

Legislative Analysis



EPHEDRINE/PSEUDOEPHEDRINE ACCESS

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4322 (Substitute H-1)

Sponsor: Rep. Rick Jones

Senate Bill 189 (Substitute H-1)

Sponsor: Sen. Patricia L. Birkholz

House Committee: Judiciary

Senate Committee: Health Policy

First Analysis (6-7-05)

BRIEF SUMMARY: The bills would amend the Public Health Code to restrict the sale of products containing ephedrine or pseudoephedrine by doing the following:

- Require a retail seller of ephedrine or pseudoephedrine products to maintain them: 1) behind a counter; 2) within a locked case; or 3) where the attendant could monitor them or use an antitheft device on the products along with constant video surveillance.
- Require a seller that did not maintain the products behind a counter or within a locked case to record product purchases, maintain the log for at least six months, and make it available to a law enforcement agency upon request.
- Provide that a retail seller would have to require photo identification for the purchase of an ephedrine or pseudoephedrine product.
- Prohibit a person from selling an ephedrine or pseudoephedrine product to a person under 18 years old.
- Require the Department of Community Health to produce signs indicating that the sale of ephedrine and pseudoephedrine products to a minor was prohibited by law, along with other specified information, and require retailers to post the signs near the point of sale.
- Limit the amount of an ephedrine or pseudoephedrine product that could be sold in a single over-the-counter sale.
- Provide that a person who violated the bills' provisions would be responsible for a state civil infraction and could be ordered to pay a maximum civil fine of \$50 per violation.
- Require the Department of State Police to report to the legislature by December 15, 2006 regarding the impact and effectiveness of the legislation.
- Beginning December 15, 2005, prohibit a local unit of government from imposing any new requirement or prohibition regarding the sale of an ephedrine or pseudoephedrine product that conflicts with the provisions of House Bill 4322.

FISCAL IMPACT: The creation and printing of required signs would impose costs on the Department of Community Health. Civil infraction fine revenue would benefit public libraries.

THE APPARENT PROBLEM:

Methamphetamine is a Schedule 2 drug, meaning that it has some legitimate medical uses but also has a high potential for abuse. Physicians prescribe methamphetamine, a stimulant, to treat several conditions including obesity, attention disorders, and sometimes, narcolepsy. According to a Legislative Brief prepared by the Legislative Service Bureau entitled "Clandestine Methamphetamine Labs", Vol. 2, Issue 5 (March 2005), clandestine meth labs have existed since the 1930s but began to expand in the 1960s when outlaw motorcycle gangs began to produce and traffic methamphetamine. A newer, easier method of producing methamphetamine known as the "ephedrine reduction method" has made meth production simple enough that "cooks" claim it is easier to make than cookies. Even elementary-age children have been known to stir up a "batch." Since the "ingredients" and materials (i.e., lighter fluid, paint thinner, drain cleaner, iodine, rubbing alcohol, rock salt, matchbooks, lye, aluminum foil, lithium batteries, coffee filters, mason jars, etc.) are relatively inexpensive and easy to obtain, illegal meth production is also highly lucrative. A \$100 investment in materials can produce over \$1,000 of methamphetamine.

Meth production also needs anhydrous ammonia (a fertilizer) and ephedrine or pseudoephedrine (used for treatment of colds, allergies, congestion, asthma, etc.). In an attempt to stifle the growth of clandestine meth labs, legislation was recently enacted to prohibit transporting or possessing anhydrous ammonia in anything other than "a container approved by law" (PA 312 of 2003), prohibit the illegal manufacturing of methamphetamine (PA 310 of 2003), and limit possession of ephedrine or pseudoephedrine – the key ingredient in the illegal production of meth – to no more than 12 grams – about 61 Sudafed 24-hour tablets (PA 308 of 2003).

Yet, the illegal use, manufacturing, and trafficking continue to grow. In 1999, 18 meth labs were seized in the state; in 2004, 209 were seized. So far this year, the Michigan State Police (MSP) report that 120 labs have been found. The majority are concentrated in Southwest Michigan, but clandestine labs are now spreading throughout the state.

