

SALES OF NITROUS OXIDE TO MINORS: CIVIL FINE

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House Bill 5463 as reported from committee w/o amendment

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House Bill 5464 as reported from committee w/o amendment

Sponsor: Rep. Stephanie Chang

Committee: Regulatory Reform

(Enacted as Public Acts 136 and 137 of 2018)

Complete to 3-6-18

BRIEF SUMMARY: Taken together, the bills would establish a civil fine for knowingly selling or distributing a device containing nitrous oxide to a person under the age of 18 years old, provide exceptions to the prohibition, and authorize the attorney general and county prosecutors to bring an action to recover a civil fine imposed under the proposed prohibition.

FISCAL IMPACT: The bills may have an indeterminate fiscal impact on state and local governments. (See *Fiscal Information*, below, for more a detailed discussion.)

THE APPARENT PROBLEM:

Nitrous oxide (“laughing gas”) has a number of legitimate commercial, industrial, and medical uses. It is used, for example, as a propellant for certain food products, including whipping cream, and is also used in dentistry for pain and anxiety control. However, it also can be used recreationally to induce temporary intoxication or euphoria. Currently, it is against the law to inhale or ingest nitrous oxide in order to become intoxicated or induce euphoria (a 93-day misdemeanor) or to sell a nitrous oxide dispensing device to another person who intends to use it to get high (penalties range from a 93-day misdemeanor for a first offense to a 4-year felony for three or more convictions).

Despite the current prohibitions and criminal penalties, use of nitrous oxide by youths continues to grow. Specifically, youths seek out small cartridges of nitrous oxide commonly used in handheld devices by bakers and others to add whipped cream toppings to their products. Known as “whip-its,” the cartridges are widely available not only in grocery stores, but also in convenience stores, big box stores, and gas stations—as well as online, where a pack of 100 can cost as little as \$54.

The easy accessibility of whip-its and their low cost have made the cartridges especially attractive to youths and teenagers as a recreational drug. According to the Association of Chiefs of Police, abuse of whip-its has been reported in many Michigan cities and has resulted in impaired driving incidents, injuries, and at least one death. Indeed, nitrous oxide can lead to brain and organ damage, severe effects on the cardiovascular and nervous systems, and asphyxiation.

To stem access to this potentially deadly substance by youths, it has been suggested that sales to minors be prohibited and that retailers be required to check IDs as they do for sales of cigarettes and alcohol.

THE CONTENT OF THE BILLS:

House Bills 5463 and 5464 would each amend Public Act 119 of 1967, which regulates the use of chemical agents with toxic chemicals or organic solvents, or both.

The bills are tie-barred to each other, meaning that neither could take effect unless the other one were also enacted. Each bill would take effect 90 days after enactment.

House Bill 5463 would prohibit the sale or distribution of a device that solely contains nitrous oxide to a person under the age of 18 for any purpose *unless* that person is accepting delivery of a device containing, or used to dispense, nitrous oxide in his or her capacity as an employee. The bill would exempt from this civil penalty a health care professional or a pharmacist, pharmacist intern, or pharmacy dispensing the device in the course of his or her duties as a pharmacist or pharmacist intern or as a pharmacy.

A person who knowingly sells or distributes a device solely containing nitrous oxide to a person under the age of 18 in violation of the above prohibition, or who fails to make *diligent inquiry* as to whether the person is a minor, would be liable for a civil fine and could be ordered by a court to pay up to \$500.

Diligent inquiry would mean a diligent good-faith effort to determine the age of a person, which includes at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal ID card, a military ID card, or any other bona fide picture ID that establishes the identity and age of the person.

MCL 752.272a

House Bill 5464 would add a new section to the act to allow the attorney general or a prosecuting attorney for the county in which the violation occurred to bring an action to recover a civil fine imposed for a violation of House Bill 5463. [Note: Though the bill allows the attorney general or a county prosecutor to "recover" a civil fine that was imposed, the bill is not clear as to where the recovered civil fine revenue would be deposited.]

The bill would also amend the title of Public Act 119 of 1967 by eliminating from the title's description that the act is *to provide penalties*. In its place, the bill would insert *to prescribe penalties and provide remedies* so to incorporate the proposed civil fine in addition to the existing criminal penalties contained in the act.

Proposed MCL 752.27b

BACKGROUND INFORMATION:

Public Act 119 of 1967 currently defines "chemical agent" as "any substance containing a toxic chemical or organic solvent or both, having the property of releasing toxic vapors," including, but not limited to, "glue, acetone, toluene, carbon tetrachloride, hydrocarbons

and hydrocarbon derivatives.” The act also prohibits the intentional drinking, eating, or otherwise “introducing” into one’s respiratory or circulatory system of any chemical agent “for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction or dulling of the senses or nervous system,” but does not prohibit the inhalation of any anesthesia for medical or dental purposes. The sale or distribution of devices containing nitrous oxide or devices to dispense nitrous oxide for the purpose of causing intoxication or euphoria is prohibited; exceptions to the prohibition are provided, e.g., for sales to certain food or medical professionals.

