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BILL ANALYSIS

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Senate Bill 189 (Substitute S-2 as reported)
Sponsor: Senator Patricia L. Birkholz
Committee: Health Policy

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RATIONALE

The manufacture and use of methamphetamine (meth) is on the rise in Michigan, particularly in rural areas in the southern and southwestern parts of the State. Under the Public Health Code, methamphetamine is classified as a Schedule 2 controlled substance. This means that it has a high potential for abuse; if abused, it may lead to severe psychic or physical dependence; and it has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions. The National Drug Intelligence Center (NDIC) of the U.S. Justice Department reports that methamphetamine (also known as "speed", "crank", or "ice", among other street names) appeals to drug abusers because it creates a sense of enhanced alertness, euphoria, and increased energy; over time, however, unsupervised use can lead to nervousness and irritability, extreme paranoia, prolonged psychosis, hallucinations, insomnia, brain damage, and increased risk of stroke and heart failure.

Methamphetamine is manufactured with common chemicals in clandestine laboratories. These labs can be set up with simple household items, such as mason jars, coffee filters, hot plates, pressure cookers, plastic tubing, and gas cans. Meth can easily be "cooked" from ingredients that may be purchased legally or stolen. Although there are several production methods, meth labs discovered in Michigan typically have used a manufacturing process that involves extracting pseudoephedrine or ephedrine from cold tablets, according to the Office of Drug Control Policy in the Michigan Department of Community Health (DCH).

Ephedrine is a derivative of the Chinese herb Ma Huang, and pseudoephedrine is the artificial version of ephedrine. Ephedrine can be found in a wide variety of products marketed as energy boosters and weight-loss aids that are distributed in drug stores, gas stations, and health food stores. Truck drivers and students reportedly use those products to stay awake and alert; body builders have been known to use them to increase muscle mass; and, since ephedrine suppresses the appetite, many dieting aids contain ephedrine. In addition, ephedrine and pseudoephedrine can act as a bronchial dilator, and pseudoephedrine is the active ingredient in most prescription and over-the-counter (OTC) medication for the treatment of such common maladies as asthma, allergies, and nasal congestion.

Several pieces of legislation, which took effect April 1, 2004, amended various Michigan statutes to prohibit the possession of large amounts of pseudoephedrine, prohibit the possession or transport of anhydrous ammonia (which is used in the meth manufacturing process) except in legally approved containers, increase criminal penalties for the operation of methamphetamine labs, and require inspections for environmental contamination of meth lab locations. It has been suggested that, in addition, sales of OTC ephedrine and pseudoephedrine products should be restricted to people at least 18 years old, and retailers should be required to monitor the products and keep records of purchases.

CONTENT

The bill would amend the Public Health Code to do the following:

- **Require a retail seller of ephedrine or pseudoephedrine products to maintain them behind a counter, within a locked case, or where the attendant could monitor them, or use an antitheft device on the products along with constant video surveillance.**
- **Provide that a retail seller would have to require photo identification for the purchase of an ephedrine or pseudoephedrine product.**
- **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.**
- **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, 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 bill's 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 one year after the effective date of the bill regarding its impact and effectiveness.**
- **Prohibit a local unit of government from imposing any new requirement or prohibition regarding the sale of an ephedrine or pseudoephedrine product beginning on the bill's effective date.**

The bill would take effect six months after it was enacted. It is described below in further detail.

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 of an optical isomer of ephedrine or pseudoephedrine, behind a counter where the public was not permitted, 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 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 were 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.

A person who sold an ephedrine or pseudoephedrine product also would have to require the purchaser of such a product to produce a valid photo identification that included his or her name and date of birth. 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 to any law enforcement agency upon request. A seller that maintained the products behind the counter or within a locked case would not have to maintain a log or other type of record.

Sales Restrictions

Under the bill, a person could not knowingly sell any ephedrine or pseudoephedrine product to an individual under 18 years old. A person could not knowingly 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.

Exceptions

The bill would not apply to any of the following:

- 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.

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 DCH 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."

If the sign were more than six feet from the point of sale, it would have to be 5 ½ inches by 8 ½ 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 make copies of it 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.

Penalty & Defense

A person who violated the bill would be responsible for a State civil infraction and could be ordered to pay a maximum civil fine of \$50 for each violation. 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.

State Police Report

One year after the bill took effect, the Department of State Police would have to submit a written report to the Legislature regarding the bill's impact and effectiveness, including the number of clandestine

methamphetamine lab incidents before and after the legislation was enacted.

Local Regulation

Beginning on the bill's effective date, 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. The bill specifies that this provision would not invalidate or otherwise restrict a requirement or prohibition in place on the bill's effective date.

Proposed MCL 333.17766b

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Methamphetamine is a dangerous and highly addictive drug that has led to America's first major homegrown drug epidemic. Meth has been compared with crack cocaine because of its highly addictive nature and low cost. A person can ingest meth by swallowing, inhaling, injecting, or smoking, and the typical high is said to last at least 12 hours. The manufacture and use of methamphetamine are an exponentially growing problem in Michigan. Only six meth labs were found and investigated in the State in 1996, but 120 labs were seized in 2001. In the first six months of 2003, the Michigan State Police seized 116 labs. Although meth labs have been a problem over the last few years in the southwestern corner of Michigan, they increasingly are being found in mid-Michigan, too. According to Senate Health Policy Committee testimony, as of March 2005, meth lab seizures were up 60% statewide, and 75% in southwestern Michigan.