Already, meth is taking its toll on those who use it, their families, their communities, and the environment. Reportedly, meth is extremely addictive; when injected or smoked, 90 percent of users become addicted on just the second try. The drug has serious long-term (and expensive to treat) physical and mental health effects. About one-third of the meth lab incidents involve children and so increased demands are put on the state's Protective Services agency. Meth users are more likely to engage in aggressive (and often criminal) behavior and engage in high-risk sexual behaviors (meth users are 2.9 times more likely to contract HIV than cocaine users). Meth production releases toxic fumes where it is produced and contaminates the area where leftover chemicals are disposed. Reportedly, for every one pound of meth produced, six to seven pounds of toxic waste are also produced. Since meth can be made almost anywhere – the beach, a motel room, a rented storage unit – innocent people can suffer health effects from the chemicals left behind that linger on walls, floors, bedding, sand, etc. Costs to taxpayers are also increased when hazmat teams are called on to detoxify abandoned labs, fires need to be put out

from explosions (many of the ingredients are flammable), and courts are jammed with meth cases and prisons filled with meth users. According to an online article published on the Stateline.org website on April 5, 2005, Oklahoma estimates that an average meth case costs \$350,000 (about \$54,000 for treatment costs for the user, \$12,000 in child welfare services, and \$3,500 to decontaminate the area).

Super labs in Mexico produce large amounts of meth that is then smuggled into the U.S.; however, the MSP reports that small, clandestine labs in Michigan produce about 60-70 percent of the drug used here. Therefore, some believe that the state needs to do more to prevent the illegal manufacture and distribution of methamphetamine. At least 27 states restrict the sale of cold and allergy over-the-counter medications that contain ephedrine or pseudoephedrine. Early reports from those states show the measures are working. Oklahoma, which enacted the most restrictive law in 2004, reports an 80 percent drop in meth incidents in some parts of the state in just one year. Many believe that Michigan should join with the majority of states in restricting the sales of OTC products containing ephedrine and pseudoephedrine.

THE CONTENT OF THE BILLS:

The bills would add new sections to the Public Health Code to regulate the sale of over-the-counter (OTC) products containing ephedrine and pseudoephedrine, provide civil penalties for violations, require a report to the legislature on the bills' effectiveness in reducing methamphetamine incidents, and prohibit local governments from enacting ordinances that would be contrary to or conflict with provisions contained in House Bill 4322. The bills are tie-barred to each other and would take effect December 15, 2005, with the exception of a provision contained in House Bill 4322 that requires the Department of Community Health to provide the required signage to retailers. That provision would take effect November 1, 2005.

Both bills would apply to products that contained 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 or an optical isomer of ephedrine or pseudoephedrine. However, the bills would not apply to sales of the following products:

- A pediatric product primarily intended for administration to children under the age of 12, according to label instructions.
- A product containing pseudoephedrine in a liquid form, if pseudoephedrine were not the only active ingredient.
- A product that the state Board of Pharmacy exempted, upon a manufacturer's application or certification by the U.S. Drug Enforcement Administration, because the product had been formulated in a way that effectively prevented the conversion of the active ingredient into methamphetamine.
- A product that was dispensed pursuant to a prescription.

A person who violated the provisions of either bill would be responsible for a state civil infraction and could be ordered to pay a maximum civil fine of \$50 for each violation. Provisions specific to each bill are detailed below.

Senate Bill 189

Product Maintenance. Except as otherwise provided in the bill, a person who possessed ephedrine or pseudoephedrine for retail sale pursuant to a sales tax license, would have to maintain all products that contained 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 or an optical isomer of ephedrine or pseudoephedrine, in one of three ways: 1) behind a counter where the public was not permitted; 2) within a locked case so that a customer wanting to gain access to the product would have to ask a store employee for assistance; or, 3) within 20 feet of a counter that allowed the attendant to view the products in an unobstructed manner or use an antitheft device with special package tags and detection alarms designed to prevent theft, along with constant video surveillance as follows:

** The video camera would have to be positioned so that individuals examining or removing those products would be visible.

** The camera would have to be programmed to record at least a one-second image at least every 10 seconds.

** The images would have to be maintained for at least six months and made available to any law enforcement agency upon request.

** The retailer prominently would have to display a sign indicating that the area was under constant video surveillance in a location that was conspicuous and clearly visible to the public.

If the retailer maintained the products within 20 feet of a counter and the counter was not staffed by at least one employee at all times, the retail distributor would have to use antitheft devices and video surveillance when the counter was not staffed.

Sales. A person who sold an ephedrine or pseudoephedrine product also would have to require the purchaser to produce a valid photo identification that included the purchaser's name and date of birth.

