

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 881
Economic Matters

(Delegate Carter)

Business Regulation - Marketing Synthetic Drugs - Penalties

This bill prohibits a person who holds a license to do business under Title 17 of the Business Regulation Article from possessing, providing, distributing, displaying, selling, or marketing a synthetic drug with the intent that it be used as a recreational drug. A person who violates this prohibition is guilty of a misdemeanor and on conviction is subject to a maximum penalty of a fine of \$1,000 or 30 days imprisonment. Corporation agents and officers are also individually subject to these penalties if they actually engage in the business. The Comptroller may conduct inspections, suspend or revoke a license, or order a stop sale or seizure of goods for violations, subject to specified hearing requirements. Seized property is subject to specified seizure and forfeiture requirements.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues and expenditures due to the bill's penalty provision. The Comptroller can handle the bill's requirements with existing resources. Enforcement by the Department of State Police can also be handled with existing resources.

Local Effect: Potential minimal increase in expenditures due to the bill's penalty provision. Enforcement can be handled with existing resources.

Small Business Effect: Minimal. Small businesses that sell synthetic drugs, as defined in the bill, are subject to penalties, although some of these synthetic drugs may already be illegal under existing law.

Analysis

Bill Summary: “Synthetic drug” means a product possessed, provided, distributed, displayed, sold, or marketed with the intent that it be used as a recreational drug, such that its consumption or ingestion is intended to produce effects on the central nervous system or brain function to change perception, mood, consciousness, cognition, or behavior in ways that are similar to the effects of marijuana, cocaine, amphetamines, or other Schedule I controlled dangerous substances (CDS). The definition includes any chemically synthesized product, including products with chemically synthesized ingredients and herbal or plant material.

The bill specifies factors to be considered in determining whether a product is being possessed, provided, distributed, displayed, sold, or marketed with the intent that it be used as a recreational drug, including whether the product is not suitable for its marketed use, contains unusual warnings, or is significantly more expensive compared to other products that are used for that product’s marketed use. Proof that the person possessed, displayed, or offered the product for sale, or kept a place of business where the product was possessed, displayed, or offered for sale, is *prima facie* evidence that the person violated the bill’s provisions.

The Comptroller may inspect the sales records and goods of a person suspected of violating the bill’s provisions and may, subject to specified notice and hearing provisions, suspend or revoke the person’s business license for violations. Additionally, the Comptroller may order an immediate stop sale until a hearing has been held or may order a law enforcement officer to seize the goods. For violating the bill’s provisions, the person’s business license is also void and must be seized and returned to the Comptroller. Before the Comptroller takes any final action, the Comptroller must give the person notice and an opportunity for a hearing in accordance with the Administrative Procedure Act.

If the Comptroller finds that public health, safety, or welfare requires emergency action, the Comptroller may order summarily a stop sale or a seizure of the person’s goods or license; the licensee must be promptly notified and given an opportunity to be heard.

All property seized by law enforcement is deemed *prima facie* to be contraband of law. The rights, title, and interest of seized property vests with the local government or the State, depending on whether a local or State law enforcement official seized the property. After a person is convicted under the bill, the State Treasurer or the fiscal officer of the local government must petition the District Court or local circuit court for an order declaring the property forfeited; a copy of the petition and order must be filed in accordance with the Maryland Rules. If the charge results in acquittal, dismissal, stet, *nolle prosequi*, or probation, a person may apply to have the property returned. The bill specifies additional

notice and other procedural requirements for the seizure and forfeiture of property in connection with violations under the bill.

The bill's requirements do not alter the obligations of a person under the sales and use tax law or any other licensing or permit requirements. The bill's penalties do not affect any other penalties for violations of a license law.

Current Law: Title 17 of the Business Regulation Article requires persons in various categories of businesses to obtain a license from the Comptroller in order to conduct business, including peddlers, junk dealers, restaurants, transient vendors, and traders and chain stores.