The costs of numerous meth labs and increased methamphetamine addiction go far beyond investigating and seizing illegal drug labs. Meth use and production can lead to an increase in other types of crimes, as users are considered more likely to commit acts of violence and property offenses either because they are high or in order to satisfy their addiction. The rise in these other crimes leads to increased

demands on law enforcement and corrections budgets. According to the Allegan County prosecutor, that county never had a jail crowding problem until meth use and production became prevalent there. Also, Allegan County apparently has seen steady increases in incidents of domestic violence and theft over the last few years. Over the past year, in the Counties of Barry and Eaton, 53 children have been removed from their homes due to a family member's use or production of meth. In addition to committing crimes, meth users can develop serious physical and mental health problems, ranging from alarming weight loss, skin infections, and tooth loss to paranoia, hallucinations, and depression. There is a high cost to treating these users for their addictions and their accompanying health problems.

Since pseudoephedrine derived from OTC medications is an important ingredient in the production of methamphetamine, access to it should be tightly regulated. During Senate Health Policy Committee testimony, an Allegan County law enforcement officer stated that several meth cookers were found with 1,800 cold tablets in their vehicle after stopping at nearly every pharmacy, grocery store, and convenience store along U.S.-131 between Allegan County and Indiana.

Although Michigan already has strong penalties for the manufacture, delivery, and possession of meth, those penalties apply only to meth users and cookers who have been caught. By restricting access to a key ingredient, the bill would take a proactive approach to thwarting the spread of methamphetamine manufacture in clandestine labs. Neither meth users, who may experience severe paranoia, nor meth manufacturers would want to present photo identification, have their purchases logged, or be videotaped buying pseudoephedrine. Thus, the bill should provide an additional deterrent to meth use and production. In Oklahoma, legislation classifying pseudoephedrine as a Schedule 5 controlled substance evidently led to a reduction in the number of meth labs from 130 in March 2004 to 36 in March 2005. Although the bill would not designate pseudoephedrine as a controlled substance, it could lead to a similar decline. Additionally, after Oklahoma's legislation took effect, the number of meth labs in neighboring Kansas reportedly skyrocketed. If meth users and

manufacturers are to be prevented from establishing themselves in this State, Michigan must enact laws at least as tough as those of adjacent states. Although no single solution will prevent the production and use of meth, the bill would provide one tool in a multifaceted approach to this problem.

Response: The prescribed civil fine would not be a sufficient deterrent for irresponsible retailers. Some might decide that \$50 per violation would be less costly than buying and installing antitheft devices and video cameras, paying an employee to monitor the products, or losing profits from customers who did not wish to deal with sales restrictions and identification requirements to obtain a routine cold medicine. Perhaps higher fines should be implemented for subsequent offenses. Furthermore, the requirement that retailers record transaction information should apply to all ephedrine and pseudoephedrine products, not just those that are not maintained behind a counter or within a locked case. It might be more effective to classify pseudoephedrine as a Schedule 5 controlled substance, as Oklahoma did, meaning that it could be dispensed and sold only by a licensed pharmacist.

Opposing Argument

The bill unfairly would burden responsible retailers and their employees with mandates and paperwork for the approximately 250 common products with trace amounts of ephedrine or pseudoephedrine. While sales of the products should be restricted, the bill's requirements would be unreasonable. It is unrealistic to expect that store personnel would or could constantly monitor the products, and antitheft devices are costly. In addition, it would be excessive to require retailers to request identification for and record every purchase and keep the log for six months just in case a law enforcement agency needed to use the information. The images collected through video surveillance also would have to be maintained for six months under the bill; the industry standard, however, is 30 days.

According to Senate Health Policy Committee testimony, most of the ephedrine used in meth manufacturing is smuggled into the United States from Asia and Latin America; it is not derived from OTC cold medicine sold in this country. Encumbering retailers with duties that belong in the arena

of law enforcement, and restricting access to medicine for those suffering from colds or allergies, would be an ill-advised solution to the problem. Increasing funding for law enforcement, curbing mail-order and internet sales, and increasing public education would be more appropriate means to address the harmful results of meth.

Response: The bill would provide several options for the maintenance and sale of the products, enabling retailers to choose one that was practical and cost-effective. Furthermore, although most of the ephedrine used to make meth comes from other countries, one-fifth is extracted from common OTC products sold in the United States. Sales of the products should be tightly regulated, as are sales of other substances with less potential for abuse. Several large retailers, such as Target and Wal-Mart, already have pledged to move ephedrine and pseudoephedrine products behind counters so that customers will have to ask employees in order to buy them. The inconvenience experienced by those wishing to purchase the products for legitimate uses would be outweighed by the benefits that individuals, families, and communities would gain if meth production and use were curbed.

Legislative Analyst: Julie Koval

FISCAL IMPACT

The bill would create additional costs for the Department of Community Health related to creating and printing the required signs. Public libraries would benefit from any additional civil infraction fine revenue.

Fiscal Analyst: Bethany Wicksall

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.