

DEVICES FOR RECREATIONAL USE OF NITROUS OXIDE

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

House Bill 5982 as reported from committee
Sponsor: Rep. Joseph N. Bellino, Jr.

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

Senate Bill 996 as reported from committee
Sponsor: Sen. Stephanie Chang

House Committee: Judiciary
Senate Committee (SB 996): Committee of the Whole
Complete to 12-20-22

BRIEF SUMMARY: House Bill 5982 and Senate Bill 996, which are identical, would amend the Public Health Code to prohibit selling or offering for sale an object specifically designed for inhaling nitrous oxide for recreational purposes, knowing that the purchase of the object was for that purpose. The bills would provide for a misdemeanor penalty for a violation and would require the attorney general or a prosecutor to provide a written notice that a person that a person was in violation of the law prior to an arrest. A person receiving such a notice could commence an action for a declaratory judgment stating that the object did not violate the bill's prohibition.

FISCAL IMPACT: The bills would have an indeterminate fiscal impact on local units of government. (See **Fiscal Information**, below, for a detailed discussion.)

THE APPARENT PROBLEM:

Currently, “whippets,” “whippits,” or “whip-its,” small metal containers used in whipped cream dispensers, are being used to obtain a rapid, short-lasting high by inhaling the nitrous oxide from the cartridges. Nitrous oxide, commonly known as laughing gas and associated with pain relief during medical and dental procedures, continues to be abused as a recreational drug, with negative consequences for the users and their communities. Nitrous oxide can lead to brain and organ damage, severe effects on the cardiovascular and nervous systems, asphyxiation, seizures, and death. Abuse of nitrous oxide has also resulted in impaired driving incidents and injuries. In some communities, tens of thousands of empty whippet canisters litter the sidewalks and streets, posing a tripping risk for pedestrians, damaging vehicles and lawn maintenance equipment, and endangering wildlife, which may ingest the empty canisters. Although a problem in 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, almost 8,000 discarded whippet canisters were collected in Mexicantown neighborhoods. A few years ago, the campaign reported that volunteers found close to 25,000 whippet canisters in less than a month in Southwest Detroit.

Despite laws penalizing the sale of whippets to persons under the age of 18 and criminalizing the unlawful sale of nitrous oxide, use of whippets by adults and teenagers continues to be a concern. Some believe that one approach to stem abuse and protect lives would be to make it a crime to sell, or offer for sale, a device (referred to as a *cracker*) used to release the nitrous

oxide from a whippet (for example, into a balloon) or which enables a person to inhale the gas directly from the canister.

THE CONTENT OF THE BILLS:

House Bill 5982 and Senate Bill 996 each would amend Article 7 (Controlled Substances) of the Public Health Code to prohibit 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. A person who violates the prohibition would be guilty of a misdemeanor punishable by imprisonment for up to 90 days or a fine of up to \$5,000, or both.

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

In addition, a person who has received a notice described above could commence an action for a declaratory judgment to obtain an adjudication of the legality of the intended sale or offer to sell. The attorney general or the prosecuting attorney who sent the notice would be made 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 the person obtaining the judgment.

Under the code, the above prohibition would not apply to any of the following:

- An object sold or offered for sale to a person licensed under the Occupational Code or under Article 15 of the Public Health Code, or to an intern, trainee, apprentice, or assistant in a profession so licensed, for use in that profession.
- An object sold or offered for sale to a hospital, sanitarium, clinical laboratory, or other health care institution (including a penal, correctional, or juvenile detention facility) for use in that institution.
- An object sold or offered for sale to a dealer in medical, dental, surgical, or pharmaceutical supplies.
- A blender, bowl, container, spoon, or mixing device not specifically designed for inhaling nitrous oxide for recreational purposes.
- A hypodermic syringe or needle sold or offered for sale for injecting or treating livestock or other animals.
- An object sold, offered for sale, or given away by a state or local governmental agency, or a person authorized by the agency, to prevent the transmission of infectious agents.

Each bill would take effect 90 days after being enacted.

