



Senate Fiscal Agency
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BILL



ANALYSIS

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Senate Bills 333 and 350 (as enacted)
House Bills 4749 and 4750 (as enacted)
Sponsor: Senator John Proos (S.B. 333)
Senator Mike Nofs (S.B. 350)
Representative Amanda Price (H.B. 4749 & 4750)
Senate Committee: Health Policy
House Committee: Health Policy

PUBLIC ACTS 84 & 85 of 2011
PUBLIC ACTS 86 & 87 of 2011

Date Completed: 7-6-12

RATIONALE

The use and production of methamphetamine ("meth") have been a growing problem in the State—particularly in southwestern Michigan—since the 1990s. Methamphetamine is manufactured with common chemicals and household items in clandestine laboratories. Although there are several production methods, meth labs discovered in Michigan typically have used a manufacturing process that involves the extraction of pseudoephedrine or ephedrine (precursor ingredients) from cold tablets, according to the Office of Drug Control Policy in the Michigan Department of Community Health.

Legislation enacted in recent years has taken various approaches to combat the use and production of meth. The legislation includes measures to restrict over-the-counter (OTC) sales of products containing ephedrine and pseudoephedrine to people at least 18 years old, require retailers to monitor the products and keep records of purchases, and prohibit internet and mail-order sales of ephedrine and pseudoephedrine products. In addition, the Federal Combat Methamphetamine Epidemic Act, which took effect in 2006, requires retailers to prohibit direct access by customers and maintain a written or electronic log of sales, including the name and address of purchasers and the date and quantity of the sale; and limits the amount of ephedrine and pseudoephedrine that a person may purchase in 24-hour and 30-day periods.

To enhance the State's efforts to limit access to the precursor ingredients of meth, a number of statutory changes were suggested, including that retailers should be required to submit information about OTC ephedrine and pseudoephedrine product sales to the National Precursor Log Exchange (NPLEx), an electronic tracking system that provides real-time data to law enforcement; that the State should adopt the daily and monthly limits prescribed in the Federal Act; that requirements regarding the storage and maintenance of ephedrine and pseudoephedrine products, as well as sales log requirements, should be revised; that the penalty for an illegal transaction should be increased; and that a misdemeanor penalty should be established for using a false ID to purchase a product containing ephedrine or pseudoephedrine. (The Exchange is described below, under **BACKGROUND.**)

CONTENT

Senate Bill 333 amended the Public Health Code to do the following:

- **Beginning January 1, 2012, require a retailer to submit electronically to the National Precursor Log Exchange information regarding sales of nonprescription products containing ephedrine or pseudoephedrine.**
- **Require an electronic sales tracking system to generate a stop sale alert if a transaction exceeds restrictions**

- on the amount of ephedrine or pseudoephedrine allowed in a sale to one purchaser.
- Provide immunity from civil liability for a person who fails to comply with record-keeping or sales verification requirements, absent a direct and proximate cause of damages.
- Designate a violation of the bill a misdemeanor and prescribe a maximum \$500 fine.

House Bill 4749 amended the Public Health Code to do the following:

- Prohibit a person from purchasing more than 3.6 grams of ephedrine or pseudoephedrine within one day, or more than nine grams within 30 days; and prescribe a misdemeanor penalty for a violation.
- Eliminate provisions allowing a retailer to monitor ephedrine and pseudoephedrine products through antitheft devices and video surveillance, rather than maintaining them behind the counter or in a locked case.
- Eliminate an exemption from the Code's sales log requirements for a retailer who maintains ephedrine and pseudoephedrine products behind the counter or in a locked case.
- Expand the transaction information that must be included in a sales log.
- Eliminate limits on the amount of ephedrine or pseudoephedrine that may be sold in a single transaction, and instead prohibit sales in excess of the daily and monthly limits described above.
- Increase the civil fine for a prohibited sale of an ephedrine or pseudoephedrine product from \$50 to \$500.
- Eliminate a requirement that a retailer post a sign informing employees and customers of ephedrine and pseudoephedrine sales laws.

House Bill 4750 amended a statutory citation in the Code of Criminal Procedure's sentencing guidelines to reflect a revision enacted by House Bill 4749.

Senate Bill 350 amended the Public Health Code to make it a misdemeanor, punishable by imprisonment for up to 93 days and/or a maximum fine of \$100, to use a false identification to purchase a product containing ephedrine or pseudoephedrine.

All of the bills took effect on July 15, 2011. Senate Bill 333 and House Bill 4749 were tie-barred to each other. House Bill 4750 was tie-barred to House Bill 4749.

Senate Bills 333 and 350 and House Bill 4749 are described below in further detail.

Senate Bill 333

Beginning January 1, 2012, the bill requires a retailer, before completing a sale under Section 17766f, to submit the required information electronically to the National Precursor Log Exchange administered by the National Association of Drug Diversion Investigators (NADDI). A retailer cannot be required to pay a fee for using the NPLeX system.

