

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provides limited government: HB 1347 will restrict the retail sale of medication containing the sole active ingredients of ephedrine, pseudoephedrine or phenylpropanolamine. The bill increases criminal penalties for several drug offenses.

B. EFFECT OF PROPOSED CHANGES:

Drug schedules: Florida law divides controlled substances into five categories ranging from Schedule I to Schedule V. The scheduling of a controlled substance is relevant to how it can be prescribed and to the severity of the criminal offense for its illicit possession, sale or purchase. A drug in Schedule I has a "high potential for abuse and has no currently accepted medical use in treatment in the United States."¹ A drug in Schedule V has a low potential for abuse relative to the substances in Schedule IV and has a currently accepted medical use in treatment in the United States, and abuse of such compound, mixture or preparation may lead to limited physical or psychological dependence relative to the substances in Schedule IV."²

Methamphetamine: Methamphetamine is a Schedule II controlled substance.³ Methamphetamine is a highly addictive nerve stimulant found in virtually every metropolitan area of the country, according to the U.S. Drug Enforcement Agency (DEA). Commonly called "speed," "crank," "crystal," or "zip," methamphetamine can be smoked, injected, snorted, or taken orally. It produces an initial "high," lasting between 15 and 30 minutes, that is difficult, if not impossible for the user to repeat, leading the user to ingest more and more of the drug and go on longer binges. Methamphetamine's psychological side-effects include paranoia, hallucinations and delusions of insects or parasites crawling under the skin. Long-time use results in a decline in physical health. According to the Office of National Drug Control Policy⁴:

Methamphetamine can be easily manufactured in clandestine laboratories (meth labs) using ingredients purchased in local stores. Over-the-counter cold medicines containing ephedrine or pseudoephedrine and other materials are "cooked" in meth labs to make methamphetamine.

The manufacture of methamphetamine has a severe impact on the environment. The production of one pound of methamphetamine releases poisonous gas into the atmosphere and creates 5 to 7 pounds of toxic waste. Many laboratory operators dump the toxic waste down household drains, in fields and yards, or on rural roads.

Due to the creation of toxic waste at methamphetamine production sites, many first response personnel incur injury when dealing with the hazardous substances. The most common symptoms suffered by first responders when they raid meth labs are respiratory and eye irritations, headaches, dizziness, nausea, and shortness of breath.

¹ s. 893.03(1), F.S. LSD and heroin are examples of Schedule I controlled substances.

² s. 893.03(5), F.S.

³ s. 893.03(2)(c), F.S.

⁴ <http://www.whitehousedrugpolicy.gov/publications/factsht/methamph/>

Meth labs can be portable and so are easily dismantled, stored, or moved. This portability helps methamphetamine manufacturers avoid law enforcement authorities. Meth labs have been found in many different types of locations, including apartments, hotel rooms, rented storage spaces, and trucks. Methamphetamine labs have been known to be boobytrapped and lab operators are often well armed.

Limitations on sale of pseudoephedrine, ephedrine, and phenylpropanolamine: As explained above, cold medication containing ephedrine, pseudoephedrine, and phenylpropanolamine can be used to manufacture methamphetamine. HB 1347 creates s. 893.1495, F.S., which provides that no person shall deliver in any single over-the-counter retail sale:

- any number of packages of any drug containing a sole active ingredient that he or she knows to contain a combined total of more than 9 base grams of ephedrine, pseudoephedrine, phenylpropanolamine, or any of their salts, optical, isomers, or salts of optical isomers,
- more than 3 packages, regardless of weight containing any such sole active ingredient

A person who knowingly violates this section commits a second degree misdemeanor for a first offense, a first degree misdemeanor for a second offense and a third degree felony for a third or subsequent offense. As a result of this provision, a person would still be able to buy medication that does not currently require a prescription containing a sole-active ingredient of ephedrine, pseudoephedrine or phenylpropanolamine without a prescription but would be limited as to how much he or she could purchase at one time and, as explained below, would have to obtain the medication from behind the counter.

