds . . . there are substantial and compelling reasons justifying a deviation from the presumptive sentence."

This research did not study the Oregon sentencing guidelines and, therefore, did not determine whether they contained a provision regarding the court's power to impose civil penalties; if not, the guidelines would supersede the clause conferring such power in the general sentencing law. However, the inquiry does not end here, since Oregon's controlled substances act does contain the additional penalties section discussed above.

This research did not examine the laws in the other states with strict guidelines. Each state would have to analyze its sentencing laws and guidelines to determine how they intermesh and whether their judges continue to have the authority granted in their general sentencing statutes to impose civil penalties.

The question that must be answered in the nine states that have both comprehensive sentencing guidelines and an additional penalties section (Louisiana, Maryland, Minnesota, New Mexico, Oregon, Pennsylvania, South Carolina, Tennessee,⁵ and Washington) is: Do their guidelines override the additional penalties provision in their drug acts? A reasonable argument can be made that since the additional penalties section is specifically included in the drug act, the legislature intended the court to have this additional authority in sentencing drug offenders. The same position can be taken relative to the assertion that the comprehensiveness of the general sentencing law in states without guidelines nullifies the authority granted in the additional penalties clause, i.e., the specific provision in the drug law takes precedence over the more general sentencing laws or guidelines.

It should be noted that California, which has sentencing rules established by the Judicial Council rather than strict guidelines, does not have in its laws either of the

⁵ Like Oregon, Tennessee also has a clause in its general sentencing law regarding the court's authority to impose civil penalties.

provisions regarding additional or civil penalties discussed above. Nevertheless, the pilot court in Imperial County, California, is denying federal benefits in sentencing drug offenders.

None of these complex issues can be resolved in this manual. Litigation may be necessary to clarify some of them. At the least, it will be necessary for each state to analyze its own laws and policies relative to the federal statute.

Any judge who is considering exercising authority under the denial statute should be aware that the denial statute requires a conviction. Therefore, an issue arises about the appropriate treatment for drug cases in which there is a deferment of the adjudication of guilt. This issue is discussed in the next section.

F. What Effect Does the Deferral of the Adjudication of Guilt Have Upon Denial?

Under the denial statute, an individual must be *convicted* of possession or trafficking of narcotics to be ineligible to receive federal benefits. The Rhode Island demonstration project has shown that this requirement affects adversely a court's ability to implement the federal law when the state has a law that allows the deferral of adjudication of guilt. In Rhode Island, when a person pleads *nolo contendere* to an offense and is placed on probation, the plea and probation do not "constitute a conviction for any purpose."⁶ Because there is no conviction, the court cannot deny federal benefits as a condition of the sentence of probation.⁷ This situation occurs fairly often in Rhode Island, particularly in connection with first-time offenders who, it is felt, are a primary target group of the federal law because they are most likely to be casual users who might find the threat of denial of benefits to be a deterrent. Thus, application

⁶ R.I. Gen. Laws 1956, Sec. 12-18-3. In contrast, if a defendant pleads *nolo contendere* and is given a suspended sentence, that disposition is considered as a conviction.

⁷ In Oregon, in contrast to Rhode Island, a defendant may plead "no contest" to a controlled substance offense, but the resulting disposition is treated as a conviction for virtually all purposes, including the denial of federal benefits.

of the law to this primary target group is impeded by the conflict between the federal and state law concerning conviction. These states are set out in Table 5.

A similar problem arises in 30 other jurisdictions (26 states, plus the District of Columbia, Guam, Puerto Rico, and the Virgin Islands), which have some provision in their statutes for deferred adjudication or conditional discharge. Of these jurisdictions, only Florida and Georgia appear to have laws as broad as that in Rhode Island. In these three states, the deferral of adjudication of guilt apparently is not limited, as it is in most of the other jurisdictions, to the offense of possession or to first-time offenders.⁸ Nineteen jurisdictions restrict their deferral provisions to individuals charged with a first-time offense of possession.⁹

⁸ The New Jersey statute states that it should "ordinarily be limited to" first-time offenders and is not restricted to the offense of possession. It provides for court referral to "supervisory treatment," and upon satisfactory completion, with the prosecutor's consent, the court may dismiss with prejudice the complaint, indictment, or accusation. The Delaware, Hawaii, South Dakota, Tennessee, Texas, and Virgin Islands statutes apply only to first offenders, but are not limited to the offense of possession.

⁹ The Indiana law is limited to first-time possession of marijuana or hashish, to which the individual pleads guilty as a Class A misdemeanor. Although Georgia has a broader provision, it also has a first-offender statute.

Table 5: States with Deferral or Diversion			
State		State	
Alabama		Nebraska	
Alaska		New Hampshire	
Arizona		New Jersey	.3
Arkansas	•	New Mexico	
California	•	New York	
Colorado	.1	Nevada	
Connecticut		North Carolina	
Delaware	.2	North Dakota	
District of Columbia	•	Ohio	.1
Florida	.3	Oklahoma	
Georgia	.4	Oregon	.8
Guam	•	Pennsylvania	.1
Hawaii	•	Puerto Rico	•
Idaho	.5	Rhode Island	.3
Illinois	•	South Carolina	
Indiana	.6	South Dakota	•
Iowa	•	Tennessee	•
Kansas		Texas	•
Kentucky		Utah	
Louisiana	•	Vermont	
Maine		Virginia	
Maryland	•	Virgin Islands	.7
Massachusetts	•	Washington	
Michigan		West Virginia	
Minnesota		Wisconsin	
Missouri		Wyoming	
Montana			

¹ Restricted to drug addicts/drug-dependent persons.
² Has both first-offender and drug addict provisions.
³ Broad deferred adjudication provision, not limited to first-offenders or offense of possession.
⁴ Has both first-offender and broad deferred adjudication provisions.
⁵ Requires first offense, drug abuse treatment, and cooperation with law enforcement in drug-related cases.
⁶ Restricted to first-time possession of marijuana or hashish.
⁷ Has both first-offender (not limited to possession) & drug addict provisions.
⁸ Has conditional discharge (first-time possession), diversion (first-time possession of less than one ounce of marijuana), and diversion at the prosecutor's discretion provisions.

