

Legislative Analysis



DEVICES FOR RECREATIONAL NITROUS OXIDE USE

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<http://www.house.mi.gov/hfa>

Senate Bill 57 as passed by the Senate
Sponsor: Sen. Stephanie Chang

Analysis available at
<http://www.legislature.mi.gov>

Senate Bill 58 as passed by the Senate
Sponsor: Sen. Joseph N. Bellino, Jr.

House Committee: Health Policy
Senate Committee: Health Policy
Complete to 11-7-23

SUMMARY:

Senate Bills 57 and 58 would amend the Public Health Code to prohibit the sale of objects designed for inhaling nitrous oxide recreationally if the seller knows that is how they will be used. A violation would be a misdemeanor punishable by imprisonment for up to 90 days or a fine of up to \$5,000, or both, with enhanced penalties for sales to a minor.

Senate Bill 57 would amend section 7453 of the code, which pertains to drug paraphernalia, to prohibit a person from 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.

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 them in writing that they are 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 the person to refrain from selling the material or offering it for sale and state that no arrest will be made if the person complies. Continued compliance with the notice would be a complete defense in a prosecution.

A person who has received such a notice could commence an action for a declaratory judgment adjudicating the legality of the intended sale or offer to sell. The attorney general or prosecutor who sent the notice would be 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 that person.

Under the code, among other exceptions, the above prohibition would not apply to an object sold or offered for sale to any of the following:

- A person licensed under the Occupational Code or under Article 15 (Occupations) of the Public Health Code, or an intern, trainee, apprentice, or assistant in a profession so licensed, for use in that profession.
- A hospital, sanitarium, clinical laboratory, or other health care institution (including a penal, correctional, or juvenile detention facility) for use in that institution.
- A dealer in medical, dental, surgical, or pharmaceutical supplies.

MCL 333.7453

Senate Bill 58 would amend section 7455, which 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 would generally apply to violations of Senate Bill 57. The bill would additionally provide that a person 18 years or older who violates section 7453 by selling or offering to sell an object specifically designed for inhaling nitrous oxide for recreational purposes to a person less than 18 years of age is guilty of a misdemeanor punishable by imprisonment for up to one year or a fine of up to \$7,500, or both.

MCL 333.7455

Each bill will take effect 90 days after being enacted, but neither bill can take effect unless both bills are enacted.

BACKGROUND:

Nitrous oxide (N₂O), also called laughing gas, is commonly used as a fast-acting sedative, anesthetic, and pain reliever in brief medical and dental procedures, where it is administered by inhalation with oxygen. Nitrous oxide also has uses in manufacturing and auto racing, and it is used in various ways related to food—notably as an aerosol or propellant for vegetable oil sprays or for making foams or whipped cream.

Nitrous oxide becomes a liquid under relatively low pressure at room temperature and is generally stored in liquid form in metal canisters. When released from pressure, it becomes a low-temperature gas. Whipped cream dispensers use small (roughly three-inch) metal canisters of the pressurized gas to aerate the cream and propel it through a nozzle. These replaceable cartridges, or chargers, are punctured when screwed into a dispenser, with the gas released through a lever action. The cartridges are commonly called whippets (spelled many ways).

Devices called crackers have been developed that can be used to puncture whippet canisters to release the pressurized gas, usually into a balloon, for inhalation for recreational use. (There are other ways the gas is accessed for a high, but this appears the most common.) The balloon helps manage the dose as well as allowing the gas—cold enough to cause frostbite when it vaporizes—to warm up. The high from inhaling nitrous oxide is rapid and short-lived (about a minute or two) and is reported to involve feelings of euphoria, relaxation, and detachment, sometimes accompanied by disorientation, dizziness, a ringing in the ears, or a general tingling sensation. Some of these effects are likely due to the brain not getting oxygen, rather than the nitrous oxide itself.

The abuse of nitrous oxide as a recreational drug is reportedly increasing in the United States and Europe, with the COVID-19 pandemic and lockdowns often cited as accelerating an already-present trend. As with many substances, the recreational use and abuse of nitrous oxide has a long history, going back farther than the discovery of its medical benefits. For several recent decades the drug has been popular on certain concert and party scenes.¹ Its expanding popularity seems to be, at least in part, because it is readily available and relatively cheap and, importantly for some, because it is hard for others to detect its use later on. In some areas of Michigan, crackers and whippets are readily available in gas stations, party stores, convenience stores, and smoke shops. They are also easily purchased online.

¹ <https://www.nytimes.com/2021/01/30/style/nitrous-oxide-whippets-tony-hsieh.html>

Recreational abusers of the gas often wrongly assume it to be safe simply because whippets are cheap and easy to get. In the short term, the intoxication caused by the drug has caused injuries and death from falls or from accidents while operating machinery (such as cars). For individuals with underlying conditions or who are inhaling nitrous oxide in conjunction with other drugs, the loss of oxygen during a session can cause seizures, arrhythmias, or respiratory or cardiac arrest.² In the long term, chronic or intensive use of nitrous oxide can interfere with the body's ability to process vitamin B-12, which can impair the ability to walk and cause permanent neurological damage.³ Long-term abuse also can cause memory loss, incontinence, sexual dysfunction, depression, psychosis, a weakened immune system, numbness, tingling, spasms, and tinnitus (ringing in the ears), some of which may also be symptoms of neurological damage caused by vitamin B-12 deficiency.⁴

In addition to health hazards, some communities face a constant, and seemingly growing, problem in the discarded metal canisters that litter their streets, parking lots, and sidewalks, where they can present a hazard to cars, pedestrians, bicycles, lawnmowers, and the natural environment. If not disposed of properly, the canisters also reportedly risk exploding during waste processing.⁵ Although a problem in many communities across the state, discarded whippets are especially problematic in parts of Detroit. In one recent cleanup sponsored by the Southwest Detroit Whippet WipeOut Campaign Coalition, nearly 8,000 discarded whippets were collected in Mexicantown neighborhoods.⁶ A few years ago, the campaign reported that volunteers found close to 25,000 whippet canisters in less than a month.

Other laws

In 2021, the state of New York made it illegal for anyone under the age of 21 to purchase whippets, with violations a \$250 or \$500 fine, depending on prior offenses.

Taiwan has addressed the issue by defining nitrous oxide as a food additive rather than a food product, thus requiring stricter licensure and other regulatory controls.

Other Michigan law

Public Act 119 of 1967 prohibits both of the following, with exceptions described below:⁷

- 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.

² <https://academic.oup.com/bja/article/116/3/321/2566058>

³ See <https://www.nytimes.com/2022/01/12/magazine/nitrous-oxide-whippets-vitamin-b12.html>

⁴ See <https://www.webmd.com/a-to-z-guides/what-to-know-about-laughing-gas>

⁵ https://www.emcdda.europa.eu/spotlights/spotlight-recreational-use-nitrous-oxide-laughing-gas_en

⁶ <https://www.freep.com/story/news/local/michigan/detroit/2022/03/27/detroit-whippet-drug-nitrous-oxide-chargers/7160023001/>

⁷ The act generally prohibits intentionally consuming or inhaling, to get high, the fumes of a substance containing a chemical or solvent that releases toxic vapors (i.e., inhalants).

- 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 of 1967 PA 119 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.

The act also 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 their employment. A person who knowingly violates the prohibition or fails to make diligent inquiry as to whether the person is a minor is responsible for a civil infraction and may be ordered by the court to pay a civil fine of up to \$500.

FISCAL IMPACT:

The bills 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.