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## BILL ANALYSIS



Telephone: (517) 373-5383  
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House Bill 4464 (Substitute H-1 as passed by the House)  
House Bill 4465 (Substitute H-1 as passed by the House)  
Sponsor: Representative Lisa Posthumous Lyons  
House Committee: Tax Policy  
Senate Committee: Finance

Date Completed: 9-17-15

**CONTENT**

**House Bill 4464 (H-1) would amend the General Sales Tax Act to revise the description of drugs, including over-the-counter (OTC) drugs, that are exempt from the sales tax, and define "over-the-counter drug".**

**House Bill 4465 (H-1) would amend the Use Tax Act to add a use tax exemption for OTC drugs legally dispensed by prescription, and define "over-the-counter drug".**

Each bill would be retroactive and effective beginning March 14, 2014.

**House Bill 4464 (H-1)**

The General Sales Tax Act exempts from the sales the sale of a prescription drug for human use and the sale of an over-the-counter drug for human use pursuant to a prescription. The bill, instead, would exempt the sale of drugs for human use that can be legally dispensed only by prescription and the sale of OTC drugs for human use that are legally dispensed by prescription.

The bill would define "over-the-counter drug" as a drug that is labeled in accordance with the format and content requirements required for labeling OTC drugs under 21 CFR 201.66.

The Act defines "prescription" and "prescription drug", for this purpose, as those terms are defined in Part 177 of the Public Health Code. The bill would delete the definitions from the Act.

(The Public Health Code defines "prescription" as an order by a prescriber (e.g., a licensed dentist, physician, or podiatrist) to fill, compound, or dispense a drug or device written and signed; written or created in an electronic format, signed, and transmitted by facsimile; or transmitted electronically or by other means of communication.

"Prescription drug" means one or more of the following:

- A drug dispensed pursuant to a prescription.
- A drug bearing the Federal legend "CAUTION: federal law prohibits dispensing without prescription" or "Rx only".
- A drug designated by the Michigan Board of Pharmacy as a drug that may only be dispensed pursuant to a prescription.)

## **House Bill 4465 (H-1)**

The Use Tax Act exempts from the use tax sales of drugs for human use that can be legally dispensed only by prescription. The bill also would exempt sales of OTC drugs for human use that are legally dispensed by prescription.

The bill would define "over-the-counter drug" in the same manner as House Bill 4464 (H-1) would define the term.

MCL 205.54g (H.B. 4464)  
205.94d (H.B. 4465)

### **BACKGROUND**

Article IX, Section 8 of the State Constitution provides, "No sales tax or use tax shall be charged or collected...on the sale or use of prescription drugs for human use." Accordingly, both the Use Tax Act and the General Sales Tax Act contain an exemption for the sale of prescription drugs. Previously, the exemption in each Act applied to purchases or sales of "a prescription drug for human use", using virtually the same language as in the Constitution.

In March 2004, the Michigan Court of Appeals issued an opinion concerning the exemption in the Use Tax Act (*Birchwood Manor, Inc. v. Commissioner of Revenue*, 261 Mich App 248). Three nursing homes had challenged the assessment of the use tax on their purchase of over-the-counter drugs that were dispensed by licensed pharmacists pursuant to prescriptions written by physicians. The Court held that the OTC drugs were exempt from the use tax under the exemption for purchases of "a prescription drug for human use".

In response to this decision, statutory amendments were enacted in June 2004 to refer in each Act to "drugs for human use that can *only* be legally dispensed by prescription" (emphasis added).

As a result of the 2004 amendments, a drug that can be both purchased over the counter *and* prescribed by a physician (such as ibuprofen) was not eligible for the exemption under either Act. This led to some confusion and misunderstanding among pharmacists, who were not always aware that they were supposed to collect the sales tax on those drugs. Concerns also were raised about the collection of the tax in situations involving third-party contracts, such as those used by some employers.

To address these issues, Public Act 211 of 2013 amended the General Sales Tax Act, effective March 14, 2014, to extend the tax exemption to the sale of OTC drugs for human use pursuant to a prescription. A similar amendment to the Use Tax Act was proposed but not enacted.

Legislative Analyst: Suzanne Lowe

### **FISCAL IMPACT**

The bills would have no impact on State or local revenue relative to current estimates and current practice. When Public Act 211 of 2013 was enacted, the fiscal impact assumed that affected transactions would be exempt from both sales and use taxes, and that tax liabilities would not be converted from sales tax liabilities to use tax liabilities. Similarly, it is expected that the proposed definitional changes would have no fiscal impact.

Fiscal Analyst: David Zin

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