The basic elements of these laws are that (1) the person has not been previously convicted of violating the drug laws of the state, the United States or other states, and he or she pleads guilty to or is found guilty, of possession of a controlled substance; (2) the court, without entering a judgment of guilt, may defer further

proceedings and place the person on probation; (3) upon successful completion of probation, the court is required to discharge the person and dismiss the proceedings without an adjudication of guilt; (4) such a discharge or dismissal is not deemed a conviction "for the purpose of disqualifications and disabilities imposed by law upon conviction of a crime"; and (5) such discharge and dismissal is only allowed once per person.¹⁰

In Colorado, Idaho, Delaware, Pennsylvania, Ohio, and the Virgin Islands, similar statutes are restricted to the dismissal and discharge of drug addicts or drug-dependent persons without an adjudication of guilt upon successful completion of a drug treatment program.¹¹ The California statute provides that persons found guilty of a first offense of violation of controlled substances laws may participate in a diversion program, provided that they have not had a previous felony conviction or diversion within five years. Upon successful completion of the diversion program, the arrest will be deemed "never to have occurred," and the record cannot be used "in any way which could result in denial of employment, benefit, license or certificate." Montana allows the court to defer imposition of sentence upon persons not previously convicted of a felony; it does not specifically state that no conviction will result from deferred imposition. In addition to its more general first-offender statute, Oklahoma also has a provision for delayed sentencing of offenders aged 18 to 21. After successful completion of a delayed sentencing program by a young offender, the court may defer judgment as provided in the first-offender statute. New York does not have a first-offender provision, but does allow the substitution of a "youthful offender adjudication" for a conviction of youths who committed crimes when they were less than 19 years of age.

¹⁰ It should be noted that the federal law contains the same provision. See 21 U.S.C. §844.

¹¹ The Idaho law requires the defendant to cooperate with law enforcement in prosecution of drug-related crimes. As noted above, Delaware and the Virgin Islands also have broader first-offender statutes that are not restricted to the offense of possession.

The federal statute's requirement of conviction is clearly at odds with these first-offender/deferred adjudication state laws, thereby narrowing the range of offenders eligible for denial of federal benefits in more than half of the jurisdictions.¹² A key group of individuals is eliminated entirely—those guilty of first-time possession of drugs who are most likely to be casual users, students or white-collar workers and professionals to whom the threat of benefit denial might carry the most weight.¹³

The jury is involved in the sentencing phase of a drug trial in some states. This raises the question whether the jury is authorized to include the denial of federal benefits in its sentence. This issue is discussed in the next section.

G. What Is the Jury's Role in Sentencing Under the Denial Statute?

In states such as Virginia where the jury can pass sentence under statutory authority, state legislation may be necessary before denial sentences can be made.¹⁴ Denial of federal benefits does not fall within the jury's enumerated sentencing options of imprisonment or fine in such states; therefore, there may be no statutory basis for denying benefits as part of a sentence. The question is further complicated in Arkansas, Missouri, Tennessee, and Texas because the laws of these states contain either the additional penalties, the authority-to-impose-civil-penalties clause, or both. These states are set out in Table 6.

¹² As noted above, there is an internal contradiction in the federal statute itself, since it also has a first-offender provision.

¹³ Senator Phil Gramm, a strong supporter of the denial of federal benefits provisions in the bill which became the Anti-Drug Abuse Act of 1988, emphasized that the proposal was aimed at the middle class:

To the middle class drug user, we say, you can lose very important Federal benefits. . . . To America's doctors we say, if you're convicted of using drugs, you can lose your license to prescribe drugs. To Wall Street we say, if you're convicted of using drugs, you can lose your securities brokers license. 134 Cong. Rec. S15,967 (daily ed. Oct. 14, 1988).

¹⁴ Arkansas, Indiana, Kentucky, Missouri, Tennessee, and Texas. The Indiana jury sentencing provision pertains only to habitual substance offenders. The Texas law states that the jury may recommend probation for up to 10 years on a felony conviction, but this is not applicable to a defendant guilty of an offense under the Texas Controlled Substance Act if the defendant was 21 or older at the time the offense was committed.

Table 6: States with Jury Involvement in Sentencing			
State		State	
Alabama		Nebraska	
Alaska		New Hampshire	
Arizona		New Jersey	
Arkansas	•	New Mexico	
California		New York	
Colorado		Nevada	
Connecticut		North Carolina	
Delaware		North Dakota	
District of Columbia		Ohio	
Florida		Oklahoma	
Georgia		Oregon	
Guam		Pennsylvania	
Hawaii		Puerto Rico	
Idaho		Rhode Island	
Illinois		South Carolina	
Indiana	• ¹	South Dakota	
Iowa		Tennessee	• ²
Kansas		Texas	
Kentucky	•	Utah	
Louisiana		Vermont	
Maine		Virginia	•
Maryland		Virgin Islands	
Massachusetts		Washington	
Michigan		West Virginia	
Minnesota		Wisconsin	
Missouri	•	Wyoming	
Montana			
¹ Pertains only to habitual offenders. ² Jury sentencing not applicable to defendant of an offense under the Texas controlled substance act if defendant was 21 years of older at the time of the offense.			