CDS are listed on one of five schedules (Schedules I through V) set forth in statute depending on their potential for abuse and acceptance for medical use. Under the federal Controlled Dangerous Substances Act, for a drug or substance to be classified as Schedule I, the following findings must be made: (1) the substance has a high potential for abuse; (2) the drug or other substance has no currently accepted medical use in the United States; and (3) there is a lack of accepted safety for use of the drug or other substance under medical supervision.

No distinction is made in State law regarding the illegal possession of any CDS, regardless of which schedule it is on, with the exception of marijuana. The use or possession of a CDS other than marijuana is a misdemeanor with maximum criminal penalties of four years imprisonment and/or a \$25,000 fine.

In general, a defendant in possession of marijuana is guilty of a misdemeanor and subject to imprisonment for up to one year and/or a fine of up to \$1,000. However, pursuant to Chapter 158 of 2014, possession of less than 10 grams of marijuana is a civil offense punishable by a fine of up to \$100 for a first offense and \$250 for a second offense. The maximum fine for a third or subsequent offense is \$500. Additionally, pursuant to Chapter 351 of 2015, if a court finds that the use or possession of marijuana was due to medical necessity, the court must dismiss the charge.

Chapter 4 of 2016 repealed the criminal prohibition on the use or possession of marijuana paraphernalia and eliminated the associated penalties. However, the law also established that the use or possession of marijuana involving smoking marijuana in a public place is a civil offense, punishable by a fine of up to \$500.

For information on primary crimes (other than possession) involving CDS, please refer to the **Appendix – Additional Primary Crimes Involving Controlled Dangerous Substances**.

Controlled Substance Analogues: Under federal law, a “controlled substance analogue” means a substance (1) with a chemical structure that is substantially similar to the chemical structure of a controlled substance in Schedule I or II; (2) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II; or (3) that is represented by or intended by a person to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II.

Under 18 U.S.C. § 813, also referred to as the federal Analogue Act, a controlled substance analogue must be treated, for the purposes of any federal law, as a Schedule I controlled substance if the substance is intended for human consumption.

Under the State’s Schedule I statute, a “controlled dangerous substance analogue” means a substance (1) that has a chemical structure substantially similar to the chemical structure of a CDS listed in Schedule I or Schedule II and (2) that has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a CDS listed in Schedule I or Schedule II. “Controlled dangerous substance analogue” does not include (1) a CDS; (2) a substance for which there is an approved new drug application; or (3) a substance exempted for investigational use under § 506 of the federal Food, Drug, and Cosmetic Act. To the extent intended for human consumption, each CDS analogue is a substance listed in Schedule I.

Background: In recent years, the public has seen the proliferation of new synthetic, designer drugs, with innocent names like “bath salts,” “spice,” and “smiles,” that may be available at local convenience stores or smoke shops and are widely available over the Internet. The popularity and availability of these substances has grown in recent years. Criminal enforcement of the sale and possession of these substances has been challenging, since manufacturers can elude legal bans on products by making slight changes to their chemical structures. Additionally, common criticisms of the federal Analogue Act are that its “substantially similar” standard is vague and that the requirement that the substance be intended for human consumption can be easily countered by a person facing prosecution, since substances like bath salts are often packaged and marketed as beauty products.

According to the National Institute on Drug Abuse, synthetic cannabinoids are man-made, mind-altering chemicals that are sprayed on dried plant material to be smoked or are vaporized and inhaled in e-cigarettes and other devices (*e.g.*, liquid incense). The chemicals are referred to as “cannabinoids” because they are related to chemicals found in marijuana. Synthetic cannabinoids may also cause some effects that are similar to the

effects of marijuana, such as elevated mood, relaxation, altered perception, and symptoms of psychosis. Psychotic effects include anxiety, confusion, paranoia, and hallucinations.

The American Association of Poison Control Centers reports a national surge in the number of synthetic cannabinoid-related calls to U.S. poison centers; in calendar 2015, Maryland had the fifth-highest number of calls (350 calls). The Maryland Poison Center reports that there were 90 calls related to synthetic cannabinoids in calendar 2014.

