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## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

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**2005 Senate Bill 78**

**Senate Substitute Amendment 2**

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Senate Bill 78 creates regulations relating to the sale of pseudoephedrine and handling of other substances used in the manufacturing of methamphetamine. This memorandum describes Senate Substitute Amendment 2 to the bill.

### **CLASSIFICATION OF PSEUDOEPHEDRINE AS A CONTROLLED SUBSTANCE**

#### **Current Law**

Pseudoephedrine is an ingredient in over-the-counter medications, such as Sudafed, and is used to produce methamphetamine. Pseudoephedrine is currently not classified as a controlled substance.

#### **The Substitute Amendment**

The substitute amendment classifies any pseudoephedrine product as a Schedule V controlled substance. “Pseudoephedrine product” is defined in the substitute amendment as a material, compound, mixture, or preparation containing any quantity of pseudoephedrine or any of its salts, isomers, or salts of isomers but does not include such a product if any of the following applies:

- The product is a pseudoephedrine liquid<sup>1</sup> or liquid-filled pseudoephedrine gelcap.<sup>2</sup> This exception does *not* apply if the Controlled Substances Board has determined, by rule, that the product can be readily used in the manufacture of methamphetamine.

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<sup>1</sup> “Pseudoephedrine liquid” is defined as a product that is intended to be sold at retail, that is a liquid at room temperature, and that contains pseudoephedrine or any of its salts, isomers, or salts of isomers.

<sup>2</sup> “Liquid-filled pseudoephedrine gelcap” is defined as a soft, liquid-filled gelatin capsule that is intended to be sold at retail and that contains pseudoephedrine or any of its salts, isomers, or salts of isomers.

- The Controlled Substances Board has determined, by rule, that the pseudoephedrine product cannot be readily used in the manufacture of methamphetamine.

Currently, controlled substances are classified into five schedules. Substances may be classified by statute or the Controlled Substances Board may classify a substance by rule. Classification by the board must be based on criteria such as the potential for abuse and the risk to the public health. [s. 961.11 (1) and (1m), Stats.]

Schedule I controlled substances have a high potential for abuse, have no currently accepted medical use in treatment in the United States, and lack accepted safety for use in treatment under medical supervision. [s. 961.13 (1), Stats.]

Schedule V controlled substances have a low potential for abuse relative to the controlled substances included in Schedule IV, have currently accepted medical use in treatment in the United States, and have limited physical dependence or psychological dependence liability relative to the controlled substances included in Schedule IV. [s. 961.21 (1), Stats.] Schedule V controlled substances must be dispensed as follows:

- They must be dispensed and sold in good faith as a medicine, and not for the purpose of evading the Uniform Controlled Substances Act.
- They must be sold at retail only by a registered pharmacist when sold in a retail establishment.
- When sold in a retail establishment, the substance must bear the name and address of the establishment on the immediate container.
- Any person purchasing the substance must, at the time of purchase, present to the seller that person's name and address. The seller must record the name and address and the name and quantity of the product sold. The purchaser and seller must sign the record of the transaction.

[s. 961.23, Stats.]

The substitute amendment includes the following additional requirements for dispensing a pseudoephedrine product:

- In addition to presenting one's name and address, a person purchasing a pseudoephedrine product must present an identification card containing the person's photograph.
- A pseudoephedrine product may be sold by a pharmacist *or* a person who is working under the direction of a registered pharmacist. The supervising pharmacist must sign the record of the transaction when a product is sold by a person working under the direction of a pharmacist, however.
- The records of transactions of sales of pseudoephedrine products may be kept in either a paper or electronic format and must be maintained by the pharmacy for at least two years. Only a pharmacist or a law enforcement officer may have access to information recorded with respect to the sale of a pseudoephedrine product.

- No person may sell a pseudoephedrine product to a person under 18 years of age, and no person under 18 years of age may purchase a pseudoephedrine product.

The substitute amendment also provides that no person, other than a physician, dentist, veterinarian, or pharmacist may purchase more than **7.5 grams** of a pseudoephedrine product within a 30-day period without the authorization of a physician, dentist, or veterinarian.

### **CRIMINAL OFFENSES RELATING TO DELIVERY OF PSEUDOEPHEDRINE**

#### **Current Law**

A person who dispenses a Schedule V controlled substance in violation of the requirements for dispensing may be charged with distribution or delivery of a Schedule V controlled substance, which is a Class I felony, punishable by a fine not to exceed \$10,000 and a term of imprisonment and extended supervision not to exceed three years and six months. [s. 961.41 (1) (j), Stats.]

Acquiring or obtaining possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge is a Class H felony, punishable by a fine not to exceed \$10,000 and a term of imprisonment and extended supervision not to exceed six years. A person purchasing a Schedule V controlled substance who gives a false name or address is presumed to have violated this provision. [s. 961.23 (4), Stats.]

#### **The Substitute Amendment**

Because pseudoephedrine products are Schedule V controlled substances under the substitute amendment, the penalties relating to Schedule V controlled substances in current law apply to pseudoephedrine products under the substitute amendment. In addition, the substitute amendment creates additional penalties.

Under the substitute amendment, a person who purchases within a 30-day period more than 7.5 grams of a pseudoephedrine product other than by purchasing the product in person from a pharmacy or pharmacist is guilty of a Class I felony. This provision does not apply to a purchase authorized by a physician, dentist, or veterinarian.

The substitute amendment provides that no person may knowingly solicit, hire, direct, employ, or use another to purchase, on behalf of the person, pseudoephedrine with the intent to acquire more than 7.5 grams of a pseudoephedrine product within a 30-day period. This offense is a Class I felony unless the person who was solicited, hired, directed, employed, or used was under 18 years of age. In that case, the offense is a Class H felony.

