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<p align="center"> ICAOS Advisory Opinion Issued by: Executive Director-Don Blackburn Chief Legal Counsel: Richard L Masters </p>			
State Requesting Opinion <p align="center">Pennsylvania</p>		Dated: 4/26/2006	
Description Clarification of Rule 2.105 Determination of second or subsequent misdemeanor DUI offense.			

Background & History


Pursuant to Commission Rule 6.101 (c) The Commonwealth of Pennsylvania has requested assistance in the interpretation of Rule 2.105 (a)(3), specifically the determination of what constitutes “a second or subsequent misdemeanor offense of driving while impaired by drugs or alcohol.” As Pennsylvania phrases the question:

Is it simply the total number of convictions for DUI in a lifetime or is it the manner in which the DUI was sentenced that determines a second or subsequent DUI offense for the purpose of Rule 2.105? If the sentence imposed by a court for a DUI specifically indicates that the DUI is being treated as a first offense for sentencing purposes, should that case be considered a first offense for compact purposes and thus not eligible for transfer under Rule 2.105?

In order for states to make uniform decisions regarding the transfer and acceptance of DUI cases, it would be helpful to have clarification on this issue thorough an Advisory Opinion from the Commission.

Analysis and Conclusion

Commission Rule 2.105 defines the types of misdemeanor offenses for which a convicted offender “shall be eligible for transfer under the Compact. Rule 2.105 (a) (3) specifies one of those types of offenses as: “a second or subsequent misdemeanor offense of driving while impaired by drugs or alcohol;” Several states have statutory provisions under which a Judge can sentence a current DUI as a first offense when there has been a specified period of time between the instant DUI offense and prior DUI convictions. Rule 2.105 (a) (3) provides no such discretion but unequivocally provides that if the “instant offense includes . . . a second or subsequent misdemeanor offense of driving while impaired by drugs or alcohol” that such a misdemeanor offender “shall be eligible for transfer.” The rule provides no exceptions to applicability based on either the time period between the first and subsequent offense(s) or the jurisdiction in which the

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convictions occurred. Because the Compact has been granted Congressional consent, its provisions as well as its authorized rules are equivalent to and have the effect of federal law. See *Cuyler v. Adams*, 449 U.S. 433 (1981); *Texas v. New Mexico*, 482 U.S. 124 (1987). Thus, both the compact and rules are enforceable on the states under both the Supremacy Clause and the Contract Clause of the federal Constitution and take precedence over conflicting statutes, executive actions or judicial orders. See *WMATA v. One Parcel of Land*, 706 F.2d 1312 (4th Cir. 1983), also *Doe v. Ward*, 124 F. Supp.2d 900 (W.D. Penn. 2000). See also *Interstate Commission for Adult Offender Supervision v. Tennessee Board of Probation and Parole, et al.* (U.S. Dist. Ct. E. D. KY. 2005). Thus, even if the sentencing court considers the DUI conviction to be a “first offense” for “sentencing purposes,” the provisions of Rule 2.105 (a)(3) prevail and any offender who has in actuality been previously convicted of a DUI misdemeanor offense shall be eligible for transfer under the Compact based on the plain meaning of this rule.