(House Bill 4749 amended Section 17766f to establish limits on the retail sale of products containing specified amounts of ephedrine or pseudoephedrine within a 24-hour or 30-day period.)

If a retailer experiences mechanical or electronic failure of the electronic sales tracking system and is unable to comply with the tracking requirement, the retailer must maintain a written log or an alternative electronic record-keeping mechanism until the retailer can comply with the electronic tracking requirement.

The bill requires NADDI to provide real-time access to NPLeX information through the NPLeX online portal to law enforcement in Michigan as authorized by State and Federal law.

The electronic tracking system must be capable of generating a stop sale alert notifying the retailer that completion of the sale will result in the seller's or purchaser's violating the quantity limits prescribed by Section 17766f. The seller may not complete the sale if the system generates an alert. The system must contain an override function that a dispenser of ephedrine or pseudoephedrine can use if he or she has a

reasonable fear of imminent bodily harm if he or she does not complete the sale. The system must log each instance in which the override function is used.

A person's failure to comply with the record-keeping or sales verification requirements does not create a civil cause of action for damages to any other person arising out of that failure absent a direct and proximate cause, and the person is immune from civil liability for any damages.

A person who violates the bill is guilty of a misdemeanor punishable by a maximum fine of \$500.

House Bill 4749

Purchase Limits & Penalty

The bill prohibits a person from purchasing more than 3.6 grams of ephedrine or pseudoephedrine alone or in a mixture within a single calendar day, or more than nine grams within a 30-day period. A person who violates the prohibition is guilty of a misdemeanor punishable by imprisonment for up to 93 days and/or a maximum fine of \$500.

Retailer Provisions

Product Maintenance. Under the Code, except as otherwise provided, a person who possesses ephedrine or pseudoephedrine for retail sale must maintain all products that contain any compound, mixture, or preparation containing any detectable quantity of ephedrine or pseudoephedrine, a salt or optical isomer of ephedrine or pseudoephedrine, or a salt of an optical isomer in accordance with one of the following:

- Behind a counter where the public is not permitted.
- Within a locked case so that a customer wanting to gain access to the product must ask a store employee for assistance.

Previously, as an alternative, a retailer could maintain the products within 20 feet of a counter that allowed the attendant to view them in an unobstructed manner, or use an antitheft device that used special package tags and detection alarms designed to prevent theft, along with constant video

surveillance. If the products were maintained within 20 feet of a counter that was not staffed by one or more employees at all times, the retailer had to use antitheft devices and video surveillance when the counter was not staffed.

The bill deleted all of the provisions related to maintaining the products within 20 feet of a counter.

Previously, if the products were maintained behind the counter or in a locked case, the retailer was not required to maintain a log (described below) or any other type of record detailing the sale of the products. The bill eliminated this provision.

Sales Log. The Code requires a person who sells an ephedrine or pseudoephedrine product to do the following:

- Require a purchaser to produce a valid photo identification that includes his or her name and date of birth.
- Maintain a log or some type of record detailing the sale, including the date, the buyer's name and date of birth, and the amount and description of the product.

The log or other record must be maintained for at least six months and made available only to a law enforcement agency upon request.

The bill requires the log or record also to include the time of purchase; the buyer's address; and a description of the identification used to make the purchase, such as the state in which a driver license was issued and the number of that license. The seller also must require the purchaser to sign the log at the time of sale. The bill provides that information entered into NPLeX satisfies the sales log or record requirements.

Other Prohibitions & Civil Penalty. The Code prohibits a retailer from knowingly doing either of the following:

- Selling an ephedrine or pseudoephedrine product to a person who is younger than 18 years old.
- Selling in a single OTC transaction more than two personal convenience packages containing two tablets or capsules of an ephedrine or pseudoephedrine product.

Previously, the Code also prohibited a single OTC sale of more than two packages, or 48 tablets or capsules, of an ephedrine or pseudoephedrine product to an individual. The bill deleted this prohibition. Instead, the bill prohibits a retailer from selling more than 3.6 grams of ephedrine or pseudoephedrine alone or in a mixture to any individual on any single calendar day, or more than nine grams to any individual within a 30-day period.

Under the Code, a person who violates any of these prohibitions is responsible for a State civil infraction. The bill increased the maximum fine per violation from \$50 to \$500.

Retailer Signs. Previously, the Code required a retailer to post, in a place close to the point of sale and conspicuous to employees and customers, a sign produced by the Department of Community Health (DCH) that included a statement explaining the ban on sales of ephedrine and pseudoephedrine products to minors, the photo ID and sales log requirements, and the ban on sales of more than two packages or 48 tablets or capsules. The DCH had to produce the sign and make it available to licensed retailers free of charge. The Code also required retailers to obtain the sign from the DCH's website and to provide copies of it, upon request, to customers.