The bill provides that a person who is considered the general owner or operator of the outlet where ephedrine, pseudoephedrine or phenylpropanolamine products are available for retail sale shall provide an employee training program, which contains instruction on state and federal regulations related to such products, to each employee engaged in the retail sale of such products. Any owner, operator or employee of an individual retail outlet who knowingly violated the provisions of the section commits a second degree misdemeanor for a first offense, a first degree misdemeanor for a second offense and a third degree felony for a third or subsequent offense.

This section will supersede any municipal ordinance or regulation passed on or after July 1, 2005, to the extent that such ordinance or regulation is more restrictive than the provisions of the section.

The bill also provides that packages of any drug having a sole active ingredient of ephedrine, pseudoephedrine, phenylpropanolamine, or any of their salts, optical, isomers, or salts of optical isomers shall be displayed and offered for sale only behind a checkout counter where the public is not permitted.

Manufacture of methamphetamine or phencyclidine with child present: The bill provides that if any person manufactures methamphetamine or phencyclidine or possesses any listed chemical with an intent to manufacture methamphetamine or phencyclidine and the commission or attempted commission of the crime occurs in a structure or conveyance where any child under 16 years of age is present, the person commits a first degree felony and must be sentenced to a minimum mandatory term of imprisonment of 5 calendar years. If, during the commission of the crime, the defendant causes a child under the age of 16 years to suffer great bodily harm, the defendant commits a first degree felony and must be sentenced to a minimum mandatory term of imprisonment of 10 calendar years.

Trafficking in pseudoephedrine: Section 893.135(1)(f), F.S., provides enhanced criminal penalties for drug trafficking. A person who knowingly sells, purchases, manufactures, delivers or brings into Florida, or who is knowingly in actual or constructive possession of, 14 grams or more of amphetamine or methamphetamine or of any mixture containing amphetamine or methamphetamine, phenylacetone, phenylacetic acid, or ephedrine in conjunction with other chemicals and equipment utilized in the manufacture of amphetamine or methamphetamine, commits a first degree felony. The section provides enhanced penalties for larger amounts of unlawful drugs specified in the section and involved in drug trafficking. If the amount of the unlawful drug

specified in the section is 14 grams or more but less than 28 grams, the person must be sentenced to a minimum mandatory term of imprisonment of 3 years and pay a fine of \$50,000. If the amount of the unlawful drug specified in the section is 28 grams or more, but less than 200 grams, the person must be sentenced to a minimum mandatory term of imprisonment of 7 years and pay a fine of \$100,000. If the amount of the unlawful drug specified in the section is 200 grams or more, the person must be sentenced to a minimum mandatory term of imprisonment of 15 years and ordered to pay a fine of \$250,000. A defendant commits a capital felony if he or she knowingly manufactures or brings into Florida 400 grams or more of an unlawful drug specified in the section and knows that the probable result of such manufacture or importation would be the death of any person. Any person sentenced for a capital felony must pay \$250,000.

HB 1347 adds pseudoephedrine to the list of controlled substances in this trafficking provision.

Storage of anhydrous ammonia: Anhydrous ammonia is a chemical which is used as an agricultural fertilizer and an industrial refrigerant. Anhydrous ammonia is a necessary component to one method of methamphetamine production. Anhydrous ammonia has a strong attraction to water and can cause severe burns and can dehydrate skin. As a result, strict engineering codes exist for all equipment designed to store and transport anhydrous equipment; propane tanks, gasoline cans, and other common containers typically used by thieves and methamphetamine manufacturers are inadequate.

The use of "makeshift containers" by anhydrous ammonia thieves and illegal methamphetamine manufacturers increases the chances of dangerous discharges or explosions because of improper handling. Commercial storage of anhydrous ammonia is regulated through container specifications required by the U.S. Department of Transportation. For example, some storage containers for anhydrous ammonia must have rated pressure relief devices to reduce the likelihood of over-pressurization. Because anhydrous ammonia is corrosive, specific valves and hoses that do not readily corrode have to be used.

HB 1347 makes it unlawful to store anhydrous ammonia in a container that is not approved by the U.S. Department of Transportation to hold anhydrous ammonia; or that is not constructed in accordance with sound engineering, agricultural, or commercial practices. Any person who violates this provision by unlawfully storing anhydrous ammonia commits a third degree felony.