If the products containing ephedrine and pseudoephedrine were kept in a location within 20 feet of a counter, regardless of whether it was staffed at all times, the seller would have to maintain a log or some type of record detailing the sale, including the date of the sale, the buyer's name and date of birth, and a description of the product and the amount purchased. The seller would have to maintain the log for at least six months and make it available only to a law enforcement agency upon request. The log or other means of recording the sale would not be a public record or subject to the Freedom of Information

Act. A person could not sell or provide a copy of the log to another person for the purpose of surveys, marketing, or solicitations.

The requirement to maintain a log would not apply to a seller that maintained the products behind the counter or within a locked case.

State police report. By December 15, 2006, the Department of State Police would have to submit a written report to the legislature regarding the impact and effectiveness of House Bill 4233 and Senate Bill 189, including the number of clandestine methamphetamine lab incidents before and after the legislation was enacted.

House Bill 4322

Sales restrictions. Under the bill, a person could not knowingly do any of the following:

** Sell any ephedrine or pseudoephedrine product to an individual under 18 years old.

** Sell more than two packages or 48 tablets or capsules, or more than two personal convenience packages containing two tablets or capsules each, of any ephedrine or pseudoephedrine product to any individual in a single OTC sale.

Signs. A seller would have 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 that included the following statement:

The sale of any product that contains 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 a minor under 18 years of age is prohibited by law. In order to purchase a product described above, you must provide the retailer with an official Michigan operator's or chauffeur's license, an official Michigan Personal Identification card, or any other bona fide picture identification which establishes the identity and age of the individual. The retailer may (emphasis added) require you to sign a log or other type of record detailing the sale of that product. State law further prohibits in a single over-the-counter transaction the sale of more than 2 packages, or 48 tablets or capsules, of any product described above.

If the sign were more than six feet from the point of sale, it would have to be 5 1/2 inches by 8 1/2 inches and the required statement would have to be printed in 36-point boldface type. If the sign were six feet or less from the point of sale, it would have to be two inches by four inches and the statement would have to be printed in 20-point boldfaced type.

The DCH would have to produce the sign and, beginning November 1, 2005, make copies available for distribution to licensed retailers free of charge on the bill's effective

date. Licensed retailers would have to obtain copies from the department and distribute them free of charge, upon request, to persons who were subject to the sign requirement.

Defense. It would be an affirmative defense to a charge of knowingly selling an ephedrine or pseudoephedrine product to a person under 18 that the defendant had in force at the time of the citation, and continued to have in force, a written policy for employees to prevent such sales, and that the defendant continued to enforce the policy. A defendant who proposed to offer evidence of this affirmative defense would have to file and serve notice of the defense, in writing, upon the court and prosecuting attorney. The notice would have to be served at least 14 days before the hearing date. A prosecuting attorney who proposed to offer testimony to rebut this affirmative defense would have to file and serve a notice of rebuttal, in writing, upon the court and the defendant. The notice would have to be served at least seven days before the hearing and contain the name and address of each rebuttal witness.

Local regulation. Beginning December 15, 2005, a city, township, village, county, other local unit of government, or political subdivision of the state could not impose any new requirement or prohibition pertaining to the sale of an ephedrine or pseudoephedrine product that was contrary to or in any way conflicting with, the provisions of House Bill 4233. The bill specifies that this provision would not invalidate or otherwise restrict a requirement or prohibition in place on the bill's effective date.

MCL 333.17766b (Senate Bill 189)

MCL 333.17766f (House Bill 4233)

HOUSE COMMITTEE ACTION:

The committee split the provisions of Senate Bill 189 as passed by the Senate with House Bill 4322 and adopted substitute bills for both. The major changes to the content of the legislation are detailed below:

- Tie-barred the two bills together.
- Established an effective date of December 15, 2005 (November 15, 2005 as the date DCH would have to begin providing signs to retailers).
- Clarified the three ways retailers can choose to maintain products containing ephedrine and pseudoephedrine.
- Only prohibits new local ordinances that are contrary to, or in conflict with, provisions of House Bill 4322 (sales to minors, signage, amounts per OTC sale, penalty, affirmative defense, and excluded products), whereas Senate Bill 189 as passed by the Senate applied the prohibition on new local ordinances to all the provisions of the legislation.