Current criminal penalties

In general, a violation of the act is a misdemeanor punishable by up to 93 days in jail, a \$100 fine, or both. A first violation of selling or distributing a device containing nitrous oxide is a misdemeanor punishable with up to 93 days in jail, a fine of not more than \$300, or both; a second offense is a misdemeanor with up to 1 year in jail, a fine of not more than \$500, or both. A third or subsequent offense, however, is a felony punishable by imprisonment for not more than 4 years, a fine of not more than \$2,000, or both.

FISCAL INFORMATION:

House Bill 5463 would have an indeterminate fiscal impact on local court funding units, which would depend on how provisions of the bill affected court caseloads and related administrative costs.

If civil fines are assessed by the courts, an increase in civil fine revenue would occur. However, the bill itself does not specify where the revenue would be dedicated. Typically, the fund to receive the civil fine revenue would be specified in the legislation. In this case, it could, by default, be an increase to the state’s general fund. Or, in the absence of statutory direction, it might be subject to the discretion of the court imposing the fine.

House Bill 5464 would not be expected to have a fiscal impact on the Department of the Attorney General. There may be limited, yet undetermined, costs to county prosecutors’ offices associated with any additional workload authorized by the bill.

ARGUMENTS:

For:

When whip-its first began to be used recreationally to obtain a high almost two decades ago, a criminal penalty was placed in law to deter store employees from selling dispensing devices to anyone suspected of using them to get high. Despite including a stiff felony penalty for repeat violations, the law has done little to stop young adults and youths from seeking the devices for a cheap and easy high. In some communities, the use by teens and children as young as 10 is so prolific as to even cause a significant litter problem from spent cartridges. The small, differently colored cartridges pose additional risks when disposed of improperly, including environmental concerns.

However, the main concern the bills seek to address is that, because whip-its are cheap and easy for even elementary-school-aged children to buy, these children are inhaling a

substance that has serious short- and long-term health risks, that can kill them, and that their parents are unaware they are using. By establishing a civil fine for sales to underage youths, the bills seek to discourage store owners and employees from selling the whip-it cartridges to children and teenagers.

Because sales of cigarettes and alcohol are age-based, store owners and employees are well-trained in checking IDs. Prohibiting sales to youths 17 years of age and younger takes the onus off store owners and employees to determine if the youth is buying the devices solely for the purpose of getting high. Making it a civil fine allows for educating retailers as to the health dangers posed by unlawful uses of nitrous oxide without giving retailers criminal records.

Response:

Though House Bill 5464 provides the authority for the attorney general or a county prosecutor to be the enforcing entity and bring an action against any person who sells a device containing nitrous oxide to a minor, the bill is silent on where that civil fine revenue would go. Without specifying where the fine revenue would be deposited, any revenue collected from an action brought by the attorney general would, under a “default” provision in the Management and Budget Act, likely be deposited in the state’s general fund. For actions enforced by a county prosecutor, disposition of the fine revenue may be subject to the discretion of the court imposing the fine. Perhaps the bill should include direction as to where, or for what purpose, the fine revenue, regardless of the enforcing entity, should be deposited.

Against:

Some concerns were expressed as to whether the bills would lead to profiling customers or unfairly targeting small mom-and-pop stores or neighborhood gas stations and convenience stores. Further, with the popularity of children’s cooking shows, wouldn’t the bills’ prohibitions be burdensome to budding bakers and chefs?

Response:

Because the prohibition on sale is age-based, it eliminates profiling and second-guessing or presumptions on the part of retailers about why someone wishes to buy a pack of whip-its. Clerks are already liable for criminal penalties for selling these devices to someone they suspect will use them in an unlawful way or to get high. Further, linking the prohibition to age, like alcohol and cigarettes, will make it easier for law enforcement to enforce. Stings can be conducted on stores reported to be selling to minors, as they currently are to check for underage sales of tobacco products and alcohol.

The bills would apply to all retail stores that sell these small cartridges of nitrous oxide. Whether a big box store, such as Walmart or Meijer, or the corner gas station, each retailer will be required to check the buyer’s ID. Online retailers can be notified to require ID for purchases and delivery similarly to how they currently handle shipments of alcohol and other products that have age restrictions.

As to being burdensome to young bakers, it is unlikely that the bills would crush someone’s dreams. It would be no different than having Mom buy the brandy for the brandy snaps or the rum for the homemade rum raisin ice cream. The point is that enactment of the bills,

by creating a barrier to minors' access to nitrous oxide devices for unlawful purposes, may save a child's life or prevent injury to scores of others.

POSITIONS:

A representative of the Detroit Police Department testified in support of the bills.
(2-21-18)

The Michigan Association of Chiefs of Police submitted testimony in support of the bills.
(2-21-18)

The Michigan Sheriffs' Association indicated support for the bills. (2-21-18)

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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.