

## WEIGHTS AND MEASURES ACT

Phone: (517) 373-8080  
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### House Bill 5893 (H-3) as reported from second committee

Sponsor: Rep. Angela Witwer

1st Committee: Agriculture

2nd Committee: Judiciary

Complete to 9-28-22

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

**BRIEF SUMMARY:** House Bill 5893 would amend the Weights and Measures Act to exempt cottage food products produced in compliance with the Food Law from product labeling requirements under certain conditions, add reasons for which a registered service agency or registered serviceperson could be subject to an enforcement action by the Michigan Department of Agriculture and Rural Development (MDARD), and amend provisions concerning penalties and fines for violating the act, among other changes described below.

**FISCAL IMPACT:** House Bill 5893 would have an indeterminate fiscal impact on the state and local units of government. (See **Fiscal Information**, below, for more information.)

### **THE APPARENT PROBLEM:**

According to testimony in the House Agriculture and Judiciary committees, MDARD currently uses the most current editions of the National Institute of Standards and Technology (NIST) handbook 44 and handbook 130, which have recently been updated. However, references in state law to the handbooks do not contain language requiring updates whenever a new edition is released. As a result, current laws do not reflect current standards and practices related to weights and measures. The bill would align the law with current MDARD practices and update other provisions.

### **THE CONTENT OF THE BILL:**

#### **Enforcement actions**

Currently under the act, the director of MDARD can initiate an enforcement action against a **registered service agency** or **registered serviceperson** for specifically listed reasons. The bill would add to this list the following:

- Placing a device in service without having the proper certification as required by law.
- Failure to comply with a request for documents or other information related directly to a **registration audit**.
- Failure to submit a placed-in-service report for a weighing and measuring device found in an out-of-tolerance condition and returned to a condition as close to zero as practicable.
- Failure to properly seal a device.
- Failure to employ the use of an approved security seal that contains a unique identifying mark that is approved and is registered with MDARD.

**Registered service agency** would mean an agency, firm, company, or corporation that installs, services, repairs, reconditions, *or places into service* commercial weights and

measures and that holds a registration issued by the director of MDARD. [This term is currently defined in the act. The bill would add the italicized phrase.]

***Registered serviceperson*** would mean an individual who installs, services, repairs, reconditions, *or places into service* commercial weights and measures and who holds a registration issued by the director of MDARD. [This term is currently defined in the act. The bill would add the italicized phrase.]

***Registration audit*** would mean an official inspection of a registered service agency's or registered serviceperson's accounts, paperwork, and offices.

### **Labeling under the Food Law**

The bill also would exempt a cottage food operation from having to include the address of the operation on a packaging label if the cottage food product is produced in accordance with section 4102 of the Food Law *and* the operation is registered with and is issued a registration number by the MSU Product Center. (These provisions are related to changes to the Food Law proposed by bills currently under consideration by the Senate.<sup>1</sup>)

### **Scanning device security measures**

Currently, if a pump for dispensing motor fuel for sale at a roadside retail location includes a scanning device for reading customer payment at the pump, the pump must include a security measure to restrict the unauthorized access of customer payment card information. The security measure must include one or more listed security measures, including pressure-sensitive security tape that is imprinted with a customized graphic and placed over the panel opening leading to the scanning device so as to restrict unauthorized opening of the panel. Under the bill, this security measure would meet the act's requirements only through December 21, 2022.

### **Violations and penalties**

With some exceptions, the bill would generally amend the sections of the act that provide penalties for specified violations by replacing the term "***person***" with "individual," so that the penalties would apply only to individuals who engage in the prohibited acts. (The bill would still prohibit an individual from engaging in those acts as a servant or agent of another *person*, but the penalties would not appear to apply to the person the individual was the servant or agent of, unless that person also was an individual.)

***Person*** means an individual, partnership, corporation, association, governmental entity, or other legal entity.

In addition, it is currently a felony for a person to add to or modify commercial weights and measures by the addition of a device or instrument that would allow the sale, or the offering or exposure for sale, of less than the quantity represented of a commodity or the falsification of the weights and measures.

Under the bill, it would also be a felony for an individual to be in possession of such a device or instrument.

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<sup>1</sup> House Bills 5671 and 5704 <http://legislature.mi.gov/doc.aspx?2022-HB-5671>

### **Consent agreements**

The act currently authorizes the director of MDARD, upon determination that a person has violated the act or its rules, to enter into a consent agreement for the assessment of a civil fine that is based on the number of repeat violations within a two-year period. The bill would authorize the MDARD director to enter into such a consent agreement only with an individual and would provide that the fines assessed are “for each violation.” (For example, the civil fine for a “first violation” would be from \$150 to \$2,500 “for each violation.” It is not thus clear what would distinguish a “first violation” from a “second violation” under the bill, because, as written, a “first violation,” “second violation,” “third violation,” etc., could each apparently refer to more than one violation.)

