

By: Estes

S.B. No. 107

A BILL TO BE ENTITLED

AN ACT

relating to prohibiting over-the-counter sales of certain forms of pseudoephedrine; providing administrative penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle C, Title 6, Health and Safety Code, is amended by adding Chapter 486 to read as follows:

CHAPTER 486. PSEUDOEPHEDRINE

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 486.001. DEFINITIONS. In this chapter:

(1) "Commissioner" means the commissioner of state health services.

(2) "Council" means the State Health Services Council.

(3) "Department" means the Department of State Health Services.

(4) "Pseudoephedrine" means any compound, mixture, or preparation containing any detectable amount of pseudoephedrine, including its salts, optical isomers, and salts of optical isomers. The term does not include any compounds, mixtures, or preparations that are in liquid, liquid capsule, or gel capsule form and in which pseudoephedrine is not the only active ingredient.

(5) "Sale" includes a conveyance, exchange, barter, or trade.

Sec. 486.002. APPLICABILITY. This chapter does not apply to the sale of any product dispensed or delivered by a pharmacist

1 according to a prescription issued by a practitioner, as defined by  
2 Section 481.002(39), for a valid medical purpose and in the course  
3 of professional practice.

4 Sec. 486.003. RULES. The council shall adopt rules  
5 necessary to implement and enforce this chapter.

6 [Sections 486.004-486.010 reserved for expansion]

7 SUBCHAPTER B. PROHIBITED SALES

8 Sec. 486.011. OVER-THE-COUNTER SALES OF PSEUDOEPHEDRINE. A  
9 person may not engage in over-the-counter sales of pseudoephedrine.

10 [Sections 486.012-486.020 reserved for expansion]

11 SUBCHAPTER C. ADMINISTRATIVE PENALTY

12 Sec. 486.021. IMPOSITION OF PENALTY. The department may  
13 impose an administrative penalty on a person who sells  
14 pseudoephedrine in violation of this chapter.

15 Sec. 486.022. AMOUNT OF PENALTY. (a) The amount of the  
16 penalty may not exceed \$1,000 for each violation, and each day a  
17 violation continues or occurs is a separate violation for purposes  
18 of imposing a penalty. The total amount of the penalty assessed for  
19 a violation continuing or occurring on separate days under this  
20 subsection may not exceed \$5,000.

21 (b) The amount shall be based on:

22 (1) the seriousness of the violation, including the  
23 nature, circumstances, extent, and gravity of the violation;

24 (2) the threat to health or safety caused by the  
25 violation;

26 (3) the history of previous violations;

27 (4) the amount necessary to deter a future violation;

1           (5) whether the violator demonstrated good faith,  
2 including when applicable whether the violator made good faith  
3 efforts to correct the violation; and

4           (6) any other matter that justice may require.

5           Sec. 486.023. REPORT AND NOTICE OF VIOLATION AND PENALTY.

6           (a) If the department initially determines that a violation  
7 occurred, the department shall give written notice of the report by  
8 certified mail to the person.

9           (b) The notice must:

- 10           (1) include a brief summary of the alleged violation;  
11           (2) state the amount of the recommended penalty; and  
12           (3) inform the person of the person's right to a  
13 hearing on the occurrence of the violation, the amount of the  
14 penalty, or both.

15           Sec. 486.024. PENALTY TO BE PAID OR HEARING REQUESTED. (a)  
16 Before the 21st day after the date the person receives notice under  
17 Section 486.023, the person in writing may:

18           (1) accept the determination and recommended penalty  
19 of the department; or

20           (2) make a request for a hearing on the occurrence of  
21 the violation, the amount of the penalty, or both.

22           (b) If the person accepts the determination and recommended  
23 penalty or if the person fails to respond to the notice, the  
24 commissioner by order shall approve the determination.

25           Sec. 486.025. HEARING. (a) If the person requests a  
26 hearing, the commissioner shall refer the matter to the State  
27 Office of Administrative Hearings, which shall promptly set a

1 hearing date and give written notice of the time and place of the  
2 hearing to the person. An administrative law judge of the State  
3 Office of Administrative Hearings shall conduct the hearing.

4 (b) The administrative law judge shall make findings of fact  
5 and conclusions of law and promptly issue to the commissioner a  
6 proposal for a decision about the occurrence of the violation and  
7 the amount of a proposed penalty.

