

Legislative Analysis



"SMURFING": EPHEDRINE OR PSEUDOEPHEDRINE INTENDED FOR METH PRODUCTION

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House Bill 5363 (Substitute H-1)
Sponsor: Rep. Amanda Price

House Bill 5615 without amendment
Sponsor: Rep. John Kivela

House Bill 5089 (Substitute H-1)
Sponsor: Rep. Bob Genetski

Senate Bill 535 as passed the Senate
Senate Bill 563 (Substitute H-1)
Senate Bill 756 with committee amendment
Sponsor: Sen. John Proos

House Bill 5090 (Substitute H-1)
Sponsor: Rep. Aric Nesbitt

House Committee: Criminal Justice
Senate Committee: Judiciary

Complete to 6-5-14

A SUMMARY OF HOUSE BILLS 5363, 5089-5090, AND 5615 AND SENATE BILLS 535, 563, AND 756 AS REPORTED BY HOUSE COMMITTEE 6-4-14

As a package, the bills would address the practice known as "smurfing." Together, the bills would:

- Prohibit purchasing or possessing ephedrine or pseudoephedrine knowing or having reason to know it is to be used to manufacture methamphetamine, and prescribe penalties.
- Prohibit the solicitation of another to purchase ephedrine or pseudoephedrine knowing it will be used to illegally manufacture methamphetamine, and prescribe penalties.
- Create the Methamphetamine Abuse Reporting Act to, among other things, require the Michigan State Police to report certain data to be included in a national database (NPLEx) that tracks real-time sales of products containing ephedrine or pseudoephedrine.
- Require the NPLEx system to generate a stop-sale alert, prohibit the sale of a product containing ephedrine or pseudoephedrine if a stop-sale alert was triggered, and require NPLEx to contain an override function allowing a retailer to complete a sale if the person had a reasonable fear of imminent harm if the sale were not completed.
- Add smurfing to the list of offenses that constitute the crime of racketeering.

All of the bills have an effective date of January 1, 2015. A detailed description of each bill follows.

(Generally speaking, "smurfing" refers to the practice by criminal enterprises of making many small purchases of pseudoephedrine from numerous retailers—and using others to make such purchases—in order to make "meth.")

Unlawful purchase or possession of ephedrine or pseudoephedrine

House Bill 5363 would amend the Public Health Code (MCL 333.17766c) to prohibit a person from purchasing or possessing any amount of ephedrine or pseudoephedrine knowing or having reason to know that it is to be used to manufacture methamphetamine.

A violation would be a felony punishable by imprisonment for not less than one year or more than 20 years. A fine of not more than \$10,000 could also be imposed. The bill would not prohibit the person from being charged with, convicted of, and sentenced for any other violation of law arising out of the violation of this provision.

Senate Bill 563 would amend the Code of Criminal Procedure (MCL 777.13n) to place the felony penalty in the sentencing guidelines. Specifically, the bill would make purchasing or possessing ephedrine or pseudoephedrine knowing or having reason to know that it is to be used to manufacture methamphetamine a Class E felony involving a controlled substance with a 5-year maximum term of imprisonment. The bill is tie-barred to House Bill 5363.

Soliciting another to purchase or obtain ephedrine or pseudoephedrine

House Bill 5089 would add a new section to the Public Health Code (MCL 333.7340c, proposed) to prohibit a person from soliciting another person to purchase or otherwise obtain any amount of ephedrine or pseudoephedrine knowing that it is to be used for the purpose of illegally manufacturing methamphetamine.

A violation would be a felony punishable by imprisonment for not more than 10 years and/or a fine of not more than \$10,000. The bill would not prohibit the person from being charged with, convicted of, and sentenced for any other violation of law arising out of the violation of this provision. If a person is convicted of a violation, the court would have to report the violation to the Department of State Police.

"Ephedrine" would include the salts and isomers and salts of isomers of ephedrine. "Pseudoephedrine" would include the salts and isomers and salts of isomers of pseudoephedrine.