ARGUMENTS:

For:

Some people describe methamphetamine as the most insidious drug they have ever seen. The drug changes receptors in the user's brain, affects dopamine levels, ages users before

their time. Most users lose their teeth within just a few years of addiction. Physical effects include malnutrition (from loss of appetite), heart arrhythmia, stroke, convulsions, amphetamine psychosis (loss of sleep, sometimes for days or weeks on end, causes delusions and hallucinations), and death. Meth addicts abuse and neglect their children. Meth "cooks" endanger themselves, their children, and their neighbors by the threat of explosions (many ingredients are flammable) and by the toxicity of the ingredients. Meth is extremely addictive – 90 percent of those who inject or smoke the drug are hooked by the second use and treatment methods that work with other addictions do not work for meth addiction, meaning that there is a high incidence of falling back into the addiction. Meth gives a brief euphoric pleasure before it takes everything away.

Meth is cheap to make (\$100 of ingredients produces \$1000 worth of product) but costs taxpayers much. Meth addiction is difficult to treat; treatment success is estimated at about six to seven percent. The damage to a person's brain from meth takes six months, perhaps longer, to heal, so the urge to use again is hard to resist. In short, treating the psychological and physical effects of meth per person is expensive. Other costs to society related to meth production and addiction include the cost of law enforcement (the number of meth labs in the state continues to increase dramatically and arrests continue to increase also), the cost to prosecute offenders (one judge reported that a couple years ago, his drug court had about five meth cases; last year the drug court had over 300), the cost to care for the children left behind when parents are incarcerated for meth related crimes or for crimes committed when on meth, and the costs to clean up the contamination when a lab is shut down or moves on (six to seven pounds of toxic waste for every pound of meth produced). Estimates by the state of Oklahoma put the cost of each case at around \$350,000.

The Michigan State Police report that though some meth is smuggled in from other states and other countries, the majority (60-70 percent) of what is used in the state is made here. Since one of the crucial ingredients of meth production is ephedrine or pseudoephedrine, the active ingredients contained in over-the-counter cold remedies (as well as prescription medications), it makes sense that a good place to start is by restricting the sale of OTC products.

Together, the bills would establish some restrictions on both retailers and purchasers that should not prove overly burdensome yet will have a significant impact on the ability to access enough OTC products to manufacture meth. States that have enacted similar laws have seen dramatic decreases in the number of meth incidents. Another important reason to enact the legislation is that as each state enacts some form of restricting sales of OTC cold medications, meth users and meth cooks relocate to the states that do not restrict such sales. Michigan needs to enact legislation soon so as to avoid becoming a haven for clandestine meth labs.

Retailers would have three options to choose from regarding where in the store products will be kept – behind a counter, in a locked case, or on the shelves but in view of an employee who is nearby, albeit this third option would also trigger additional requirements of video surveillance, anti-theft devices, and maintenance of a log to record

the name of the purchaser and description of the product sold, etc. The intent is not to create obstacles for the retailers, but to discourage and prevent attempts to secure large quantities of the OTC products needed to manufacture meth. Many stores in other states have reported that thefts of these products decreased dramatically after similar laws were enacted. Many consumers have reported only minor inconvenience associated with showing an ID or needing to ask a store employee for assistance. Reportedly, one survey found that the majority of people would accept some inconvenience if the restrictions decreased meth lab incidents. Furthermore, some of the nation's largest retailers (Target, Wal-Mart, Rite Aid, CVS, and others) have already announced plans to voluntarily move OTC cold medications off the regular shelves and to a more secure location.

Senate Bill 189 would also require the state police to report to the legislature within a year of the bills' effective date the impact of the legislation on the meth problem. At that time, the restrictions can be reviewed for effectiveness and adjusted as needed. In the meantime, the legislation is a necessary step in the battle against illegal meth production.

Against:

Some retailers see the "product maintenance" choices as unworkable and burdensome to consumers. Large stores may have the space and capital to invest in adding locked cases or creating room behind existing counters from which to dispense cold and allergy medications. Some can simply keep them behind the pharmacist's window in their in-store pharmacies. However, small mom and pop stores, convenience stores, gas stations, etc. could be forced to undertake costly structural renovations to add the necessary space to accommodate an extra case or make room behind an existing, but already crowded, counter. Trying to maintain six months of video tapes may also prove to be an obstacle to some retailers (perhaps the time period could be shortened to eight weeks?). Since surveillance cameras and anti-theft equipment (which can cost \$50,000-\$75,000 to install) may be too expensive to be a viable alternative, some of these smaller retailers would have to choose between eliminating other products that customers expect to purchase there (to make room for the "proper" maintenance of cold medications) or stop selling cold medications – a loss of business for the retailer and an inconvenience to the consumer.