H. Conclusion

In conclusion, there are several theories upon which to base a state judge's authority to exercise the discretion apparently granted under the federal denial of federal benefits statute. However, since the issue has not been decided by any appellate court, there is no solid authority to ensure that the denial concept would withstand a challenge.

CHAPTER III. IMPLEMENTATION ISSUES

A. Introduction

This section outlines the steps necessary to implement a denial of federal benefits program and once implemented, the processes that are necessary to maintain the program.

B. Background

The experience of the demonstration sites as well as the other state courts which have issued orders under the authority of the denial of federal benefits law, suggests that the most effective approach to implementing denial of federal benefits is to view it as a program effort of the court. There are a set of goals to be achieved in issuing denial orders can be established. In doing so, the various entities in the justice system—the judge, court administrator, prosecutor, and defense counsel—each has a role to play. Representatives from all of the persons and offices involved in drug cases need to communicate with each other to agree on program goals, training methods, and other processes.

This approval can be contrasted to one in which only one of the justice system entities—a judge, court administrator, or prosecutor attempts to implement the denial process without the other entities being fully aware of the policy and legal implications, the process and the goals.

C. Program Development

The goals of the denial of federal benefits program must be clear. The program goals will determine the degree to which the program is intended to punish the offender, to encourage drug treatment, to discourage drug use, and to deter potential benefit seekers from drug related activity. Implementation strategies, therefore, can follow the specific goals to be achieved.

D. Implementation

A pilot project in one court or one judicial district has several advantages. First, it can demonstrate how easily a denial of federal benefits program can be implemented and the level of success that is likely. Second, it will allow refinement of the program and its goals before its general introduction. Third, it will eliminate unequal application of the law within one court.

E. Program Support

A denial of federal benefits program must have the support of the judges, prosecutor, and court administrator or clerk. Without the support of the judges, orders will not contain recommendations for periods of ineligibility to receive federal benefits. Without the support of the prosecutor, periods of ineligibility and drug rehabilitation will not be made part of the plea bargaining process.

F. Dispositions Which Are Not Convictions for Either Possession or Trafficking

The denial of federal benefits is predicated upon a conviction of a drug offense. The requisite conviction for a controlled substance violation is not met if there is a criminal disposition, but the disposition does not pertain to a controlled substance violation. This can occur when a person is arrested and charged with a controlled substance violation in addition to other violations (e.g., firearms, DWI), but the controlled substance violation is dropped when the defendant pleads guilty to the non-controlled substance charges.

The conviction requirement also excludes from denial of federal benefits offenders whose cases are handled through a diversion program. In California, an offender has a statutory right to have his or her case diverted if certain criteria are met.¹ In Rhode Island, offenders that meet certain statutory qualifications have the right to plead *nolo contendere*. By statute, this disposition cannot be treated as a conviction for

¹ See the discussion in Chapter II Legal Issues, Section F.

purposes of denial if the disposition is probation rather than a suspended sentence. The same result may flow from a non-final disposition/delayed disposition in which the offender pleads guilty, the court enters a guilty judgment, but then sets aside the guilty judgment and places the offender on probation. Typically, under this statutory scenario, there is no conviction if the offender satisfies the terms of probation.²

G. Training and Education

Education relating to the conditions and penalties of the denial of federal benefits statute has four aspects: education of the prosecutor, the bench, the bar, and the public.

Most denial statements issued in the two demonstration sites resulted from guilty pleas. Since the prosecutor is instrumental in the pre-trial plea bargaining process, the prosecutor must understand the provisions of the denial statute. In both demonstration sites the prosecutor was self-educated. In Oregon and Texas, the prosecutor relied on informational material supplied by the Department of Justice (DOJ).

Judges also have several critical responsibilities in the process. In particular, they must ensure that a plea is made knowingly, voluntarily, and intelligently. They must also exercise discretion in setting the length of the period of ineligibility and any other conditions of the denial order. The various approaches used to inform the bench about denial of federal benefits include sending a memorandum (Klamath and Lake Counties), and conducting a session on denial of federal benefits at a judicial conference (Rhode Island).

The defense bar, including public defenders and court appointed attorneys, should be educated about the denial of federal benefits. An ineffective assistance of counsel claim could result if defense counsel does not explain the denial of federal benefits consequences of a guilty plea to the client. Furthermore, the defense bar must

² See, for example, Art. 27, Sec. 641, Annotated Code of Maryland (1992).

understand the denial law in order to articulate to its clients the consequences of a drug conviction, regardless of whether a denial penalty or condition is a term of the sentence. The defense bar needs to have a general understanding of the 460 federal benefits that are subject to denial, and they should be supplied with resources and information about specific benefits.³

Rhode Island purchased advertisements in the state legal newspaper. The notice summarized the major provisions of the denial statute and gave the name and phone number of a person to contact for further information. The contact person had a package of information about the denial statute that was sent to any interested attorney.