Injury to a law enforcement officer: HB 1347 provides that if a person violates any provision of chapter. 893, F.S., and such violation results in a serious injury to a state, local, or federal law enforcement officer, the person commits a third degree felony. If the injury sustained by the law enforcement officer results in death or great bodily harm, the person commits a second degree felony.

Precursor chemicals and essential chemicals: Section 893.033(1), F.S., defines "listed precursor chemical" as a chemical that may be used in manufacturing a controlled substance in violation of ch. 893, F.S., and is critical to the creation of the controlled substance. Section 893.033(2), F.S., defines "listed essential chemical" as a chemical that may be used as a solvent, reagent, or catalyst in manufacturing a controlled substance in violation of ch. 893, F.S. Section 893.149, F.S., makes it is a second degree felony to possess a listed chemical with the intent to unlawfully manufacture a controlled substance or possess or distribute a listed chemical knowing, or having reasonable cause to believe that the listed chemical will be used to unlawfully manufacture a controlled substance.

HB 1347 amends s. 893.033(1), F.S., to add benzaldehyde, hydriodic acid and nitroethane and delete benzyl chloride and anhydrous ammonia from the list of "precursor chemicals." Subsection (2) is amended to add anhydrous ammonia, benzyl chloride, hydrochloric gas and iodine to the list of "essential chemicals". According to the Florida Department of Law Enforcement, this change mirrors the federal law.

HB 1347 amends s. 893.149, F.S., relating to possession of a listed chemical, to provide that the section does not apply to a public employee or private contractor authorized to clean up or dispose of hazardous waste or toxic substances pursuant to the provisions of ch. 893, F.S. Any damages arising out of the unlawful possession of, storage of, or tampering with a listed chemical, as defined in s. 893.033, F.S., must be the sole responsibility of the person or persons unlawfully possessing, storing, or tampering with the listed chemical. In

no case shall liability for damages arising out of the unlawful possession of, storage of, or tampering with a listed chemical extend to the lawful owner, installer, maintainer, designer, manufacturer, possessor, or seller of the listed chemical, unless such damages arise out of the acts or omissions of the owner, installer, maintainer, designer, manufacturer, possessor, or seller which constitute negligent misconduct or failure to abide by the laws regarding the possession or storage of a listed chemical.

Selling controlled substance within 1000 feet of assisted living facility: Currently, section 893.13, F.S., provides penalties for various drug offenses depending on the type and quantity of the controlled substance as well as the location where the offense occurs. The severity of the offenses of sale, manufacture or delivery of a controlled substance or possession with intent to sell, manufacture or deliver a controlled substance are increased if the offense occurs within 1,000 feet of the following locations:

- a child care facility or school⁵
- a park, community center or recreational facility⁶
- a public or private college, university or other postsecondary educational institution⁷
- a place of worship⁸
- a convenience business⁹
- a public housing facility¹⁰

For most Schedule I drugs¹¹, and some Schedule II drugs, the severity of the offense is increased from a second degree felony to a first degree felony if it occurs within 1,000 feet of one of the locations listed above. For other Schedule I and Schedule II drugs as well as Schedule III and Schedule IV drugs¹², the severity of the offense is increased from a third degree felony to a second degree felony if the offense occurs within 1,000 feet of one of the locations listed above.

HB 1347 amends s. 893.13, F.S., to increase the severity of the sale, manufacture or delivery of a controlled substance or the possession with intent to sell, manufacture or deliver a controlled substance that occurs within 1,000 feet of an assisted living facility¹³. For most Schedule I drugs, and some Schedule II drugs, the severity of the offense will be increased from a second degree felony to a first degree felony if the offense occurs within 1,000 feet of an assisted living facility. This will result in the maximum sentence for the offense increasing from fifteen years to thirty years.¹⁴ For other Schedule I and Schedule II drugs, as well as Schedule III and Schedule IV drugs, the severity of the offense will be increased from a third degree felony to a second degree felony if the offense occurs within 1,000 feet of an assisted living facility. This will result in the maximum sentence for the offense increasing from five years to fifteen years.

C. SECTION DIRECTORY:

Section 1. Amends s. 893.033, F.S., to revise definitions of "listed precursor chemical" and "listed essential chemical".

