

SUBJECT: Regulation of abusable synthetic substances

COMMITTEE: Public Health — favorable, without amendment

VOTE: 8 ayes — Crownover, Naishtat, Blanco, Coleman, S. Davis, Sheffield,
Zedler, Zerwas

0 nays

3 absent — Collier, Guerra, R. Miller

WITNESSES: For — (*Registered, but did not testify*: Kathy Hutto, Coalition for Nurses in Advanced Practice; Tiana Sanford, Montgomery County District Attorney's Office; Troy Alexander and Michelle Romero, Texas Medical Association; Ryan Van Ramshorst, Texas Pediatric Society; Lon Craft, Texas Municipal Police Association; Michele Owens)

Against — None

On — Brady Mills, Texas Department of Public Safety Crime Laboratory (*Registered, but did not testify*: Karen Tannert, Department of State Health Services)

BACKGROUND: A “consumer commodity” is defined by Health and Safety Code, ch. 431 to mean any food, drug, device, or cosmetic, as those terms are defined in Chapter 431 or by the federal Food, Drug, and Cosmetic Act. It also would include any other article, product, or commodity that is customarily produced or distributed for sale and consumed or used by individuals under circumstances as defined in statute.

The term does not include:

- a meat or meat product, poultry or poultry product, or tobacco or tobacco product;
- a commodity subject to packaging or labeling requirements imposed under the Federal Insecticide, Fungicide and Rodenticide

- Act or the Virus-Serum-Toxin Act;
- a drug intended for use by man that is not safe for use except under the supervision of a practitioner legally licensed to administer the drug;
 - a misbranded drug or device that is a color additive intended only for coloring;
 - a drug subject to the provisions of the federal Food, Drug, and Cosmetic Act, sec. 503(b)(1);
 - a beverage subject to or complying with packaging or labeling requirements under the federal Alcohol Administration Act; or
 - a commodity subject to the provisions of Agriculture Code, ch. 61 relating to the inspection, labeling, and sale of agricultural and vegetable seed.

Health and Safety Code, ch. 481 established the Texas Controlled Substances Act, which categorizes controlled substances into penalty groups and provides specific penalties. Health and Safety Code, sec. 481.1031 defines Penalty Group 2-A as any quantity of a synthetic chemical compound that is a cannabinoid receptor agonist and mimics the pharmacological effect of naturally occurring cannabinoids — effectively, synthetic cannabis or marijuana. Penalty Group 2-A provides offenses for possession of a controlled substance in this group that range from a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) to life in prison.

DIGEST: HB 1212 would allow the Department of State Health Services (DSHS) commissioner to designate a consumer commodity as an “abusable synthetic substance” and would allow the commissioner to issue an emergency order to schedule that substance as a controlled substance.

Definitions. The bill would include within the definitions of “controlled substance” and “controlled substance analogue” Penalty Group 2-A, which governs synthetic cannabinoid substances. The bill also would add Penalty Group 2-A to the list of penalty groups that, for the purposes of prosecution, include controlled substance analogues that are structurally similar to controlled substances and produce a similar effect to those

compounds.

Designation as an abusable synthetic substance. The DSHS commissioner could designate a consumer commodity as an abusable synthetic substance if the commissioner determined the commodity was likely an abusable synthetic substance and that the importation, manufacture, distribution, and retail sale of the commodity posed a threat to public health. The commissioner would make the determination based on:

- whether the commodity was sold at a price higher than similar commodities are ordinarily sold;
- evidence of clandestine importation, manufacture, distribution, or diversion of the commodity from legitimate channels;
- evidence suggesting the product was intended for human consumption, regardless of the packaging on the commodity; and
- whether certain other factors suggested the commodity was an abusable synthetic substance intended for illicit drug use.

Emergency scheduling. The bill would allow the DSHS commissioner to emergency schedule a substance as a controlled substance if the commissioner determined that scheduling the substance was necessary to avoid an imminent hazard to public safety, if the substance was not already scheduled, and no exemption or approval was in effect for the substance under the federal Food, Drug, and Cosmetic Act. The bill would set criteria for whether a substance posed an imminent hazard to public safety that would be in addition to existing criteria for scheduling a controlled substance under the Texas Controlled Substances Act.

Publication. If the commissioner scheduled a substance as a controlled substance, the bill would allow the commissioner to publish the new schedule as specified under Health and Safety Code, sec. 481.036(c), and the action would take effect on the date the schedule was published in the Texas Register.

Expiration. The emergency schedule would expire on September 1 of each

odd-numbered year if the scheduling occurred before January 1 of that year.

Notice. The bill would require the commissioner to post notice about each emergency scheduling on the Department of State Health Services' website.

Defense to prosecution for an offense. The bill would create a defense to prosecution for the existing class B misdemeanor offense related to the possession of a controlled substance in Health and Safety Code, sec. 481.119(b). It would be a defense to prosecution for this offense that the actor requested emergency medical assistance in response to their own possible controlled substance overdose or that of another person.

The bill would remove an existing affirmative defense to prosecution for an offense involving the manufacture, delivery, or possession of a controlled substance analogue that the analogue was not in any part intended for human consumption.

Enforcement of abusable synthetic substances. A commodity classified as an abusable synthetic substance under the bill would be subject to enforcement actions under the Texas Food, Drug, and Cosmetic Act and would be subject to other provisions in that act that apply to food and cosmetics.

The bill would take effect September 1, 2015, and would apply only to an offense committed on or after that date.

SUPPORTERS
SAY:

HB 1212 would allow the DSHS commissioner to regulate synthetic drugs as they evolve and help prevent Texans, especially teenagers and young adults, from dying from these drugs. Synthetic drugs are created specifically to mimic natural illicit drugs, but they can be more potent and dangerous than illicit drugs, causing death, hospitalization, and aggressive behavior. The Food and Drug Administration does not regularly regulate these drugs because they are commonly labeled "not for human consumption" or packaged as potpourri or incense. The bill would address

this gap in regulation by allowing the DSHS commissioner to issue an emergency order to add a substance to a controlled substance schedule and by removing an existing defense to prosecution for a person committing an offense involving the manufacture, delivery, or possession of a controlled substance analogue that was not intended for human consumption.

The bill is necessary because manufacturers can quickly and easily change the molecular compounds included in their products to skirt state and city laws, and the Legislature cannot respond to these changes during the interim. Other filed bills this session seek to add additional synthetic substances to the regulated penalty groups, but these bills are not enough. People could overdose because the state would not have the ability to designate and regulate abusable synthetic substances at all times, including outside of a legislative session. The bill would provide this needed authority to protect individuals from these dangerous, deadly drugs.

The bill would not contribute to the overcriminalization of drug offenses because the bill aims to target distributors, rather than individuals, in order to take the drugs off the street and out of stores. The emergency scheduling in the bill intentionally has a short expiration date to allow the Legislature to have final say in any scheduling that occurred during the interim. The bill also would prevent overcriminalization by adding a defense to prosecution for an offense related to the possession of a controlled substance for a person who requests emergency medical assistance in response to an overdose due to a synthetic drug.

**OPPONENTS
SAY:**

HB 1212 could contribute to the overcriminalization of drug offenses. Not all substances targeted by the bill are bought or labeled for human consumption, and the bill would penalize those who bought a synthetic cannabinoid substance for another use. By allowing the commissioner to emergency schedule substances according to a vague standard, the bill could result in more arrests and incarceration, stretching the capacity of courts and jails with nonviolent offenders. The bill also could overly penalize teenagers, to whom these drugs are commonly marketed.