The education of the general public may have a deterrent effect on drug involvement. Rhode Island's public information effort included posters on the mass transit busses, pamphlets, public service announcements, and a toll-free number with recorded information.

H. Identification of Federal Benefits

There are over 5,000 federal benefits. A description of each of these benefits can be found in the *Catalogue of Federal Domestic Assistance* which is published jointly by the Office of Management and Budget and the General Services Administration. All of these benefits, however, are not subject to the denial law. The denial statute excludes the benefits earned by present or former members of the armed services and their families, spouses, and survivors. Benefits which are granted based upon a person's economic means and those which have been earned by payment or

³ One example of the need of defense counsel to understand the denial law is made by one of the cases audited by the NCSC project staff. In this case the defendant was placed on the waiting list for a drug treatment program because of his lack of financial resources. The defendant, however, did not move the court to waive the 10 year period of ineligibility which was ordered. *Oregon v. Brinkner*, (91-2692-CR).

services are also excluded. The Department of Justice Guidelines lists 460 federal benefits that it has identified and determined to be subject to the denial statute.

A jurisdiction that is contemplating active participation in the denial of federal benefits program should identify those federal benefits widely used in the community by its population. All participants in the criminal proceedings—the bench, the defense bar, the prosecutor, and the probation department—should be informed about these programs. Providing this information is important because most participants in the criminal justice system are not able to articulate the benefits from which an offender would be precluded and many are under the erroneous impression that welfare benefits are subject to denial. Some participants in the criminal justice system have questioned the practical effect of a period of ineligibility while an offender is incarcerated, forgetting that in some corrections systems incarcerated offenders obtain Pell Grants to pay for vocational education courses.

I. Identification and Classification of Eligible Offenses

Before the denial program is activated, each controlled dangerous substance offense must be categorized as either a *possession* or *trafficking offense*, as defined by the denial statute and the Department of Justice regulations. Some state offenses, such as the possession of a certain amount of a certain controlled substance, may appear to be a *trafficking offense*, but they may not meet the criteria of the federal definitions to be classified as a possession offense for purposes of the denial program. Offenses such as *cultivation* and *manufacturing of a controlled substance* must also be categorized as either a *possession* or a trafficking offense.

J. Identification of Cases Appropriate for Denial of Federal Benefits

In Imperial County, California and in Nolan County, Texas, the cases which have potential for a denial of federal benefits order are identified by the deputy district attorney. In Oregon, all felony cases are screened by the victim/witness coordinator.

The coordinator flags potential denial cases by partially completing the denial of federal benefits order; the partially completed order is included with the prosecutor office's file when the case is routed to the deputy district attorney. In Rhode Island, cases were identified from the daily Preliminary Arrangement Calendar (PAC) docket which was reviewed the day before the hearing. Rhode Island's approach was different from that of the other jurisdictions because a demonstration project staff person performed this function. The staffer did not work for either the court, clerk, or prosecutor's office. The demonstration project staff person also had access to the state's criminal justice information printouts. The printouts were used to determine such information as whether the case was eligible for denial, the defendant's identifying information (name, address, etc.,) and the defendant's prior convictions.

K. Voluntariness of Guilt Plea

The judge accepting a guilty plea should determine whether the person offering the guilty plea realizes its implications under the denial of federal benefits statute. This should be done even if the court does not deny federal benefits. A conviction for possession or trafficking a controlled substances will have implications if the defendant is convicted in the future. These implications include treating the subsequent pleas or convictions as the second, third, or subsequent offense. In the case of the third conviction for trafficking, the Department of Justice has the authority to deny the person's right to receive *all* federal benefits forever even if the state judge does not recommend denial. Even if the defendant has been treated previously as a first time offender in three different jurisdictions, the convictions will be counted so long as the Department of Justice's clearinghouse receives information about the convictions.

Other issues bearing on the voluntariness of the plea include the extent to which the court or defense counsel explains the denial of federal benefits to the defendant.

L. Forms

All material forms used in drug case processing that have an impact on denial should be revised. Failure to revise the forms makes denial an ad hoc approach. The following paragraphs discuss some of the various forms that the court should review.

1. Guilty Plea

Several states have forms which the defendant signs upon entering a guilty plea. In California, this form is called the "Change of Plea." In Oregon, it is called the "Petition to Enter a Guilty Plea." Essentially the form advises the defendant of his or her constitutional and statutory rights. When the form is filed, the record is evidence that the defendant's guilty plea was made knowingly.

The defendant should be advised that a conviction for either trafficking in or possessing a controlled substance may result in a sentence that includes the denial of the defendant's right to receive certain federal benefits for up to 10 years, depending on the number of previous convictions and upon whether the plea is to possession or trafficking. The defendant should be further advised that the sentence could also include the requirement that he or she complete drug treatment or perform community service. The defendant should be advised further that even if denial is not ordered in this case, that upon the third conviction for trafficking in any federal or state court, the denial of all eligible federal benefits shall be forever.

2. Judge's Checklist

The defendant should be advised about the possibility of denial of federal benefits in the colloquy conducted between the judge and the defendant in which the court advises the defendant of his constitutional and statutory rights and determines if the defendant is aware of each of these rights. In some courts a check list is available to the judge to ensure that he or she does not overlook any right.

3. Plea Negotiations or Agreement

Of the sites studied, only Oregon uses a written document as a basis of the plea negotiations. Any "negotiation" type form which lists all possible outcomes should include spaces where a period of ineligibility can be indicated, as well as the length of the period, and whether any benefit is excluded.

