



Ohio Legislative Service Commission

Bill Analysis

Dennis M. Papp

S.B. 372

130th General Assembly
(As Introduced)

Sens. Eklund, Manning, Patton, Lehner, Seitz, Uecker

BILL SUMMARY

- Requires the Attorney General to add, by an emergency rulemaking procedure specified in the bill, an unscheduled substance to schedule I of Ohio's controlled substance schedules if the Attorney General determines that the substance poses an imminent hazard to the public.
- Authorizes the Attorney General to do either of the following by rule adopted in accordance with the Administrative Procedure Act: (1) add an unscheduled substance to schedule I if the substance has no accepted medical use or (2) remove a substance from schedule I after it was added by the Attorney General.
- Requires the Attorney General to consult with the State Board of Pharmacy when adding a substance to or removing a substance from schedule I.
- Requires the Attorney General to compile, update, and maintain on the Attorney General's website a list of the substances the Attorney General adds to or removes from schedule I.

CONTENT AND OPERATION

Controlled substance schedules

Under both federal and state law, certain drugs and chemicals are regulated as controlled substances.¹ These substances are listed on one of five schedules, designated as schedule I, II, III, IV, or V, according to whether the substances have a currently

¹ 21 United States Code (U.S.C.) 812, 21 Code of Federal Regulations 1308.11 to 1308.15, and R.C. Chapters 2925. and 3719.

accepted medical use in treatment in the United States, their relative potential for abuse, and their likelihood of causing dependence when abused.²

Ohio's schedules of controlled substances are included in the Revised Code.³ These statutory schedules, however, are subject to the following changes:

(1) If the U.S. Attorney General makes a controlled substance scheduling change under federal drug abuse control laws, the same change is automatically effected in the corresponding schedules in Ohio;⁴

(2) The State Board of Pharmacy may make a change to any of Ohio's controlled substance schedules by adopting a rule to do so in accordance with the Administrative Procedure Act (R.C. Chapter 119.).⁵

Classification as schedule I

A schedule I classification indicates the following: (1) the substance has no currently accepted medical use in treatment in the United States, (2) there is a lack of accepted safety for its use under medical supervision, and (3) it has a high potential for abuse. Examples include marijuana, heroin, lysergic acid diethylamide (LSD), and 3,4-methylenedioxymethamphetamine ("Ecstasy").⁶ Current law prohibits possession of a schedule I controlled substance and prohibits a health professional from prescribing a schedule I controlled substance.⁷

Schedule I changes by the Ohio Attorney General

The bill establishes two ways for the Ohio Attorney General to make changes to Ohio's list of schedule I controlled substances by adding a compound, mixture, preparation, or substance (hereinafter "substance") that was unscheduled. These procedures are in addition to the existing authority of the State Board of Pharmacy to make changes to any of the five controlled substance schedules.

² U.S. Department of Justice, Drug Enforcement Administration, Office of Diversion Control, *Resources: Controlled Substance Schedules* (last visited November 12, 2014), available at <<http://www.deadiversion.usdoj.gov/schedules/>>.

³ R.C. 3719.01 and 3719.41.

⁴ R.C. 3719.43.

⁵ R.C. 3719.44, not in the bill.

⁶ R.C. 3719.41, 21 U.S.C. 812(b)(1), and *Controlled Substance Schedules*.

⁷ R.C. 2925.03, 2925.11, 2925.36, and 3719.06, not in the bill.



First, if the Attorney General determines that an unscheduled substance poses an imminent hazard to the public, the bill requires the Attorney General to add the substance to schedule I. In this case, the substance is to be added by an emergency rulemaking procedure specified in the bill.⁸ Second, if an unscheduled substance has no accepted medical use in treatment, the bill authorizes the Attorney General to add the substance to schedule I. In this case, the substance is to be added by rule adopted in accordance with the Administrative Procedure Act.⁹

The bill also permits the Attorney General to remove a substance from schedule I that was added by the Attorney General. The substance is to be removed by rule adopted in accordance with the Administrative Procedure Act.¹⁰

Additions by emergency rulemaking

Under the bill, the Attorney General must add, by emergency rule adopted in accordance with the bill, an unscheduled substance to schedule I if the Attorney General determines, in consultation with the Board, that both of the following are the case:

- (1) The substance has no accepted medical use in treatment in Ohio;
- (2) The substance poses an imminent hazard to the public health, safety, or welfare.

Imminent hazard determination

In determining whether an unscheduled substance poses an imminent hazard to the public health, safety, or welfare, the Attorney General must consider all of the following factors:

- (1) Its actual or relative potential for abuse;
- (2) The scope, duration, and significance of abuse;
- (3) The risk to the public health, as reported by hospitals or licensed health care professionals;
- (4) Reports of law enforcement officials, emergency medical services personnel, and emergency facility personnel;

⁸ R.C. 3719.46

⁹ R.C. 3719.45(A)(1).

¹⁰ R.C. 3719.45(A)(2).



(5) Whether it has been added to or removed from schedule I on a temporary basis under the laws of other states.

Board review

On determining that the substance has no accepted medical use in treatment in Ohio and poses an imminent hazard to the public health, safety, or welfare, the Attorney General must provide to the Board a written statement that includes both of the following:

- (1) The full text of the proposed emergency rule;
- (2) The reasons for the Attorney General's determination.

