



Ohio Legislative Service Commission

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Fiscal Note & Local Impact Statement

Bill: [Sub. H.B. 334 of the 129th G.A.](#)

Date: December 5, 2012

Status: As Enacted

Sponsor: Reps. Johnson and Bubp

Local Impact Statement Procedure Required: No

Contents: Pseudoephedrine and ephedrine product sales tracking and controlled substances scheduling

State Fiscal Highlights

- **National Precursor Log Exchange.** If the Office of the Attorney General chooses to enter into a contract or memorandum of understanding with the administrator of the National Precursor Log Exchange (NPLEx), as permitted by the bill, the likely administrative cost will be minimal annually. Such a tool could make investigations of methamphetamine use, production, and trafficking easier to perform.
- **Controlled substance analogs.** As a result of the changes made to the controlled substances schedule, there could be additional persons arrested, prosecuted, and sentenced to a prison term for related violations. However, relative to the total number of annual prison commitments, around 20,000 or so, any increase to the Department of Rehabilitation and Correction's overall prison population, and resultant incarceration costs, is expected to be minimal. The state might gain a negligible amount of revenue annually in the form of locally collected court costs that are forwarded for deposit in the state treasury to the credit of the Indigent Defense Support Fund (Fund 5DY0) and the Victims of Crime/Reparations Fund (Fund 4020).

Local Fiscal Highlights

- **Crimes involving pseudoephedrine and ephedrine.** Violations of the bill's two new criminal prohibitions related to the sale of pseudoephedrine and ephedrine will generate additional work and related costs for local criminal justice systems (law enforcement agencies, municipal/county prosecutors, municipal and county courts, and sanctioning). However, any increase in costs is likely to be minimal annually, as it seems reasonable to conclude that retailers and terminal distributors will largely comply with the bill's requirements and there will be relatively few violations.
- **Crimes involving controlled substance analogs.** If the bill results in an increase in the number of criminal cases involving the Controlled Substances Law, there could be an increase in the number of cases filed annually for courts of common pleas to adjudicate, thus potentially creating increased costs for county criminal justice systems, including county prosecutors, public defenders/assigned counsel, and local detention facilities as well as the courts. Whether the potential cost increase for any given county in any given year could reach into the tens of thousands of dollars is uncertain. Convictions may also generate additional revenue in the form of court costs and fees imposed on offenders by the sentencing court.

Detailed Fiscal Analysis

The bill modifies current law related to (1) the regulation of pseudoephedrine and ephedrine sales and (2) controlled substances, including analogs.

(1) Pseudoephedrine and ephedrine

National Precursor Log Exchange

The bill permits the Office of the Attorney General to enter into a contract or memorandum of understanding with the National Association of Drug Diversion Investigators or its designee to provide access to the National Precursor Log Exchange (NPLEx). NPLEx is a "public/private partnership offering a real-time electronic methamphetamine precursor tracking service, free of charge, to law enforcement and state governments."¹ Funding for the system is provided by drug manufacturers.

According to staff of the Attorney General, the likely administrative cost to enter into such a contract or memorandum of understanding will be minimal annually. Once the contract is activated, the Attorney General will have access to the database, receive weekly reports, and have the ability to disseminate the information to state and local law enforcement authorities. Such a tool could make investigations of methamphetamine use, production, and trafficking easier to perform.

Once the NPLEx is active for Ohio, retailers are mandated to participate in the program (this requirement ends if the system ceases to be offered free of charge). In practice, this system will likely replace the paper log books that currently track pseudoephedrine and ephedrine sales, thus perhaps creating efficiencies for retailers. The bill stipulates that retailers are only mandated to use the system for as long as it is offered free of charge, including obtaining access to the exchange, submitting information to the exchange, or receiving stop-sale alerts from the exchange. Retailers and terminal distributors are also not required to participate if the equipment or software needed to use the exchange is not technologically capable of interfacing with the existing systems that are already in place, or will be in place at some point in the future.

Regulation of pseudoephedrine and ephedrine

The bill modifies current law related to the sale of pseudoephedrine. Many of these changes mirror requirements in federal law, specifically the Combat Methamphetamine Epidemic Act of 2005. Since this federal law is already in place and states are expected to abide by it, there would be no direct fiscal effect related to these changes, which can be viewed as codifying current practice. These changes also include adding "ephedrine" in the statute as well as the daily and monthly limits for sales.

¹ "Frequently Asked Questions," *Nplexservice.com*, n.p., n.d., Web, January 19, 2012.

Criminal provisions

The bill prohibits a retailer or terminal distributor from failing to comply with the information submission requirements regarding the NPLEx. A violation of this prohibition is a misdemeanor for which the offender is to be fined not more than \$1,000 per violation. As the misdemeanor is unclassified, a violation does not carry the possibility of a jail term.

