Legislative Analysis

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SMURFING: EXPAND PROHIBITIONS & PENALTIES

House Bills 4767, 4768, and 4864 as reported from committee
Sponsor: Rep. John Kivela

House Bill 4769 as reported by Committee
Sponsor: Rep. Edward McBroom

Committee: Criminal Justice
Complete to 10-23-15

BRIEF SUMMARY: As a package, the bills address "smurfing" by doing the following:

- Add a criminal penalty for attempting to solicit another person to purchase ephedrine or pseudoephedrine knowing that it is to be used to manufacture methamphetamine or "meth" (House Bill 4767).
- Make a technical correction in the sentencing guidelines for soliciting a person to do the above (House Bill 4768).
- Require the NPLEx system to generate a stop-sale alert for a period of five years for a person convicted of attempting to solicit a person to purchase ephedrine or pseudoephedrine for the purpose of manufacturing meth (House Bill 4864).
- Provide an enhanced penalty for manufacturing methamphetamine within 1,000 feet of a library or K-12 school property.
- Take effect 90 days after enactment.

Generally speaking, "smurfing" refers to the practice by criminal enterprises of making many small purchases of behind-the-counter cold and allergy medications containing ephedrine and pseudoephedrine from numerous retailers, as well as using others to make such purchases, in order to make methamphetamine or "meth."

FISCAL IMPACT: House Bills 4767 and 4769 could have a significant fiscal impact on state and/or local governments, but House Bills 4768 and 4864 would not. See ***Fiscal Information*** below for more information.

THE APPARENT PROBLEM:

Methamphetamine—or "meth"—is a highly addictive and extremely physically destructive drug. The production of meth also presents health and safety concerns as the manufacturing process results in toxic chemicals being released into the surrounding environment. "Cooking" meth often results in explosions that level buildings or result in raging fires that can and do kill and injure people, including young children. The unlawful manufacture of meth continues to increase in the state, with data released by the El Paso Intelligence Center National Seizure System (EPIC-NSS) in 2010 showing a 290 percent increase in meth lab seizures in Michigan between 2007 and 2009 compared to an average increase of 76 percent nationwide during the same time period. The Department of State

Police reports that, 494 meth labs were seized in 2014, up from 351 the year before. The meth lab seizures were in addition to sites where meth-related equipment had been dumped.

One reason meth is so prevalent is that it is easy to make with commonly available ingredients. However, meth cannot be made without either ephedrine or pseudoephedrine, the active drug in cold and allergy medications. The increase in meth-lab seizures cited above is believed to be due to "smurfing"–the practice of buying large quantities of products containing ephedrine or pseudoephedrine and the use of smaller, more mobile laboratories. For instance, the "one pot" method can manufacture meth in a used plastic soda or sports drink bottle.

Anti-smurfing legislation enacted in 2014, which focused on reducing access to products containing ephedrine or pseudoephedrine, made it against the law to purchase or possess any amount of those substances knowing or having reason to know that the substance will be used to manufacture meth. The legislation also made it against the law to solicit another person to purchase or otherwise obtain any amount of ephedrine or pseudoephedrine knowing that it is to be used for the purpose of illegally manufacturing meth–a 10-year felony.

Reportedly, some feel the felony penalty for soliciting another to buy ephedrine and pseudoephedrine products is too harsh in some situations and fails to give prosecutors a viable option if a case is weak or the penalty too severe for the facts of the case. Creating a lower crime category that would be a misdemeanor, such as "attempting" to solicit another to do the prohibited act, could give prosecutors an additional option in plea deals and charging decisions that could keep some first-time offenders making a huge mistake from having a felony record.

The 2014 bill package also made changes to the system used by law enforcement and retailers to monitor the purchases of products containing ephedrine and pseudoephedrine; the system blocks sales that would exceed legal limits, generates a "stop sale" alert if a customer is prohibited, due to a previous meth-related conviction, from buying a product containing ephedrine or pseudoephedrine, and provides law enforcement with immediate access to transaction information. It has been suggested that a similar "stop sale" be triggered if a person who had been convicted of "attempting" to solicit another tried at a future time to purchase ephedrine or pseudoephedrine products.