The act further provides that if a person alleged to have violated the act does not enter into a written consent agreement, the MDARD director (as an alternative to initiating a criminal prosecution) may do either of the following:

- If the person is a registrant, commence an administrative hearing under the Administrative Procedures Act.
- If the person is not a registrant, commence a civil violation proceeding in court.

Upon finding a violation as a result of either action described above, the MDARD director must assess an administrative fine or a civil fine of up to \$10,000 plus investigation costs and the amount of the economic benefit of the violation. The bill would instead require, upon finding a violation as a result of either action described above, that the *court* must assess a civil fine of up to \$10,000 *for each violation* plus investigation costs and the amount of the economic benefit of the violation. (Italics indicate additions proposed by the bill. The assessment of an administrative fine by the director would be removed, although solely requiring *the court* to assess a civil fine would appear to leave unaddressed the first action described above, in which a registrant is the subject of an administrative hearing.)

### **Other provisions**

The bill would change provisions that refer to, and incorporate by reference, the 2014 edition of the National Institute of Standards and Technology (NIST) handbook 44 and the 2014 edition of the NIST handbook 130, to instead refer to and incorporate by reference the 2022 editions of the NIST handbook 44 and handbook 130.

The bill would disallow the use of terms such as “approximate” to qualify units of weight, measure, or count in commodity packaging and advertising.

The bill would add applicable test and calibration data to the documents that must be mailed to MDARD within five business days after a device is placed in service or returned to service.

MCL 290.602 et seq.

### ***FISCAL INFORMATION:***

Under the bill, it would be a felony for an individual to be in possession of a device or instrument that would allow the sale, or the offering or exposure for sale, of less than the quantity represented of a commodity or falsification of weights and measures. The number of convictions that would result under provisions of the bill is not known. New felony convictions

would result in increased costs related to state prisons and state probation supervision. In fiscal year 2021, the average cost of prison incarceration in a state facility was roughly \$44,400 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$4,600 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue.

Also under the bill, “first violation,” “second violation,” and “third violation” could each include more than one violation and, upon finding a violation, the court must assess a civil fine of up to \$10,000 for each violation. To the extent that this leads to an increase in civil fine revenues, the department would benefit from any such revenue. Under section 31a of the Weights and Measures Act, any civil fine revenue collected must be paid to the state’s general fund and then credited to the department for enforcement.

The fiscal impact on local court systems would depend on how provisions of the bill 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.

MDARD representatives indicate that the bill would not have a material impact on department responsibilities under the act and would thus have no material impact on department costs. In addition, the bill does not change fees under the act and would not have a material impact on department fee revenue.

***ARGUMENTS:***

***For:***

Proponents of the bill argue that it provides much-needed updates to be able to effectively serve Michigan citizens and commerce. For example, referencing the current NIST handbook would provide for the use of devices capable of weighing trucks while in motion, thus avoiding slowdowns when trucks must pull off the highway and be weighed on a scale. Supporters also expressed specific concerns about current provisions regarding preventing skimmers at gas stations and the inability to update prevention measures, and in general maintained that businesses are more likely to do business in Michigan when they know the rules that apply, making clear and up-to-date guidelines best for the state.

***Against:***

Critics of the bill argue that it creates a one-size-fits-all model for businesses in Michigan, while a marketplace of ideas would better serve Michigan consumers than a one-size approach.

***Against:***

A concern was raised in committee that under the bill, simply possessing certain instruments or devices such as weights that are not true would constitute a felony regardless of whether the possessor intended to use those instruments or devices to commit a crime.

***Response:***

Unlike a tool such as a crowbar, which is intended for another task even though it can also be used to commit a crime, the sole purpose of the instruments and devices referred to in the bill is to cheat others out of fair payment for goods. Both state and federal law contain numerous prohibitions of items that serve no practical purpose but carry an inherent harm.

***POSITIONS:***

Representatives of the Michigan Department of Agriculture and Rural Development (MDARD) testified in support of the bill. (5-24-22)

The following entities indicated support for the bill:

- Michigan Petroleum Association (3-16-22)
- National Council on Weights and Measures (5-4-22)

The following entities indicated opposition to the bill (3-16-22):

- Clean Fuels Michigan
- MICHauto
- Michigan Energy Innovation Business Council
- Michigan Environmental Council

Legislative Analyst: Susan Stutzky  
Fiscal Analysts: William E. Hamilton  
Robin Risko

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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.