8 Sec. 486.026. DECISION BY COMMISSIONER. (a) Based on the  
9 findings of fact, conclusions of law, and proposal for a decision,  
10 the commissioner by order may:

11 (1) find that a violation occurred and impose a  
12 penalty; or

13 (2) find that a violation did not occur.

14 (b) The notice of the commissioner's order under Subsection  
15 (a) that is sent to the person in the manner provided by Chapter  
16 2001, Government Code, must include a statement of the right of the  
17 person to judicial review of the order.

18 Sec. 486.027. OPTIONS FOLLOWING DECISION: PAY OR APPEAL.  
19 Before the 31st day after the date the order of the commissioner  
20 under Section 486.026 that imposes an administrative penalty  
21 becomes final, the person shall:

22 (1) pay the penalty; or

23 (2) file a petition for judicial review of the  
24 commissioner's order contesting the occurrence of the violation,  
25 the amount of the penalty, or both.

26 Sec. 486.028. STAY OF ENFORCEMENT OF PENALTY. (a) Within  
27 the period prescribed by Section 486.027, a person who files a

1 petition for judicial review may:

2 (1) stay enforcement of the penalty by:

3 (A) paying the penalty to the court for placement  
4 in an escrow account; or

5 (B) giving the court a supersedeas bond approved  
6 by the court that:

7 (i) is for the amount of the penalty; and

8 (ii) is effective until all judicial review  
9 of the commissioner's order is final; or

10 (2) request the court to stay enforcement of the  
11 penalty by:

12 (A) filing with the court a sworn affidavit of  
13 the person stating that the person is financially unable to pay the  
14 penalty and is financially unable to give the supersedeas bond; and

15 (B) sending a copy of the affidavit to the  
16 commissioner by certified mail.

17 (b) If the commissioner receives a copy of an affidavit  
18 under Subsection (a)(2), the commissioner may file with the court,  
19 before the 6th day after the date the copy is received, a contest to  
20 the affidavit. The court shall hold a hearing on the facts alleged  
21 in the affidavit as soon as practicable and shall stay the  
22 enforcement of the penalty on finding that the alleged facts are  
23 true. The person who files an affidavit has the burden of proving  
24 that the person is financially unable to pay the penalty or to give  
25 a supersedeas bond.

26 Sec. 486.029. COLLECTION OF PENALTY. (a) If the person  
27 does not pay the penalty and the enforcement of the penalty is not

1 stayed, the penalty may be collected.

2 (b) The attorney general may sue to collect the penalty.

3 Sec. 486.030. DECISION BY COURT. (a) If the court sustains  
4 the finding that a violation occurred, the court may uphold or  
5 reduce the amount of the penalty and order the person to pay the  
6 full or reduced amount of the penalty.

7 (b) If the court does not sustain the finding that a  
8 violation occurred, the court shall order that a penalty is not  
9 owed.

10 Sec. 486.031. REMITTANCE OF PENALTY AND INTEREST. (a) If  
11 the person paid the penalty and if the amount of the penalty is  
12 reduced or the penalty is not upheld by the court, the court shall  
13 order, when the court's judgment becomes final, that the  
14 appropriate amount plus accrued interest be remitted to the person  
15 before the 31st day after the date that the judgment of the court  
16 becomes final.

17 (b) The interest accrues at the rate charged on loans to  
18 depository institutions by the New York Federal Reserve Bank.

19 (c) The interest shall be paid for the period beginning on  
20 the date the penalty is paid and ending on the date the penalty is  
21 remitted.

22 Sec. 486.032. RELEASE OF BOND. (a) If the person gave a  
23 supersedeas bond and the penalty is not upheld by the court, the  
24 court shall order, when the court's judgment becomes final, the  
25 release of the bond.

26 (b) If the person gave a supersedeas bond and the amount of  
27 the penalty is reduced, the court shall order the release of the

1 bond after the person pays the reduced amount.

2 Sec. 486.033. ADMINISTRATIVE PROCEDURE. A proceeding to  
3 impose the penalty is considered to be a contested case under  
4 Chapter 2001, Government Code.

5 SECTION 2. The State Health Services Council shall adopt  
6 rules to implement and enforce Chapter 486, Health and Safety Code,  
7 as added by this Act, not later than October 31, 2005.

8 SECTION 3. This Act takes effect September 1, 2005.