4. Confessions—State's Evidence

If the court provides the defendant with a notice of the consequences of cooperation with the government in its investigation of co-defendants or others, or of the consequences of testifying as a witness for the government, that notice should be amended. The defendant should be advised that anyone who cooperates with or testifies for the government is excluded from the "penalties" of the denial of federal benefits statute.⁴

5. Appeal

If the jurisdiction provides the defendant with a notice about the consequences of an appeal, the defendant should be informed about 1) the status of the judicial statements when the defendant appeals the criminal case; and 2) the defendant's right of appeal of an agency's decision to deny a federal benefit to that agency or to the DOJ.⁵

A mechanism needs to be established to ensure that the judicial statement or the judicial notice of denial are not overlooked if an appeal is filed. For example, the judicial statement could be signed, but retained by the court until the period for filing the appeal has lapsed. Only after there is no possibility of appeal, would the judicial statement be mailed to the Information Clearinghouse. Another issue is whether an order for a stay of execution should provide for judicial notice of the order of stay to the

⁴ See 21 U.S.C. 862(e).

⁵ Guideline, §25.

Information Clearinghouse, and whether that the Information Clearinghouse is notified if the underlying criminal conviction is reversed, vacated, or remanded.

6. Satisfaction With Legal Counsel

Some jurisdictions include as part of the court's written record a form, signed by the defendant, in which the defendant indicates whether he or she is satisfied with the legal representation provided by the defense attorney. This form can be revised to show that the defendant acknowledges being advised of the consequences of denial, how to obtain a waiver, and the basis and procedure for how to appeal the period of ineligibility.

7. Termination of the Period of Ineligibility

The court needs to consider the development of forms for *pro se* litigants who seek to waive or terminate the period of ineligibility or participation in a drug treatment program.⁶

M. Judicial Statements Recommending the Denial of Federal Benefits

The regulations promulgated by the Department of Justice indicate that sentencing and denial information shall be sent to the Information Clearinghouse by a "statement".⁷ This statement can consist of the order or judgment of sentence, the denial of federal benefits form approved by the Office of Management and Budget (OMB), the "Judicial Notice of Restoration" approved by Administrative Office of the United States Courts, or a denial of federal benefits order form approved by the state court.⁸ In Rhode Island, the demonstration project developed its own denial of federal benefits form based upon the form approved by OMB. Rhode Island's form served the additional function of a data collection instrument. It is acceptable to append the order/judgment of sentence to the denial of federal benefits form.

⁶ See U.S. Administrative Office of the Courts Form No. 294 (5/90), "Reinstatement of Federal Benefits."

⁷ Guideline, §15.

⁸ Guideline, §19.

A digital version of the denial order is available from the Information Clearinghouse. The digital version offers several advantages. First, for copies that are automated, the form can be prepared on a personal computer. Second, it provides the Information Clearinghouse with a document that is very legible, which reduces transcription mistakes. Third, when cases are continued, it allows the preparation of a new draft denial order that shows the new sentencing date and sentencing judge without having to re-key all the information.

N. Preparation of the Judicial Statements

All the courts issuing judicial statements use some version of the denial of federal benefits form developed by the Department of Justice. Most of the sites complete the forms in two steps. In the first step, information about the case and the defendant is collected prior to acceptance of the guilty plea and sentencing. This information includes basic identification information such as the case file number, the defendant's name, address, social security number. This preliminary preparation of the judicial notice is typically prepared by a member of the prosecutor's support staff. The second stage in completing the judicial notice comes once a plea agreement has been reached. The third stage is at the sentencing hearing.

O. Completing the Denial of Federal Benefits Form

The state court has the option of using the denial of federal benefits form developed by the Department of Justice, its own form, or including the orders pertaining to denial in the judgment of sentence or another order. Courts using the DOJ form, however, have experienced some difficulty in completing the form.

All of the defendant's aliases and name variations should be entered in space number 4 of the DOJ denial form. All prior convictions for either possession or trafficking that were considered in determining the length of the period of ineligibility and the condition should be entered in space number 17. The convictions can include

convictions from other states as well as federal court convictions. Alternate birth dates should be entered in space number 17, and alternate social security numbers should be entered in space number 10.

In courts that open separate case files for dissimilar charges growing out of one indictment or arrest (e.g., robbery, burglary, assault, and trafficking), the case number should be closely scrutinized to ensure that the correct case number for the controlled substance charge is the one entered on the notice of denial (judicial statements). The notice of denial form should be in the correct case file, and not in the case file of one of the non-controlled substance charges. The sentencing judge must sign the order.

P. Special Hearings—Waiver and Rehabilitation

The state court will have to determine how it will hold hearings under its rules of procedure to determine if a person has completed a supervised drug rehabilitation program, has otherwise been rehabilitated, or has met the requirements to be deemed rehabilitated.

In all the cases audited by NCSC staff in which state courts recommended the denial of federal benefits, only one was identified in which the offender had initiated proceedings for the termination of the period of ineligibility. In this case, the proceeding was initiated by a "Motion for an Order Suspending the Denial of Federal Benefits" prepared and signed by counsel. Attached to the motion was a letter from the offender to the sentencing judge which claimed his participation in a drug treatment program and his abstinence from controlled substances. Also attached to the motion was a copy of a monthly progress report from the drug treatment counselor showing completion of the rehabilitation. The defendant's motion was unopposed and was granted after a hearing in open court.⁹

⁹ *Oregon v. Pflieger* (91-2340 CR).