On receipt of the statement, the Board must make its own determination as to whether the substance has no accepted medical use in treatment in Ohio and poses an imminent hazard to the public health, safety, or welfare. The bill requires the Board to consider the same factors, as described above, that the Attorney General must consider.

The Board must give written notice of its determination to the Attorney General as soon as practicable. Failure of the Board to give notice prior to the 31st day after receipt of the statement must be treated by the Attorney General as a determination by the Board that the substance has no accepted medical use in treatment and poses an imminent hazard to the public health, safety, or welfare.

Agreement on medical use and imminent hazard status

If the Board determines that the substance has an accepted medical use in treatment or does not pose an imminent hazard to the public health, safety, or welfare, it must include with the written notice a statement specifying the reasons for its determination. Under the bill, the Attorney General may then modify its proposed rule to address the Board's reasons. The bill provides that the Board and Attorney General must continue this process until an agreement is reached.

Order for emergency rule adoption

If the Attorney General and the Board agree that the substance has no accepted medical use in treatment and poses an imminent hazard to the public health, safety, or welfare, the Attorney General must issue an order suspending the procedure required by the Administrative Procedure Act for the adoption of nonemergency rules. The bill also specifies that the procedure required by the Administrative Procedure Act for the

adoption of emergency rules does not apply in this instance (see "**Administrative Procedure Act background**," below).¹¹

The order must state the reasons why the Attorney General and the Board determined that the substance has no accepted medical use in treatment and poses an imminent hazard. The Attorney General must file this order in electronic form with the Secretary of State, the LSC Director, and the Joint Commission on Agency Rule Review (JCARR) and must adopt the emergency rule.

Effective date and duration of emergency rule

An emergency rule adopted under the bill is effective on the day it is filed in final form electronically with the Secretary of State, the LSC Director, and JCARR. The LSC Director must publish the full text of the rule in the *Register of Ohio*.

The emergency rule is valid until the end of the 364th day after the day it takes effect. Before that date, the Attorney General or the Board may adopt the rule as a nonemergency rule by complying with the procedure specified in the Administrative Procedure Act.

If the Attorney General or the Board begins the procedure for adopting the emergency rule as a nonemergency rule before the end of the 364th day, but the nonemergency rule is not yet final at the end of the 364th day, the emergency rule remains valid for an additional 365 days or until the nonemergency rule is final, whichever is earlier.

Additions and removal by Administrative Procedure Act rulemaking

The bill authorizes the Attorney General to do either of the following by rule adopted in accordance with the Administrative Procedure Act's rulemaking process, which generally requires public notice and a public hearing but also includes procedures for adopting rules on an emergency basis (see "**Administrative Procedure Act background**," below):

(1) Add to schedule I an unscheduled substance that has no accepted medical use in treatment in Ohio;

(2) Remove from schedule I a substance that was added by the Attorney General.

¹¹ R.C. 119.03(F).

Board review

Before a substance is added to or removed from schedule I by rule adopted in accordance with the Administrative Procedure Act, the Attorney General must request a statement of the Board's position on the proposed action. Not later than 30 days after receiving the request, the Board must provide a written statement of its position to the Attorney General. The statement must include a discussion of the potential impact of the action on the practice of pharmacy. The Board may determine its position by resolution adopted during a public meeting or telephone conference call.

Factors to consider

The Attorney General may, by rule adopted under the Administrative Procedure Act, add a substance to or remove it from schedule I only after considering all of the following with regard to the substance:

- (1) Its actual or relative potential for abuse;
- (2) Its history and current pattern of abuse;
- (3) The scope, duration, and significance of abuse;
- (4) The risk to the public health, as reported by hospitals or licensed health care professionals;
- (5) Reports of law enforcement officials, hospitals, or licensed health care professional;
- (6) Whether it has been added to or removed from schedule I under the laws of other states;
- (7) The position of the Board;
- (8) Any other information that the Attorney General considers relevant.

Attorney General website information

The bill requires the Attorney General to compile and periodically update a list of substances that are added to or removed from schedule I by the Attorney General. A copy of the list must be maintained on the Attorney General's website. The bill also requires the Attorney General to include on the website a notation that Ohio's list of schedule I controlled substances is contained in R.C. 3719.41.¹²

¹² R.C. 109.44.



Administrative Procedure Act background

In general, when adopting a rule under the Administrative Procedure Act, an agency must do all of the following:

- (1) Give public notice of its intention to adopt a rule;
- (2) File the proposed rule with the Secretary of State, the LSC Director, and JCARR;
- (3) Hold a public hearing on the proposed rule;
- (4) Adopt the proposed rule and file it in final form.¹³

The Administrative Procedure Act also allows for the adoption of an emergency rule. At the request of an agency, the Governor may suspend the rulemaking procedure upon determining that an emergency exists. The agency may then immediately adopt the rule without complying with the notice and hearing requirements that otherwise generally apply. An emergency rule takes effect immediately on filing, but expires on the 91st day after its effective date, unless the agency adopts it as nonemergency rule in the meantime.¹⁴

HISTORY

| ACTION | DATE |
|------------|----------|
| Introduced | 10-16-14 |

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¹³ R.C. 119.03.

¹⁴ R.C. 119.03(F).