House Bill 5090 would amend the Code of Criminal Procedure (MCL 777.13m) to specify that soliciting another person to purchase or obtain ephedrine or pseudoephedrine to manufacture methamphetamine would be a Class D felony involving a controlled substance with a 10-year maximum term of imprisonment. The bill is tie-barred to House Bill 5089.

Methamphetamine Abuse Reporting Act

Senate Bill 535 would create the Methamphetamine Abuse Reporting Act to do the following:

- Require the Department of State Police (MSP) to notify NADDI of convictions of methamphetamine-related offenses, beginning with convictions occurring on or after the bill's effective date. At a minimum, the information would have to include the offender's date of birth, full name, driver license or state ID (if known by MSP), date of conviction, and a statement the person was convicted of a meth-related offense, which could be satisfied by a statutory citation to the violation.
- Specify that the purpose of the above would be to generate a stop-sale alert through NPLEx. The stop-sale would be in force for 10 years from the date of conviction for the methamphetamine-related offense.
- Allow NADDI to provide a statement on NPLEx that the stop-sale alert was generated due to a conviction for a methamphetamine-related offense and that the subject of the alert may contact MSP if the person believes the information reported to NADDI under the new act is erroneous.
- Require the MSP to contact NADDI if:
 - MSP corrects/updates information regarding the conviction, if the information had been previously reported to NADDI; and/or,
 - The conviction is set aside or expunged.
- Require NADDI to promptly correct or update information in, or remove information from, NPLEx upon notification by MSP of the above.
- Provide civil immunity to MSP and NADDI for compiling, maintaining, or reporting methamphetamine-related offense information under the new act.
- Allow a person who sells ephedrine or pseudoephedrine at retail to rely on information provided by the MSP to NADDI for enforcing a stop-sale alert. Except as stated below, provide immunity from civil liability for the reliance upon and use of that information.
- Prohibit a person from intentionally disclosing to any person any information he or she knows was provided under the act, except as otherwise authorized by the act. Information provided under the act and information entered into NPLEx under the act would not be subject to public disclosure under the Freedom of Information Act.
- Create a criminal penalty for the unauthorized disclosure of information in violation of the above provision. A violation would be a misdemeanor punishable by imprisonment for not more than 90 days and/or a fine of not more than \$500.
- Define "methamphetamine-related offense" to mean a violation of one or more of the following provisions in the Public Health Code:

- A violation or attempted violation of Article 7 (Controlled Substances) involving methamphetamine.
- A violation or attempted violation of Section 17766c of the Code (which limits the nonprescription purchase of products containing ephedrine or pseudoephedrine to certain amounts.)
- A violation or attempted violation of Section 17766f of the Code (which governs the nonprescription sale of products containing ephedrine or pseudoephedrine).

Senate Bill 756 would amend the Public Health Code (MCL 333.7340a and 333.17766f). Currently, the NPLEx system must be capable of generating a stop-sale alert notifying the retailer that completing the sale will result in the seller's or purchaser's violating the quantity limits for the sale of ephedrine or pseudoephedrine. The bill instead would require the system to be capable of generating a stop-sale alert notifying the retailer that the person was prohibited from purchasing a nonprescription product containing ephedrine or pseudoephedrine due to a conviction reported under the proposed Methamphetamine Abuse Reporting Act or that completing the sale would result in a violation of the quantity limits for the sale of ephedrine or pseudoephedrine.

The bill would also prohibit a person from knowingly selling any product containing 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 of ephedrine or pseudoephedrine to an individual during the period in which a stop sale alert is generated for that individual based upon criminal history record information provided under the Methamphetamine Abuse Reporting Act. The NPLEx system would be required to contain an override function that could be used by a dispenser of ephedrine or pseudoephedrine who has a reasonable fear of imminent bodily harm if the sale were not completed. Each instance in which the override function is utilized would have to be logged by the system.

Senate Bills 535 and 756 are tie-barred to each other.