Further, in a related matter, due to the potential harm that can be caused in and to the area surrounding a meth lab, it has been suggested that any person who would manufacture meth near a school or library be subject to enhanced penalties similar to those in place currently for certain drug crimes committed in a drug-free school zone or near a library.

Legislation addressing these issues has been offered.

THE CONTENT OF THE BILLS:

House Bill 4767 amends the Public Health Code (MCL 333.7340c). Currently, it is a felony to solicit another person to purchase or otherwise obtain any amount of ephedrine or pseudoephedrine knowing that it is to be used for the purpose of illegally manufacturing methamphetamine.

Under the bill, a person who *attempted* to violate the above prohibition would be guilty of a misdemeanor punishable by imprisonment for not more than one year and/or a fine of not more than $1,000.

House Bill 4768 amends the sentencing guidelines portion of the Code of Criminal Procedure to make a technical change to clarify that the reference to soliciting another person to purchase or obtain ephedrine or pseudoephedrine to manufacture meth pertains to the felony violation and not the violation of attempting to do the same added by House Bill 4767, which is a misdemeanor (MCL 777.13m). The bill is tie-barred to House Bill 4767.

House Bill 4864 amends the Methamphetamine Abuse Reporting Act (MCL 28.124). That act requires a stop-sale alert through NPLEx to be generated for individuals convicted of meth-related offenses for a period of 10 years following the conviction. The bill would require a stop-sale alert for a period of five years following a conviction under House Bill 4767 for attempting to solicit another to purchase or obtain any amount of ephedrine or pseudoephedrine knowing that it will be used for the purpose of illegally manufacturing methamphetamine. The bill is tie-barred to House Bill 4767.

[The National Precursor Log Exchange (NPLEx) is a real-time electronic logging system used by pharmacies and law enforcement to track sales of over-the-counter cold and allergy medications containing ephedrine and pseudoephedrine. The system is sponsored by the makers of such medications and provided to law enforcement agencies and state governments free of charge by the National Association of Drug Diversion Investigators (NADDI). The system blocks sales that would exceed legal limits and provides law enforcement with immediate access to transaction information when necessary.

A retailer – before completing a sale under Section 17766f of the Public Health Code – must electronically submit the required information to NPLEx. If the system generates a "stop-sale" alert, the retailer is prohibited from completing the sale. A violation is a state civil infraction that may result in a fine of $500 for each violation.

Section 17766f limits the sale of ephedrine and pseudoephedrine to no more than 3.6 grams per individual per day or more than 9 grams per individual for any 30-day period.]

House Bill 4769 amends the Public Health Code to provide an enhanced penalty for manufacturing methamphetamine on or within 1,000 feet of school property (drug-free zone) or a library. (The Code currently provides enhanced penalties for certain drug offenses committed within a school drug-free zone or within 1,000 feet of a library.) The

penalty would apply to a person 18 years of age or over and would allow a court to impose a criminal fine or term of imprisonment up to twice that authorized for manufacturing, delivering, or possessing with intent to deliver methamphetamine, currently set at a fine of not more than $25,000 or not more than 20 years in prison, or both. Thus, manufacturing methamphetamine in a drug-free school zone or within 1,000 feet of a library would be a felony punishable by a term of imprisonment not to exceed 40 years and/or a fine of not more than $50,000.

BACKGROUND INFORMATION:

How much is 3.6 grams of pseudoephedrine? According to Appriss, Inc., 3.6 grams is the amount found in:

- One 15-count box of a 24-hour allergy medicine (15 pills x 240 mg per pill = 3.6 grams);
- Three 10-count boxes of a 12-hour cold medicine (30x 120 mg = 3.6 grams); or
- Six 20-count boxes of a four-six hour cold medicine (120 x 30 mg = 3.6 grams).

FISCAL INFORMATION:

House Bill 4767: To the extent that the bill results in a greater number of convictions, it would increase costs on local correctional systems. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues.

