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FISCAL IMPACT REPORT

SPONSOR: Foley DATE TYPED: 03/09/03 HB 865

SHORT TITLE: Possession of Certain Drug Precursors SB _____

ANALYST: Fox-Young

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
			\$0.1 Significant	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 176, HB 284

SOURCES OF INFORMATION

Responses Received From
 Corrections Department (CD)
 Department of Health (DOH)
 Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General (AG)

No Response
 Public Defender Department (PDD)

SUMMARY

Synopsis of Bill

House Bill 865 amends sections of the Drug Precursor Act, providing additional penalties for the possession of certain drug precursors that are used to manufacture controlled substances and/or explosive devices.

- The bill amends Section 30-31B-1 NMSA, providing that Chapter 30, article 31B NMSA may be cited as the “Drug Precursor Act.”

- The bill amends Section 30-31B-2 NMSA, defining “iodine matrix” as iodine at concentrations greater than one and one-half percent by weight in a matrix or solution.
- The bill amends Section 30-31B-3 NMSA, adding red phosphorus, anhydrous ammonia, iodine matrix and crystal iodine to the list of drug precursors subject to regulation by the board of pharmacy and to the requirements of the Drug Precursor Act.
- The bill enacts a new section, providing that **possession of more than six grams of ephedrine or pseudoephedrine is a misdemeanor offense**. Certain individuals are exempted from this provision.
- The bill provides that **possession of any amount of anhydrous ammonia is a misdemeanor offense**. Certain individuals are exempted from this provision.
- The bill provides that **possession of any amount of red phosphorus is a misdemeanor offense**. Certain individuals are exempted from this provision.
- The bill provides that **possession of more than two ounces of crystal iodine or iodine matrix is a misdemeanor offense**. Certain individuals are exempted from this provision.

Significant Issues

The Attorney General (AG) notes that of the items discussed in this bill, only ephedrine currently appears on the pharmacy board’s list of drug precursors. (AG references Pharmacy Board Regulations, §16.19.21.35.)

The Association of District Attorneys (AODA) notes that the bill makes it a misdemeanor offense to possess the precursor elements used to make methamphetamine: pseudoephedrine, Red Phosphorus, Anhydrous Ammonia, Iodine Matrix and Crystal Iodine.

These precursors have many legitimate uses. For example, products containing pseudoephedrine, an oral decongestant, are contained in many over the counter drugs for treating allergy and cold symptoms. Ephedrine was used for years in weight loss pills, and appears to have been replaced on the market by ephedra, one of its own precursors. It appears that an absolute ban on possession of red phosphorus and anhydrous ammonia may be unreasonable, as these precursors have some uses that should not be criminalized. For example, fireworks and some matches contain red phosphorus, and anhydrous ammonia may have uses in scientific laboratory settings.

AODA notes that if there is sufficient evidence to show that precursors are used or intended for use in the manufacture of methamphetamine, district attorneys traditionally charge individuals in possession with trafficking by manufacturing, a second degree felony offense, or attempted trafficking by manufacturing, a third degree felony offense. AODA further notes that the provisions of the bill may preclude the state from pursuing these charges, as they enact law that is more specific for purposes of charging.

AG also notes the potential for confusion regarding penalties. Currently, §30-31B-12 (B) sets forth penalties pertaining to drug precursors, including possession in violation of a board rule, that provide for graduated classifications for first, second, and third or subsequent offenses. A

first offense is a misdemeanor, and subsequent offenses are fourth or third degree felonies. If the language is not clarified, AG notes that the bill could be read to reduce the penalties for possession of ephedrine or pseudoephedrine for second or later offenses.

FISCAL IMPLICATIONS

AODA indicates that misdemeanor violations associated with methamphetamine production and distribution are likely to increase dramatically. Courts, district attorneys and the Public Defender Department (PDD) will likely see a significant increase in costs.

AG notes that the appellate caseload may increase, prompting an increase in costs to the agency as well as to PDD.

The Corrections Department (CD) notes that although the amendment adds new misdemeanors to the Act, the increase in the number of offenders serving time in the department's facilities as a result of the bill will likely be small. CD predicts a significant increase in the number of offenders supervised by the department's Probation and Parole Division.

County jails will likely see a significant increase in costs as a result of the bill.

RELATES

Relates to HB 176 (Additional Controlled Substances) and HB 284 (Trafficking of Methamphetamine). These duplicate bills amend the criminal offense of trafficking controlled substances, Section 30-31-20, to include a methamphetamine, its salts, isomers and salts of isomers.

TECHNICAL ISSUES

The bill lists individuals exempted from penalties for possession of each of the new drug precursors. In each case, the bill provides an exception for a "person engaged in the regular course of conducting a lawful business." The standard language to describe such an individual is a "person engaged in the ordinary course of business."

Additionally, it is not clear whether the listed exceptions exhaust all potential innocent uses of the specific chemicals addressed. The bill should be amended to include language providing that given all facts and circumstances, the provisions of each subsection should not apply to individuals performing legitimate manufacturing processes or to bona fide labs, conducting legal business in selling a product or service. Such language could replace the general "retail distributor, wholesaler, manufacturer, warehouseman..." contained in the bill as drafted. In the case of ephedrine and pseudoephedrine, an exception should be made for amounts reasonable to treat illnesses. Language should be amended to cover any other innocent uses of the precursors that are not addressed here.

AODA recommends that, due to the discrepancy between the penalties for possession of the added precursors (misdemeanor) and the penalties when those precursors are combined or associated with the production of methamphetamine (second or third degree felony), the penalty for possession of these added precursors be increased to a fourth degree felony.

AODA notes that the bill provides "a person shall not possess more than six grams of ephedrine

or pseudoephedrine. . . . the weighing shall not include fillers, inert ingredients, capsules or containers.” (page 8, line 16 et seq.) AODA notes that it is unlikely that law enforcement officers will have the means to weigh amounts excluding the above-named items to determine an accurate amount, when assessing whether a violation has occurred.

QUESTIONS

Hydrochloric acid, drain cleaner, battery acid, lye, lantern fuel, and antifreeze are all ingredients commonly used in making methamphetamine. Should possession of these items be limited as well?

JCF/yr