⁵ s. 893.13(1)(c), F.S.

⁶ s. 893.13(1)(c), F.S.

⁷ s. 893.13(1)(d), F.S.

⁸ s. 893.13(1)(e), F.S.

⁹ s. 893.13(1)(e), F.S.

¹⁰ s. 893.13(1)(f), F.S.

¹¹ Includes offenses listed in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b) and (2)(c)4, F.S.

¹² Includes offenses listed in s. 893.03(1)(c), (2)(c)1, (2)(c)2, (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3) and (4), F.S.

¹³ The bill provides that the term "assisted living facility" is defined as the term is used in chapter 400. Section 400.402(6) defines the term to mean "any building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, or other residential facility, whether operated for profit or not, which undertakes through its ownership or management to provide housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator."

¹⁴ s. 775.082. F.S.

Section 2. Amends s. 893.13, F.S., to provide criminal penalties for manufacture of certain controlled substances if child present; prohibits sale, manufacture of controlled substance within 1,000 feet of assisted living facility; prohibits storing anhydrous ammonia in container not approved by United States Department of Transportation or not constructed in accordance with certain practices; provides criminal penalties for violation of chapter 893 that results in injury to law enforcement officer.

Section 3. Amends s. 893.135, F.S., to add pseudoephedrine to trafficking statute.

Section 4. Amends s. 893.149, F.S.; exempts public employees or private contractors authorized to clean up or dispose of hazardous waste or toxic substances pursuant to the provisions of chapter 893, F.S. from offenses related to possession of listed chemicals; specifies that damages arising from the unlawful possession of, storage of, or tampering with listed chemicals as defined in s. 893.033, F.S., shall be the sole responsibility of the person or persons engaged in the unlawful activity.

Section 5. Creates s. 893.1495, F.S., to restrict sale of drug containing ephedrine, pseudoephedrine or phenylpropanolamine; provides criminal penalties.

Sections 6-25: Reenacts 311.12(3)(c), 397.451(4)(b) and (6), 414.095, 435.04, 772.12, 775.087(2)(a) & (3)(a), 782.04(1)(a), (3)(a) & (4)(a), 893.02(12), 893.1351(1), 903.133, 907.041(4)(c), 921.0022(3)(g), (h), (i), 921.0024(1), 921.142(2), 921.187(1), 943.0585, 943.059, 948.034(1), (2) for the purpose of incorporating amendments to ss. 893.13, 893.033 or 893.135 by reference.

Section 26: Provides effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Estimating Conference has determined that the prison bed impact of this bill would be indeterminate with minimal impact expected.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Because the bill limits the quantity of medication containing a single active ingredient that can be sold during a single transaction, this bill could have a negative fiscal impact on businesses who sell this type of medication. Further, employee training regarding the new restrictions will be necessary.

D. FISCAL COMMENTS:

See above for further details.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee adopted an amendment which clarified that the provision limiting the sale of ephedrine, pseudoephedrine or phenylpropanolamine applies only to retail sales. The amendment also removed language which would have required the Department of Health to exempt by rule products that have been formulated in such a way to effectively prevent the conversion of the active ingredient into methamphetamine. The amendment also provides that a person who is considered the general owner or operator of the outlet where ephedrine, pseudoephedrine or phenylpropanolamine products are available for retail sale must provide an employee training program, which contains instruction on state and federal regulations related to such products, to each employee engaged in the retail sale of such products. Any owner, operator or employee of an individual retail outlet who violated the provisions relating to the sale of these products shall not be penalized for a first violation but must thereafter be in full compliance with the provisions of the section.

On April 15, 2005, the Justice Appropriations Committee adopted an amendment that revises the Committee Substitute for HB 71 by providing that an individual shall not "*knowingly*" market, sell or distribute any drug containing ephedrine, pseudoephedrine or phenylpropanolamine or "*knowingly*" allow an employee to do so. The amendment also reduces the penalties for this offense - a first offense is revised from a first degree misdemeanor to a second degree misdemeanor and a second offense is revised from a third degree felony to a first degree misdemeanor. The bill was reported favorably with a committee substitute.