The bill deleted all of these provisions.

Senate Bill 350

Under the bill, if a person uses or attempts to use a false identification or another person's identification to purchase a product that contains any compound, mixture, or preparation containing any detectable quantity of ephedrine or pseudoephedrine, the person is guilty of a misdemeanor punishable by imprisonment for up to 93 days and/or a maximum fine of \$100.

The penalty does not apply to a person who participates in an undercover operation in which the individual purchases or receives the product under direction of his or her employer and with the prior approval of the local prosecutor's office as part of an employer-sponsored internal enforcement action.

The penalty also does not apply to a person who participates in an undercover operation in which the individual purchases or receives the product under the direction of the Michigan State Police (MSP) or a local law enforcement agency as part of an enforcement action, unless the initial or contemporaneous purchase or receipt of the product is not under the direction of the MSP or a local law enforcement agency and is not part of the undercover operation.

MCL 333.7340a (S.B. 333)
333.17766e (S.B. 350)
333.17766c et al. (H.B. 4749)
777.13n (H.B. 4750)

BACKGROUND

The National Precursor Log Exchange is a real-time electronic logging system used by pharmacies and law enforcement to track sales of OTC cold and allergy medications containing ephedrine and pseudoephedrine. The system is sponsored by the makers of such medications and provided to law enforcement agencies and state governments free of charge by the National Association of Drug Diversion Investigators. The system blocks sales that would exceed legal limits and provides law enforcement with immediate access to transaction information when necessary.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The use of the NPLeX electronic tracking system will increase the effectiveness of measures enacted previously to restrict access to precursor ingredients and curb the manufacture of meth. The original limits on ephedrine and pseudoephedrine purchases, as well as the requirements for photo ID and sales logging, were not as useful as they could have been, for several reasons. First, as purchases of medication containing precursor ingredients were limited, meth cooks modified their production methods by making smaller, "one-pot" batches in a matter of a few hours. Thus, they were able to continue making the drug without violating laws related to the sale of precursor ingredients.

Furthermore, while Michigan and Federal laws required individual retailers to maintain logs of precursor ingredient purchases, the logs frequently were written, not electronic, and there was no way to identify buyers who might be going from store to store or state to state to purchase products in excess of the prescribed limits. The National Precursor Log Exchange, however, provides seamless communication between states and between retailers. The system notifies a retailer when a person attempts to buy more than he or she is allowed by law, regardless of where previous transactions occurred, and provides data immediately to help law enforcement identify people who might be buying ephedrine and pseudoephedrine products for improper use.

This system also avoids the shortcomings of some other measures enacted by states to prevent the manufacture and abuse of meth. For example, Oregon and Mississippi designated ephedrine and pseudoephedrine products as controlled substances requiring a prescription. While well-intentioned, this approach has been ineffective because meth makers simply buy the products in bordering states, while individuals with colds or allergies experience undue inconvenience in trying to alleviate their symptoms. Moreover, prescription information is protected by health privacy laws, and the systems used to track prescriptions reportedly are updated approximately weekly--not quickly enough to aid law enforcement. The NPLeX system blocks illegal purchases and provides real-time data to law enforcement without requiring people who have a legitimate need for these products to obtain a prescription.

Another benefit of using NPLeX is that it is less costly and time-consuming to retailers and law enforcement than written sales logs. This electronic system is funded entirely by pharmaceutical manufacturers; there is no added cost to the State, retailers, or law enforcement agencies. Furthermore, the information is more secure if stored in NPLeX than it is in a written log on a pharmacy counter.

Overall, adoption of the NPLeX system in Michigan under Senate Bill 333 and enactment of the Federal ephedrine and pseudoephedrine limits and other amendments under House Bill 4749 are proactive steps in the fight against meth.

Blocking access to precursor ingredients at the point of sale is essential in preventing the manufacture and abuse of this drug, and NPLeX will facilitate this without further burdening people who have a legitimate need for ephedrine or pseudoephedrine products.

Supporting Argument

A precursor ingredient tracking log, whether written or electronic, is effective only to the extent that the information contained in it is accurate. After the sales log requirement went into effect, some meth cooks reportedly used false IDs, or IDs belonging to other people, to circumvent the sales limits on OTC precursor products and evade detection by law enforcement. By making this action a misdemeanor, Senate Bill 350 will deter some meth makers and provide another tool for the law enforcement community.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bills will have an indeterminate fiscal impact on State and local government. There are no data to indicate how many offenders will be convicted of the new misdemeanors. Local governments will incur the costs of incarceration in local facilities and/or misdemeanor probation, which vary by county. Additional penal and State civil infraction fine revenue will benefit public libraries.

Fiscal Analyst: Dan O'Connor

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.