Whatever procedure is devised to bring the matter before the court, the period of ineligibility will not in fact be terminated, unless and until a copy of the judicial statement recommending the termination of the period of ineligibility is received by the Information Clearinghouse and entered in the database.

Q. Setting Aside of a Guilty Plea

Similar to the safeguards needed for appeals, there should be a procedure that ensures that the judicial statements that were sent to the Information Clearinghouse are not overlooked if the court sets aside a guilty plea or conviction. This procedure includes designating a person who will be responsible for this task.

R. Costs

The courts involved in reporting denial orders to the Department of Justice reported that the costs of participation were minimal.¹⁰ The activities which incurred significant cost included personnel time for mailing the judicial notice of the denial order and the cost of mailing. The receipt of the verification from the denial of federal benefits Information Clearinghouse gave the court staff another responsibility because something had to be done with the document once it was received. The document was generally treated as case-related correspondence. Therefore, the document was read by the addressee (i.e., the judge who signed the judicial statement), routed to the clerk's or court administrator's office, and inserted into the appropriate court file. Since no court audited the case file to cross-check the information on the verification with the judgment of sentence, no court reported any cost for verification.

¹⁰ The District Attorney's Office for Imperial County, California and the Governor's Justice Commission for Rhode Island were the recipients of grants from the Office of Justice Programs of the Department of Justice to conduct the two denial of federal benefits demonstration projects. The grant to Imperial County was for \$150,000. The award was made May 21, 1991 with the project ending on August 31, 1992. Rhode Island received an initial grant of \$150,000 on July 27, 1990 and a supplemental grant on September 25, 1991. The Rhode Island demonstration project ended September 30, 1992. See Notice, 55 F.R. 37434 (September 11, 1990).

In Imperial County, California, most of the pre-sentencing clerical work was conducted by the prosecutor's office, therefore the financial responsibility was on that office and not on the court. The probation department in California comes within the judicial branch. The drug offenders in California are entitled to a pre-sentencing report which is prepared by the probation department. The probation department reported that making the determination and recommendation for denial had a minimum impact on staff time and therefore on costs. The probation officer determined if the defendant was eligible for denial and if so, included a boilerplate paragraph in the pre-sentencing report recommending that the court include in its sentence a recommendation for the denial of federal benefits. The recommendation paragraph was developed by the prosecutor's office.

The Rhode Island denial program hired staff to conduct all of the denial related activities before the events in which plea bargaining took place. Rhode Island's staff consisted of the project manager, who managed the project and directed the staff, collected data on the cases, and sent the judicial statement to the Information Clearinghouse. Staff also included one associate for each participating court, who screened the PAC docket for potential denial cases, collected criminal history information on the potential denial defendants, made recommendations to the prosecutor that the denial of federal benefits be included in the plea bargaining negotiations, and handled the judicial statements in the courtroom. The cost of this approach included the salaries of part-time staff.

S. The Federal Information Clearinghouse

Pursuant to the directive of the President and the Denial of Federal Benefits Project in the Office of Justice Programs, the U.S. Department of Justice acts as the

federal government's information clearinghouse for denial of federal benefits data provided by state and federal courts.¹¹

The Information Clearinghouse has many functions. It is the link between the judicial statement and of the federal agency which may grant or deny a benefit to a convicted criminal defendant. The Information Clearinghouse is the federal recipient of both state and federal judicial notices of denial.

The Information Clearinghouse has a custom designed database with sub-databases to help it carry out several functions after the denial order is received. Information from all denial orders is entered into the database. If there is an obvious problem with the information on the judicial statement, it is brought to the attention of the Information Clearinghouse director by the data entry staff for the director to resolve. The director acknowledges in writing every judicial statement received by the Information Clearinghouse and provides an opportunity for the state courts to verify the accuracy of the information entered in the database. The Information Clearinghouse has the additional function of coordinating the participation of state courts in the denial of Federal benefits.¹²

T. Verification of the Denial Order

Once the data from the denial order are entered, a cover letter and a computer generated denial order are sent to the authorized official. The letter requests verification of the denial order. In computer form, the verification order duplicates the information submitted on the original denial order.

The denial program should have a person designated to serve as the Information Clearinghouse's contact person for the verifications and to verify the information. The preferable practice is to use the court file to verify its information and

¹¹ *Report [of the President] Pertaining to Denial of Federal Benefits to Drug Traffickers and Possessors Pursuant to Public Law 100-690, Section 5301(g)(1) (102 Stat. 4312)*, House Document No. 101-90, Government Printing Office (1989); Guideline, §14.

¹² Report of the President.

not to rely solely on a photocopy of the order that was submitted to the Department of Justice.

All the information on the verification should be checked with the court file, but there are some issues that deserve special attention. There are several pitfalls that can be corrected by auditing the case upon receiving the verification. This section discusses some of the more frequently occurring problems.

Every case in which the court has ordered a penalty or condition under the denial law should have the original judgment of sentence or judicial notice of denial form in the court file. The document which is sent to the Information Clearinghouse should be signed by a judge.

