Legislative Analysis

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DEVICES FOR RECREATIONAL USE OF NITROUS OXIDE

House Bill 5982 as introduced
Sponsor: Rep. Joseph N. Bellino, Jr.

Senate Bill 996 as passed by the Senate
Sponsor: Sen. Stephanie Chang

House Committee: Judiciary
Senate Committee (SB 996): Committee of the Whole
Complete to 4-29-22

SUMMARY:

House Bill 5982 and Senate Bill 996, which are identical, would amend Article 7 (Controlled Substances) of the Public Health Code to prohibit selling or offering for sale an object specifically designed for inhaling nitrous oxide for recreational purposes, knowing that the object will be used to inhale nitrous oxide for recreational purposes. A person who violates the prohibition would be guilty of a misdemeanor punishable by imprisonment for up to 90 days or a fine of up to $5,000, or both.

At least two business days before a person is to be arrested for a violation, the attorney general or a prosecuting attorney would have to notify the person in writing that the person is in possession of specific, defined material that the attorney general or prosecuting attorney has determined to be an object specifically designed for inhaling nitrous oxide for recreational purposes. The notice would have to request that the person refrain from selling the material or offering it for sale and state that no arrest will be made if the person complies with the notice. Continued compliance with the notice would be a complete defense in a prosecution.

In addition, a person who has received a notice described above could commence an action for a declaratory judgment to obtain an adjudication of the legality of the intended sale or offer to sell. The attorney general or the prosecuting attorney who sent the notice would be made the defendant to such an action. A declaratory judgment stating that the sale or offer to sell specified material does not violate the above prohibition would be a complete defense against a prosecution for the person obtaining the judgment.

Under the code, the above prohibition would not apply to any of the following:[1]

- An object sold or offered for sale to a person licensed under the Occupational Code or under Article 15 of the Public Health Code, or to an intern, trainee, apprentice, or assistant in a profession so licensed, for use in that profession.
- An object sold or offered for sale to a hospital, sanitarium, clinical laboratory, or other health care institution (including a penal, correctional, or juvenile detention facility) for use in that institution.

[1] This list omits other objects excepted under the code, such as hypodermic needles for livestock, that do not seem remotely likely to apply to the inhalation of nitrous oxide.

- An object sold or offered for sale to a dealer in medical, dental, surgical, or pharmaceutical supplies.
- A blender, bowl, container, spoon, or mixing device not specifically designed for inhaling nitrous oxide for recreational purposes.

Each bill would take effect 90 days after being enacted.

MCL 333.7453

BACKGROUND:

Other state law

1967 PA 119 prohibits both of the following, with exceptions described below:[2]

- Selling or distributing a device that contains any amount of nitrous oxide.
- Selling or distributing a device to dispense nitrous oxide for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulling of the senses or nervous system.

A person who violates the above provisions is guilty of a crime as follows:

- Except as provided below, the person is guilty of a misdemeanor punishable by imprisonment for up to 93 days or a fine of up to $100, or both.
- If the person has one prior conviction, the person is guilty of a misdemeanor punishable by imprisonment for up to one year or a fine of up to $500, or both.
- If the person has two or more prior convictions, the person is guilty of a felony punishable for imprisonment for up to four years or a fine of up to $2,000, or both.

The above prohibitions do not apply to any of the following:

- A person licensed under the Food Law who sells or distributes the device as a grocery product.
- A person engaged in the business of selling or distributing catering supplies only or food processing equipment only who sells or distributes the device in the course of that business.
- A person engaged in the business of selling compressed gases for industrial or medical use who sells or otherwise distributes the device in the course of that business.
- A pharmacy, pharmacist, or pharmacist intern who dispenses the device in the course of those duties.
- A health care professional.

In addition, 1967 PA 119 prohibits selling or distributing a device that solely contains nitrous oxide to a person under the age of 18. This prohibition does not apply to pharmacies, pharmacists, pharmacist interns, or health professionals acting in the course of their duties. It also does not apply if the minor is accepting a delivery in the course of the minor's employment. A person who knowingly violates the prohibition, or who fails to make diligent inquiry as to whether the person is a minor, is liable for a civil fine and may be ordered by a court to pay up to $500.

[2] The act also generally prohibits intentionally consuming or inhaling, in order to get high, the fumes of a substance containing a chemical or solvent that releases toxic vapors (e.g., "huffing").

Penalties under the bills

The bills would amend section 7453 of the Public Health Code, which currently prohibits selling or offering for sale drug paraphernalia knowing that it will be used for certain specified purposes. Section 7451 of the code defines ***drug paraphernalia*** as any equipment, product, or material or combination of equipment, products, or materials that has a specified application to a controlled substance as defined in the code. The provisions described above concerning exceptions, prearrest notice, and actions to obtain a declaratory judgment currently apply under the code with regard to drug paraphernalia.

Section 7455 of the code provides that a person who violates section 7453 is guilty of a misdemeanor punishable by imprisonment for up to 90 days or a fine of up to $5,000, or both. This penalty now applies to a violation related to drug paraphernalia and under the bills would apply to a violation related to an object specifically designed for inhaling nitrous oxide for recreational purposes.

In addition, section 7455 provides that a person 18 years old or older who violates section 7453 by selling or offering to sell drug paraphernalia to a person under the age of 18 is guilty of a misdemeanor punishable by imprisonment for up to one year or a fine of up to $7,500, or both. Because this provision specifically applies to the sale of drug paraphernalia to a minor, the enhanced penalty would not apply to selling or offering for sale to a minor an object designed for inhaling nitrous oxide for recreational use. (Nitrous oxide is not a controlled substance as defined in the Public Health Code.)

FISCAL IMPACT:

House Bill 5982 and Senate Bill 996 would have an indeterminate fiscal impact on local units of government. A person who violates provisions of the bills would be guilty of a misdemeanor punishable by imprisonment in jail, a fine, or both. The number of convictions that would result under provisions of the bills is not known.

New misdemeanor convictions would result in increased costs related to county jails and/or local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction.

The fiscal impact on local court systems would depend on how provisions of the bills affected court caseloads and related administrative costs. It is difficult to project the actual fiscal impact to courts due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, case types, and complexity of cases.

Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.