Racketeering Act

House Bill 5615 would add a felony violation of certain sections of the Public Health Code concerning ephedrine or pseudoephedrine to the list of offenses contained in the definition of "racketeering". The sections are 7340 (which prohibits selling, distributing, delivering, or furnishing a product containing ephedrine or pseudoephedrine), proposed 7340c (which prohibits soliciting another to purchase ephedrine or pseudoephedrine for the illegal manufacture of methamphetamine), and proposed 17766c (which limits the nonprescription purchase of products containing ephedrine or pseudoephedrine to certain amounts).

BACKGROUND INFORMATION AND BRIEF DISCUSSION OF THE ISSUES

Currently, a retailer – before completing a sale under Section 17766f of the Public Health Code – must electronically submit the required information to the National Precursor Log

Exchange (NPLEx) administered by the National Association of Drug Diversion Investigators (NADDI). If the system generates a "stop sale" alert, the retailer is prohibited from completing the sale. A violation is a state civil infraction that may result in a fine of \$500 for each violation. (Section 17766f limits the sale of ephedrine and pseudoephedrine to no more than 3.6 grams per individual per day or more than 9 grams per individual for any 30-day period.)

The National Precursor Log Exchange (NPLEx) is a real-time electronic logging system used by pharmacies and law enforcement to track sales of over-the-counter 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.

How much is 3.6 grams of pseudoephedrine? According to Appriss, Inc., 3.6 grams is the amount found in:

- One 15-count box of a 24-hour allergy medicine (15 pills x 240 mg per pill = 3.6 grams);
- Three 10-count boxes of a 12-hour cold medicine (30x 120 mg = 3.6 grams); or,
- Six 20-count boxes of a four-six hour cold medicine (120 x 30 mg = 3.6 grams).

This package of bills is the latest of several legislative attempts to give law enforcement the tools necessary to combat the problem of illegal meth production. Meth is a highly addictive and extremely physically destructive drug. The production of meth results in toxic chemicals being released into the surrounding environment and often results in explosions that level buildings, result in raging fires and/or kill and injure people, including young children. The unlawful manufacture of meth continues to increase in the state, and is especially troublesome in western Michigan. Meth is easy to make with commonly available ingredients. Meth cannot be made without either ephedrine or pseudoephedrine. Supporters hope, therefore, that the various provisions in the bills, especially specifically making "smurfing" a crime, will make it more difficult for meth "cooks" to obtain the necessary ephedrine and pseudoephedrine products, thus decreasing the availability of the drug in the state.

FISCAL IMPACT:

House Bills 5089 and 5090 would have an indeterminate fiscal impact on the state's correctional system. Information is not available on the number of persons that might be convicted under the provisions of the bill. New felony convictions could result in increased costs related to state prisons and state probation supervision. The average cost of prison incarceration in a state facility is roughly \$35,600 per prisoner per year, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision average about \$3,600 per supervised offender per year.

Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues.

Senate Bill 535 would result in a minimal fiscal impact on the Department of State Police. To comply with the provisions of the bill, MSP would have to selectively assemble the required criminal history records (CHR) information and "push" that information to the National Association of Drug Diversion Investigators. (NADDI would not "pull" CHR data from MSP, nor would it be able to review the entire breadth of available CHR information about a purchaser.) This would require some programmatic changes to MSP's CHRI databases and applications. The cost of these programmatic changes would be minimal and could be supported by the existing appropriations available to the department.

A fiscal analysis on the impact to the corrections system and the judiciary by the bills is in process.

POSITIONS:

The following entities testified, submitted testimony, or indicated support for one or more of the bills on 2/5/14, 4/30/14, and/or 6/4/14:

Michigan State Police
Office of the Attorney General
Eaton County Sheriff's Office
Michigan Association of Chiefs of Police
Michigan Sheriffs' Association
Michigan Retailers Association
Marquette County Prosecutor's Office
Michigan Pharmacists Association
Prosecuting Attorneys Association of Michigan (PAAM)
Michigan Association of Health Plans
APPRISS, Inc.
Consumer Healthcare Products Association
Michigan Fraternal Order of Police
Oakland County Sheriff's Office
Deputy Sheriff's Association of Michigan
Plymouth Township Police Department
Niles Police Department
Johnson & Johnson

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Mark Wolf
Robin Risko

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