The person who is the subject of the denial should have a controlled substance conviction for either possession or trafficking in the court file referenced in the denial order. This may sound simple. However, it is possible for there not to be a conviction for a controlled substance offense for a variety of reasons noted previously. The case may include a plea agreement not to prosecute the controlled substance charge, but to enter a guilty plea to a different charge; the guilty plea and the resulting conviction have been overturned based on the suppression of evidence, or there could be an order for a stay of execution.¹³

The verification should show that the Information Clearinghouse picked up all of the information included in the judicial statement. The information should include the defendants multiple names, birth dates, or social security numbers. The verification should include information pertaining to the date and charge of the prior convictions for trafficking or possession.

Once the verification has been completed, the letter and verification form should be filed in the court file. Copies should be sent to defense counsel and the prosecutor.

¹³ *Oregon v. Ortiz* (91-2499-CR, 91-2496-CR).

A notation should be entered on the documents or on the court file indicating that the verification was made and copies of the documents were distributed.

U. The General Services Administration

The Information Clearinghouse informs the General Services Administration of the names of persons and information about the affected benefit. When a person applies for benefits, the agency administering the benefit reviews the *List of Parties Excluded from Federal Procurement or Non-Procurement Programs*, known informally as the debarment list, to determine whether the applicant is listed and is, therefore, ineligible to receive the benefit. The Information Clearinghouse serves as the point of contact for verification purposes. The Department of Education, however, accesses the Information Clearinghouse's database directly instead of using the debarment list. The Department of Education found that this procedure allows it to perform computer matches more efficiently for the various student aid programs.¹⁴

The Debarment List contains approximately 6,500 entries, consisting of those parties excluded from receiving federal contracts or federally approved subcontracts and from certain federal benefits and other assistance. It is printed and distributed monthly to over 17,000 subscribers in both the federal government and the private sector. The burden rests with each agency to consult the Debarment List to ensure that the applicant for either a new benefit or a renewal of an existing benefit is not subject to a period of ineligibility.

In addition, to the Debarment List mechanism there is another procedure that helps to eliminate ineligible applicants for federal benefits. An applicant is required to certify that he or she is not subject to a judicial order that would bar their receipt of those Federal benefits. By this certification the applicant is asserting to the agency that

¹⁴ Notice - "Computer Matching Program," Department of Education, 57 F.R. 11354 (April 2, 1992).

he or she is not permanently ineligible to receive federal benefits based upon having received a third or subsequent trafficking conviction.

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APPENDIX A

Denial of Federal Benefits to Drug Traffickers and Possessors 21 U.S.C. Section 862

THE FEDERAL DENIAL OF BENEFITS STATUTE

The Anti-Drug Abuse Act of 1988, Public Law 100-690, Title V - User Accountability, Subtitle G Denial of Federal Benefits to Drug Traffickers and Possessors, Section 5301, 102 Stat 4310, as amended and as recodified as 21 United States Code Section 862

(a) Drug traffickers

(1) Any individual who is convicted of any Federal or State offenses consisting of the distribution of controlled substances shall --

(A) at the discretion of the court, upon the first conviction for such an offense be ineligible for any or all Federal benefits for up to 5 years after such conviction;

(B) at the discretion of the court, upon a second conviction for such an offense be ineligible for any or all Federal benefits for up to 10 years after such conviction; and

(C) upon a third or subsequent conviction for such an offense be permanently ineligible for all Federal benefits.

(2) The benefits which are denied under this subsection shall not include benefits relating to long-term drug treatment programs for addiction for any person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services.

(b) Drug possessors

(1) Any individual who is convicted of any Federal or State offense involving the possession of a controlled substance (as such term is defined for purposes of the Controlled Substances Act [21 U.S.C.A. § 801 et seq. 1] shall -

(A) upon the first conviction for such an offense and at the discretion of the court -

(i) be ineligible for any or all Federal benefits for up to one year,

(ii) be required to successfully complete an approved drug treatment program which includes periodic testing to insure that the individual remains drug free;

(iii) be required to perform appropriate community service;
or

(iv) any combination of clauses (i), (ii), or (iii); and

(B) upon a second or subsequent conviction for such an offense be ineligible for all Federal benefits for up to 5 years after such conviction as determined by the court. The court shall continue to have the discretion in subparagraph (A) above. In imposing penalties and conditions under subparagraph (A), the court may require that

the completion of the conditions imposed by clause (ii) or (iii) be a requirement for the reinstatement of benefits under clause (i).

(2) The penalties and conditions which may be imposed under this subsection shall be waived in the case of a person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services.

(c) Suspension of period of ineligibility

The period of ineligibility referred to in subsections (a) and (b) of this section shall be suspended if the individual -

(A) completes a supervised drug rehabilitation program after becoming ineligible under this section;

(B) has otherwise been rehabilitated; or

(C) has made a good faith effort to gain admission to a supervised drug rehabilitation program, but is unable to do so because of inaccessibility or unavailability of such a program, or the inability of the individual to pay for such a program.

(d) Definitions - As used in this section -

(1) the term "Federal benefit" -

(A) means the issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility; and

(2) the term "veterans benefit" means all benefits provided to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States.

(e) Inapplicability of This Section to Government Witnesses

The penalties provided by this section shall not apply to any individual who cooperates or testifies with the Government in the prosecution of a Federal or State offense or who is in a Government witness protection program.

(f) Indian Provision

Nothing in this section shall be construed to affect the obligation of the United States to any Indian or Indian tribe arising out of any treaty, statute, Executive order, or the trust responsibility of the United States owing to such Indian or Indian tribe. Nothing in this subsection shall exempt any individual Indian from the sanctions provided for in this section, provided that no

individual Indian shall be denied any benefit under Federal Indian programs comparable to those described in subsection (d)(1)(B) or (d)(2) above.