MCL 333.7453

BACKGROUND INFORMATION:

Other state law

1967 PA 119 prohibits both of the following, with exceptions described below:¹

- 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.
- 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 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.

In addition, 1967 PA 119 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 the minor's employment. A person who knowingly violates the prohibition, or who fails to make diligent inquiry as to whether the person is a minor, is liable for a civil fine and may be ordered by a court to pay up to \$500.

Penalties under the bills

The bills would amend section 7453 of the Public Health Code, which currently prohibits selling or offering for sale drug paraphernalia knowing that it will be used for certain specified purposes. Section 7451 of the code defines ***drug paraphernalia*** as any equipment, product, or material or combination of equipment, products, or materials that has a specified application to a ***controlled substance*** as defined in section 7104 the code. The provisions described above

¹ The act also 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). See <https://archives.drugabuse.gov/publications/nida-community-drug-alert-bulletin-inhalants/what-are-inhalants>

concerning exceptions, prearrest notice, and actions to obtain a declaratory judgment currently apply under the code with regard to drug paraphernalia.

Section 7455 of the code 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 now applies to a violation related to drug paraphernalia and under the bills would apply to a violation related to an object specifically designed for inhaling nitrous oxide for recreational purposes.

In addition, section 7455 provides that a person 18 years old or older who violates section 7453 by selling or offering to sell drug paraphernalia to a person under the age of 18 is guilty of a misdemeanor punishable by imprisonment for up to one year or a fine of up to \$7,500, or both. Because this provision specifically applies to the sale of drug paraphernalia to a minor, the enhanced penalty would not apply to selling or offering for sale to a minor an object designed for inhaling nitrous oxide for recreational use. (Nitrous oxide is not a controlled substance under the Public Health Code.)

FISCAL INFORMATION:

House Bill 5982 and Senate Bill 996 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.

ARGUMENTS:

For:

The bills, which are identical, would attempt to stem the use of nitrous oxide from whippets for unlawful recreational purposes by prohibiting the sale of devices used to release the gas from the canisters for inhalation. Adults and teens often think nitrous oxide is harmless. However, even in a medical setting, if not used appropriately by professionals trained in the safe delivery of the gas, nitrous oxide can result in serious injuries to various organs and systems in the body and has resulted in death. Besides the health threat posed by using whippets and other food containers containing nitrous oxide such as vegetable sprays to obtain a high, the discarded canisters pose various hazards to communities as described above. Although the bills do not specify a penalty for a violation, the current penalty for selling or offering for sale drug paraphernalia contained in a different provision of the Public Health Code would also

apply to an object specifically designed for inhaling nitrous oxide for recreational purposes, knowing that the object will be used for that purpose. Under the bills, as is currently provided for sales of materials that constitute drug paraphernalia, a person (such as a store) would have to be warned in writing by the attorney general or a county prosecutor before an arrest and given the opportunity to cease selling devices designed for inhaling the gas.

It is hoped that by targeting the sale of devices used to access nitrous oxide for recreational purposes, use of whippets to obtain a high can be mitigated, public health can be protected, and communities can find relief from the hundreds and even thousands of used canisters that inundate their streets, sidewalks, yards, and parks.

Against:

A question was raised during committee debate as to whether whippets could be sold behind the counter like tobacco, spirits, and some over-the-counter medications. In addition, couldn't a person avoid prosecution under the bills by saying the devices were used to fill a balloon with a different gas for a gift or party?

Response:

Increasing the number of items retailers must keep behind the counter can be problematic, especially for smaller stores that may not have sufficient room to keep boxes of whippets behind the counter. The bills focus not on making whippets that are an FDA-approved food product used in baking more difficult for people to obtain, but instead on removing a object from the marketplace that has no legitimate use and exists solely for a person to access the nitrous oxide inside a whippet to obtain a high.

POSITIONS:

Representatives of the following entities testified in support of the bills (5-3-22):

- Southwest Detroit Business Association
- Whippet WipeOut Campaign Coalition

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ 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.