It is also a Class I felony under the substitute amendment to purchase pseudoephedrine on behalf of another with the intent to facilitate another person's manufacture of methamphetamine.

A person who proves all of the following by a preponderance of the evidence has a defense to a prosecution of delivering or distributing a pseudoephedrine product that is based upon a violation of a requirement for dispensing a pseudoephedrine product:

- The person did not knowingly or recklessly violate the condition.
- The person reported his or her own violation to a law enforcement officer in the county or municipality in which the violation occurred within 30 days after the violation.

A seller who proves all of the following by a preponderance of the evidence has a defense to such a prosecution:

- The person did not knowingly or recklessly violate the condition.
- The acts or omissions constituting the violation of the condition were the acts or omissions of one or more of the person's employees.
- The person provided training to each of those employees regarding the restrictions on the delivery of pseudoephedrine products.

A person who proves all of the following by a preponderance of the evidence has a defense to a prosecution for selling more than 7.5 grams of a pseudoephedrine product to a person in a 30-day period:

- The purchaser presented an identification card that contained a name or address other than the person's own.
- The appearance of the purchaser was such that an ordinary and prudent person would believe that the purchaser was the person depicted in the photograph contained in that identification card.
- The sale was made in good faith, in reasonable reliance on the identification card and appearance of the purchaser, and in the belief that the name and address of the purchaser were as listed on the identification card.

A person who proves all of the following by a preponderance of the evidence has a defense to a prosecution for selling a pseudoephedrine product to a person under 18 years of age:

- The purchaser presented an identification card that indicated that he or she was 18 years of age or older.
- The appearance of the purchaser was such that an ordinary and prudent person would believe that the purchaser was 18 years of age or older.
- The sale was made in good faith, in reasonable reliance on the identification card and appearance of the purchaser, and in belief that the purchaser was 18 years of age or older.

### **POSSESSION OF METHAMPHETAMINE PRECURSORS**

The substitute amendment prohibits the possession of an ephedrine or pseudoephedrine product, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, or pressurized ammonia with intent to manufacture methamphetamine. Under the substitute amendment, possession of materials used

in manufacture of methamphetamine is a Class H felony. Possession of more than **9 grams** of ephedrine or pseudoephedrine, other than pseudoephedrine contained in a product that is not included as a Schedule V controlled substance, creates a rebuttable presumption of intent to manufacture methamphetamine. This penalty may be increased by five years if the person intended to distribute methamphetamine within 1,000 feet of certain places, such as a school or a park.

Under the substitute amendment, when making a sentencing decision concerning a person convicted of the above offense, the court must consider as an aggravating factor that the person intended to deliver or distribute methamphetamine to a prisoner within the precincts of any prison, jail, or house of correction or knowingly used a public transit vehicle during the violation.

### **STANDARDS FOR STORAGE OF CONTROLLED SUBSTANCES BY DISTRIBUTORS AND MANUFACTURERS**

#### **Current Law**

Under current law, the Pharmacy Examining Board must adopt rules setting minimum standards for manufacturing and distributing drugs. [s. 450.07 (4) (b), Stats.]

#### **The Substitute Amendment**

The substitute amendment provides that rules for manufacturing and distributing drugs may not impose requirements regarding the storage of a controlled substance in a safe, a steel cabinet, a vault, or any other secure storage compartment, area, room, or building *unless*: (1) the controlled substance is included in Schedule I, II, III, or IV under current Wisconsin law; or (2) the controlled substance is also a controlled substance under federal law.

### **AGRICULTURAL CHEMICALS USED TO MANUFACTURE METHAMPHETAMINE**

#### **Current Law**

Under current law, no person may do any of the following:

- Store, hold, or transport anhydrous ammonia into a container that does not meet the requirements of the rules for safe storage and handling promulgated by the Department of Commerce.
- Transfer or attempt to transfer anhydrous ammonia into a container that does not meet the requirements of the rules for safe storage and handling.
- Transfer or attempt to transfer anhydrous ammonia without the consent of the owner of the anhydrous ammonia.
- Intentionally cause damage to anhydrous ammonia equipment without the consent of the owner of the equipment.

- Intentionally take, carry away, use, conceal, or retain possession of anhydrous ammonia or anhydrous ammonia equipment belonging to another without the other's consent and with intent to deprive the owner permanently of the anhydrous ammonia or the equipment.

In general, a violation of the above provisions is a Class I felony. [s. 101.10, Stats.]

### **The Substitute Amendment**

The substitute amendment prohibits intentionally releasing or allowing the escape of anhydrous ammonia belonging to another into the atmosphere. This provision does not apply if the owner has authorized the actor to exercise control over the anhydrous ammonia or has consented to its release. The offense is a Class I felony.

The substitute amendment also provides that a person who attempts to intentionally take, carry away, use, conceal, or retain possession of anhydrous ammonia, or anhydrous ammonia equipment belonging to another without the other's consent and with intent to deprive the owner permanently of the anhydrous ammonia or the equipment is subject to the penalty for the completed act. Generally, an attempt to commit an offense is punishable by one-half of the maximum fine and one-half of the maximum imprisonment for the completed offense. [See s. 939.32, Stats.]

### **EFFECTIVE DATE**

The substitute amendment provides that the legislation takes effect on the first day after publication except that the provisions providing that pseudoephedrine products are a Schedule V controlled substance and the requirements for dispensing a pseudoephedrine product as a Schedule V controlled substance takes effect on the first day of the fourth month beginning after publication.

### **LEGISLATIVE HISTORY**

The Senate adopted Senate Substitute Amendment 2 on a voice vote and passed the bill, as amended, on a vote of Ayes, 33; Noes, 0. The Assembly concurred in the bill on a vote of Ayes, 92; Noes, 6.

AS:ksm