(g) Presidential Report

(1) On or before May 1, 1989, the President shall transmit to the Congress a report -

(A) delineating the role of State courts in implementing this section;

(B) describing the manner in which Federal agencies will implement and enforce the requirements of this section;

(C) detailing the means by which Federal and State agencies, courts, and law enforcement agencies will exchange and share the data and information necessary to implement and enforce the withholding of Federal benefits; and

(D) recommending any modifications to improve the administration of this section or otherwise achieve the goal of discouraging the trafficking and possession of controlled substances.

(2) No later than September 1, 1989, the Congress shall consider the report of the President and enact such changes as it deems appropriate to further the goals of this section.

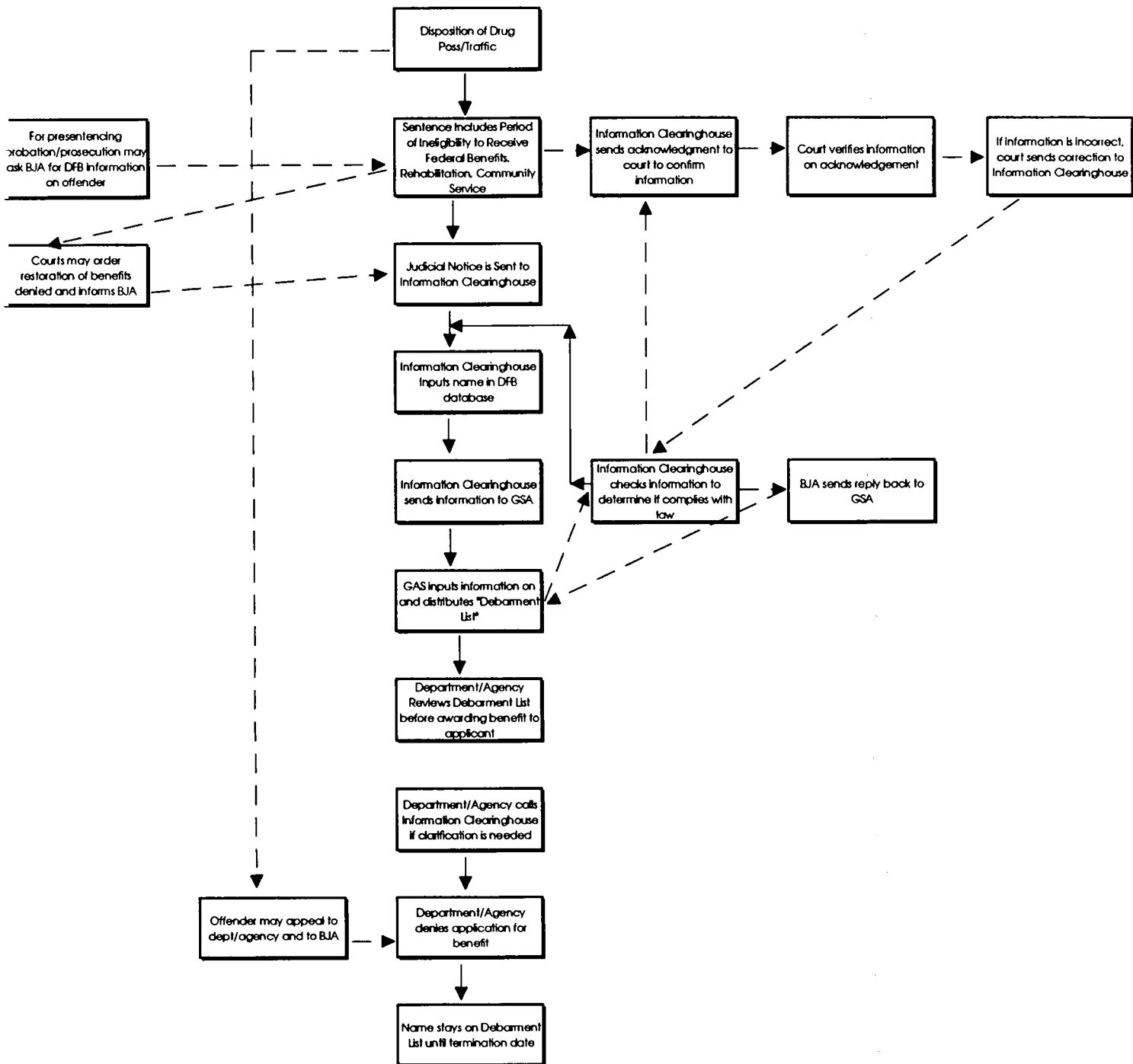
(h) Effective Date

The denial of Federal benefits set forth in this section shall take effect for convictions occurring after September 1, 1989.

APPENDIX B

Generic Denial of Federal Benefits Process

Generic Denials Process



REQUEST FOR SUPPLEMENTAL MATERIAL

The State Judicial Participation in the Denial of Federal Benefits Project of the National Center for State Courts has compiled a comprehensive manual of background and other resource material related to the denial of federal benefits statute, and can make this material available to you. This material includes the Department of Justice, Department of Education, and other agency regulations interpreting or implementing the denial statute, the list of benefits affected by the statute, various reports, and some legislative history. If you would like to receive this material, please complete and return the bottom of this form.

Name: _____

Title: _____

Agency: _____

Address: _____

Phone No.: _____

Fax No.: _____

Comments:

Return to:

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