The bill would have an indeterminate fiscal impact on the judiciary and local court funding units. The fiscal impact would depend on how the provisions of the bill affected caseloads and related administrative costs.

House Bill 4768: In amending the sentencing guidelines, the bill does not have a direct fiscal impact on state or local units of government.

House Bill 4864: The bill would not have a significant fiscal impact on the Department of State Police (MSP).

House Bill 4769: The bill would increase costs on the state's correctional system. Information is not available on the number of persons that might be convicted under the provisions of the bill. New felony convictions would result in increased costs related to state prisons and state probation supervision. The average cost of prison incarceration in a state facility is roughly $34,800 per prisoner per year, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision average about $3,760 per supervised offender per year. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues. The bill would have an

indeterminate fiscal impact on the judiciary and local court funding units. The fiscal impact would depend on how the provisions of the bill affected caseloads and related administrative costs.

ARGUMENTS:

For:

As seen in the MSP data from last year, methamphetamine use is continuing to increase in Michigan, as are the number of meth labs and so-called one-pot cooking operations. The problem is especially widespread in southwest Michigan and the Upper Peninsula, but is spreading throughout the state.

Meth poses more of a problem than other illegal street drugs due to its highly addictive nature, the havoc wreaked on the health of the individual user, and the toxins released into the environment, as well as the risk of explosions and fires associated with the manufacturing process.

Legislation enacted last year included efforts to deter access to products containing ephedrine and pseudoephedrine, components in cold and allergy medications, that are necessary ingredients for meth production. In fact, meth cannot be made without one of those ingredients. Currently, the amount of cold and allergy medications containing ephedrine and pseudoephedrine that a person can buy at one time and in a month are limited to ensure the products are being purchased for personal use. Thus, to circumvent the restrictions, some solicit (or pressure) others to buy small amounts for them until they have enough product for a batch of meth; last year's legislation made this a felony and created a 10-year stop sale alert for anyone with a meth conviction that is intended to block future purchases by that person.

However, considering the high societal costs to enforce anti-meth laws and prosecute offenders, costs to clean up toxic dump sites, and health and safety risks to the public, some feel that anyone even *attempting* to solicit others to buy the restricted cold and allergy medications for the purpose of making meth should be prosecuted. House Bill 4767 addresses this issue by creating a misdemeanor penalty and House Bill 4864 creates a five-year stop-sale alert similar to what is in place for the crime of soliciting others to buy ephedrine and pseudoephedrine products for meth production.

Moreover, having a misdemeanor offense offers prosecutors another option when choosing an appropriate charge or in determining an appropriate plea offer. It is hoped that these bills, along with last year's legislation, will effectively stem the rise in meth production and meth use by making it more difficult to obtain the ingredients necessary to make meth.

For:

House Bill 4769 creates enhanced penalties for manufacturing meth in a drug-free school zone or near a library. These are locations where there is a steady stream of people of all ages, especially children, coming and going many hours of the day and evening. Therefore, it is appropriate that a strong deterrent be created to discourage meth operations, which

have a high potential of risk to the public's health and safety, from operating near schools and libraries. With a potential prison sentence of up to 40 years, courts will have the ability to take dangerous people off the streets for a significant amount of time. Reportedly, the bill is needed as current laws are not adequate. For instance, participants in a meth operation located within a drug-free school zone were not subject to the enhanced penalties currently in place as the law does not specifically apply to the manufacture of methamphetamine. The bill would correct this oversight.

Response:

Besides providing enhanced penalties for certain drug offenses committed within a drug-free school zone or near a library, current law (Section 7410a of the Public Health Code) also applies enhanced penalties to certain drug offenses involving distribution that are committed in or within 1,000 feet of a public or private park. Considering the level of danger posed by meth manufacturing operations, perhaps it would be appropriate to apply the enhanced penalty available for distribution of certain controlled substances in or near a park to manufacturing meth in or near a park, as well.

Against:

No arguments were offered opposing the bills.

POSITIONS:

Michigan Association of Health Plans indicated support for the bills. (10-6-15)

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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.