The bill also prohibits a retailer or terminal distributor from failing to comply with the bill's stop-sale² provisions. A violation of this prohibition is a second degree misdemeanor. Under current law, a second degree misdemeanor carries a possible jail term of up to 90 days, a maximum fine of \$750, or both.

It seems reasonable to assume that retailers and terminal distributors will largely comply with the bill's requirements, which means that there will be relatively few violations. Thus, to the degree that the bill has a fiscal effect on local criminal justice systems (law enforcement agencies, municipal/county prosecutors, municipal and county courts, and sanctioning), it might be in terms of a minimal increase in criminal cases and related annual operating costs.

Qualified immunity

The bill provides that a retailer or terminal distributor of dangerous drugs is not liable in damages in a civil action for injury, death, or loss to person or property resulting from any act or omission in carrying out the duties regarding over-the-counter pseudoephedrine and ephedrine product sales, unless the act or omission is reckless or constitutes willful or wanton misconduct. As a result of this provision, there may be fewer civil cases filed annually in local courts (jurisdiction depends on the amount of damages alleged by the aggrieved). An additional possibility is that, if filed, such civil actions may be resolved more promptly than might otherwise have been the case under current law and practice. Either outcome would generate some form of operational savings realized in various involved courts resulting from a decrease in judicial dockets and in the related workload of other court personnel.

(2) Controlled substance analogs

The bill clarifies existing charging and sentencing provisions related to controlled substance analogs, including the application of penalty enhancements in certain circumstances, depending upon the amount of the drug involved and whether the offense took place within the vicinity of a school. The bill also modifies the current listings of synthetic cannabinoids and synthetic derivatives of cathinone to include more general class schedules rather than the specific chemical names. This change

² A stop-sale alert is defined as a notification sent from the NPLEx to the retailer or terminal distributor of dangerous drugs indicating that the completion of a sale would result in a violation of the daily and/or monthly limits as indicated in state and federal law.

should make it easier for local and state criminal justice systems to charge, prosecute, and convict under Ohio's Controlled Substances Law.

Based on national data about current trends involving certain controlled substance analogs, it appears that there may be a possibility for growth in these types of cases, in terms of possession, trafficking, and abuse of such substances. Because of the nature of the analogs, scheduling such substances and remaining "one step ahead" of manufacturers can pose a challenge. The bill is expected to provide an additional tool for the law enforcement community to combat these challenges. It is uncertain as to whether this provision of the bill will generate a significant increase in the number of new cases involving controlled substance analogs and related state and local criminal justice system expenditures.

That said, two observations can be made regarding controlled substance analogs. First, over time, the bill could increase the number of persons sentenced to a state correctional facility and related state incarceration costs, as it may become easier for the state and local criminal justice systems to prosecute, convict, and sanction certain drug offenders. Second, federal controlled substances law is valid in all 50 states and the federal Drug Enforcement Agency (DEA) is already actively using its emergency rule making authority to combat controlled substance analogs with assistance from state and local law enforcement agencies. As a result, the bill could be seen as supplementing existing federal drug enforcement activity and creating no more than a minimal annual increase in prosecution and sanctioning costs for the state and its political subdivisions.

In order to provide a complete analysis of the potential fiscal impact on state and local criminal justice systems, these potential additional costs are outlined below. It should be noted that while there is a possibility that the number of offenders committed to a state correctional facility could increase as a result of this provision of the bill, and thus subsequently affect state incarceration costs, there is also a belief that, after its enactment, there could also be a chilling effect on the manufacturing and distribution of these types of substances.

Department of Rehabilitation and Correction

If there is some number of additional criminal cases filed, some offenders may be sentenced to prison. Relative to the size of prison population (close to 50,000) and the number of offenders sentenced to prison (around 20,000 or so per year), however, the number of individuals that could be sentenced to prison may be relatively small and the associated incarceration costs minimal. The average annual cost for the Department of Rehabilitation and Correction to incarcerate an offender in an Ohio prison is currently around \$24,870, with the marginal cost of adding an offender estimated at \$3,600.

State revenues

The state might gain a negligible amount of revenue annually in the form of locally collected court costs that are forwarded for deposit in the state treasury to the credit of the Indigent Defense Support Fund (Fund 5DY0) and the Victims of Crime/Reparations Fund (Fund 4020). In the case of a felony, the court is generally required to impose state court costs totaling \$60 for a felony, divided as follows: \$30 to Fund 5DYO and \$30 to Fund 4020.

County revenues and expenditures

If there is an increase in the number of criminal cases filed annually with courts of common pleas, costs for these local criminal justice systems, including county prosecutors, public defenders/appointed counsel, and local detention facilities as well as the courts could increase. These potential costs could be offset to some degree by fine and court cost revenue, if imposed on the offender and ultimately collected after sentencing.