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## FISCAL IMPACT REPORT

SPONSOR HJC ORIGINAL DATE 02/11/09 CS/630 & 865/aHFI#1/  
LAST UPDATED 03/19/09 HB aSJC  
SHORT TITLE Legal Substances as Drug Precursors SB \_\_\_\_\_  
ANALYST Sanchez, C.

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>	None	Indeterminate	Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Bernalillo County Metropolitan Court (BCMC)  
Administrative Office of the District Attorney (AODA)  
Department of Corrections (DOC)  
Department of Public Safety (DPS)  
Public Defender (PD)

### SUMMARY

#### Synopsis of Senate Judiciary Committee Amendment

Under the Drug Precursors Prohibited Acts and Penalties section of HB 630 & 865, the SJC amendment eliminates the paragraph that reads, "Possession of more than nine grams of such a substance, material, compound, mixture or preparation raises a rebuttable presumption that the possession is for the purpose of unlawful manufacture in violation of this paragraph".

#### Synopsis of House Floor Amendment

The amendment replaces "raises a rebuttable presumption" with "is evidence" on page 3, lines 12 and 13.

#### Synopsis of House Judiciary Committee Substitute

House Judiciary Committee Substitute for House Bill 30 and House Bill 865 makes the possession of a prescription-only or over-the-counter dosage form of a substance, with the intent of using that substance to manufacture a controlled substance, a crime. The possession of more than nine grams of such a substance, material, compound, mixture or preparation is evidence that the substance was intended to illegally manufacture a controlled substance.

The HJC Substitute for House Bill 630 & 865 changes a section of the drug precursor act by adding a caveat that if the drug precursor is being used or possessed with the intent of being used for the unlawful manufacturing of a controlled substance the drug precursor no longer falls under the legal use as defined by the Federal Food, Drug and Cosmetic Act

The Substitute also adds a new subsection to the drug precursor act. This subsection creates another prohibited act by which one can violate the act: by possessing a substance excluded from the definition of drug precursor and prepared for dispensing pursuant to prescription or over-the-counter distribution, with the intent to unlawfully manufacture a controlled substance.

### **FISCAL IMPLICATIONS**

According to the Department of Corrections, the additional felony convictions resulting from this bill would increase the Department's costs by leading to minimal increases to the inmate population and probation/parole caseloads. However, it is always difficult to predict or estimate the ultimate effect of any new or expanded crime bill with any certainty.

### **SIGNIFICANT ISSUES**

The major issue for Prosecution would be proving the intent of the possessor. This amendment would allow an additional charge to be placed against drug manufacturers using over the counter medicines to make drugs. The intent would need to be proved by testimony from the manufacturer and associates and by circumstantial evidence surrounding the seizure of the substances (methamphetamine being cooked, prepared for sale, etc.).

According to the Administrative Office of the District Attorney, the clarification of the definition of a drug precursor would allow the original intent of the legislation (to stop people from using legal, over the counter and prescription drugs as raw material to make illegal drugs) to be carried out.

According to RLD, police officers have discovered during legal searches significant quantities of pseudoephedrine products that they believe are being used to manufacture methamphetamine. The possession of a schedule 5 controlled substance currently is not a crime. This Bill states that possession of more than 9 grams of a drug precursor is "evidence" that the substance is being used in the illicit manufacture of a controlled substance.

### **OTHER SUBSTANTIVE ISSUES**

This bill is apparently in response to the Court of Appeals December 2008 decision in *State v. Vance*. In *Vance*, the defendant was convicted of possession of a drug precursor pursuant to the current drug precursor law because he possessed pseudoephedrine tablets. The defendant was also caught with a battery, razor blade and a hazy liquid. The Court of Appeals reversed the defendant's conviction because it found that the tablets were "over the counter" medication that were "safe and effective" under the Federal Food, Drug and Cosmetic Act and thus exempt from the drug precursor classification under the current drug precursor law.

According to the Public Defender, while HB 630 succeeds in proscribing the defendant's conduct in *Vance*, it adds an extra burden because it requires the state to prove that the substance was being used in the manufacture of a controlled substance. Because of this burden, this law could face challenges from criminal defendants.

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Persons who are arrested with what are otherwise legal substances and have the intent to turn them into illegal drugs will not be charged with a fourth degree felony for possession of Drug Precursors.

CS/mt:mc:svb