Against:

As written, the requirement in Senate Bill 189 for retailers to have purchasers sign a log is problematic. First of all, it only applies to retailers who keep the products on the shelves. This could cause confusion to purchasers, and affect compliance, if consumers do not understand that some retailers are exempt from maintaining a log if they keep the products in a locked case or behind a counter. However, keeping a log of each purchase seems to be an important part of the success reported by other states in reducing meth lab incidents. In fact, Oklahoma legislators just recently passed legislation to create a statewide electronic database that would track purchases of pseudoephedrine. According to news reports, the legislation would target "smurfing" – the practice of going from store to store in order to buy hundreds or thousands of tablets at a time – by allowing pharmacists to check and see if the same person just bought similar products from another pharmacy down the road. Rather than having only some retailers keep a paper

log that only law enforcement personnel might see (and then weeks or months later), measures should be explored to see if there is an easy or cost-efficient way to implement something similar for Michigan retailers so that meth manufacturers can be caught in the act, so to speak, of gathering enough cold tablets for a cooking session.

Moreover, in light of the growing problems with identity theft, the wisdom of the requirement that purchasers record their date of birth (DOB) in the log, along with their signatures, must be questioned. Having a person's date of birth is an easy way to gain access to other sensitive personal information needed to steal another's identity, such as a social security number, driver's license, or credit account numbers. Considering that some stores have a high turnover of employees, the DOB requirement should be dropped. Instead, perhaps the purchaser could be required to leave a thumbprint in the log with non-staining ink.

In addition, some retailers feel that the current time period that the store must retain the record of each purchase (six months) is too long and cumbersome.

Against:

The signage requirements contained in House Bill 4322 are not feasible nor practical. If the sign is more than six feet from the point of sale, the required language is to be printed in 36-point boldfaced type but the finished sign must be 5-1/2 inches by 8-1/2 inches (roughly half the size of the average piece of notebook or typing paper). However, to type out the entire text required by the substitute, in the type size specified, the text fills over two pieces of paper with a one-inch margin. If the sign is less than six feet from the point of sale, it is to be printed on a sign that is two inches by four inches, although a trial test needed over half a page. To use any smaller of print, however, would not be readable by the average person. As learned from signs required of liquor licensees, such signage needs to be short, to the point, and easily read in just a few seconds.

Against:

House Bill 4322 would prohibit sales of OTC products containing ephedrine and pseudoephedrine to people under 18. A supporter of the prohibition say this is because of the danger that methamphetamine poses. If meth is that dangerous, perhaps there needs to be a blanket ban, except by prescription, for all such products. Otherwise, the bill shouldn't discriminate between sales to adults and sales to minors.

Response:

The intent is not to discriminate against minors, but to protect them. Meth addiction, like many drugs, affects a person's judgment and decision-making abilities. The addiction also drives people to do things they wouldn't ordinarily do. Already, many meth addicts use their children (some as young as six years old) to buy cold products to make meth with, and some children have reported to school liaison officers that their parents made them begin to cook meth when they were eleven. Prohibiting sales to minors will prevent parents from using young children to obtain ephedrine and pseudoephedrine.

Against:

The bills do not address the problems caused by illegal methamphetamine exported from Mexican super labs, nor does it address the large amounts of ephedrine and pseudoephedrine products smuggled across the border from Canada via Detroit and Port Huron. Therefore, the bills should not be seen as a panacea that will end the problem of clandestine meth labs. Ongoing efforts to educate the public about the dangers of meth addiction and support for funding treatment programs for addicts need to be continued, and maybe even tighter restrictions on sales of products containing ephedrine and pseudoephedrine should be explored.

POSITIONS:

The Michigan Association of Substance Abuse Coordinating Agencies (MASACA, Inc.) supports the bills. (6-1-05)

The Allegan County prosecuting attorney testified in support of the bills. (6-1-05)

A representative of the Osceola County Office of the Sheriff testified in support of the bills. (6-1-05)

A representative of the Michigan Pharmacists Association indicated support for the bills. (6-1-05)

A representative of Rite Aid Pharmacies indicated support for the bills. (6-1-05)

A representative of the Van Buren County Meth Task Force indicated support for the bills. (6-1-05)

A representative of the Department of Community Health indicated the department conceptually supports the bills. (6-1-05)

Spartan Stores opposes the bills. (6-1-05)

A representative of the Michigan Grocers Association indicated opposition to Senate Bill 189. (6-1-05)

Legislative Analyst: Susan Stutzky

■ 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.