On July 9, 2012, President Obama signed the Synthetic Drug Abuse Prevention Act of 2012. This legislation bans compounds found in synthetic stimulants, synthetic marijuana, and synthetic hallucinogens. These designer drugs are on the Drug Enforcement Agency's list of Schedule I controlled dangerous substances, making it a federal crime to manufacture, possess, distribute, import, or export these chemicals or products containing them. In announcing the signing of the Act, the Office of National Drug Control Policy encouraged states that have not already done so to incorporate these substances into their state drug schedules "to ensure that state law enforcement agencies have full authority to act against these substances."

In 2012, Maryland enacted Chapter 384, adding the chemical compounds in "bath salts" to the State's Schedule I substances. Additionally, under Maryland law, if the federal government places a substance on Schedule I, it is automatically considered a Schedule I substance in the State unless the Department of Health and Mental Hygiene (DHMH) objects to the designation. Since DHMH has not raised an objection, the synthetic cannabinoids and hallucinogens designated by federal law as Schedule I substances are illegal in Maryland.

In 2013, Maryland enacted Chapter 442, adding "cannabimimetic agents," also referred to as "spice," "synthetic marijuana," or "K2," to the State's list of Schedule I controlled dangerous substances. "Cannabimimetic agents" are defined as substances that are cannabinoid receptor type 1 agonists as demonstrated by binding studies and functional assays within one of several listed structural classes and are listed as Schedule I substances. Thus, some synthetic drugs as defined under the bill may already be illegal under State law.

Additional Information

Prior Introductions: None.

Cross File: SB 740 (Senator Muse) - Finance.

Information Source(s): Baltimore, Carroll, Harford, Montgomery, Queen Anne's and St. Mary's counties; Comptroller's Office; Department of Health and Mental Hygiene; Judiciary (Administrative Office of the Courts); Department of State Police; Office of Administrative Hearings; National Institute on Drug Abuse; American Association of Poison Control Centers; Maryland Poison Center; Department of Legislative Services

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min/kdm

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Appendix – Additional Primary Crimes Involving Controlled Dangerous Substances

For specified primary crimes involving controlled dangerous substances and paraphernalia, a person may not:

- distribute, dispense, or possess with the intent to distribute a controlled dangerous substance;
- manufacture a controlled dangerous substance or manufacture, distribute, or possess a machine, equipment, or device that is adapted to produce a controlled dangerous substance with the intent to use it to produce, sell, or dispense a controlled dangerous substance;
- create, distribute, or possess with the intent to distribute a counterfeit substance;
- manufacture, distribute, or possess equipment designed to render a counterfeit substance;
- keep a common nuisance (any place resorted to for the purpose of illegally administering controlled dangerous substances or where such substances or controlled paraphernalia are illegally manufactured, distributed, dispensed, stored, or concealed); or
- pass, issue, make, or possess a false, counterfeit, or altered prescription for a controlled dangerous substance with the intent to distribute the controlled dangerous substance.

Exhibit 1 contains the applicable sentences for these crimes.

Exhibit 1
Penalties for Distribution of Controlled Dangerous Substances (CDS)
and Related Offenses

Offense

Current Penalty

CDS (Other than Schedule I or II Narcotic Drugs and Other Specified CDS)

First-time Offender – CDS (other than Schedule I or II narcotic drugs and other specified CDS)	Maximum penalty of 5 years imprisonment and/or \$15,000 fine
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Repeat Offender – CDS (other than Schedule I or II narcotic drugs and other specified CDS)	2-year mandatory minimum sentence Maximum penalty of 5 years imprisonment and/or \$15,000 fine
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CDS (Schedule I or II Narcotic Drug)

First-time Offender – Schedule I or II narcotic drug	Maximum penalty of 20 years imprisonment and/or \$25,000 fine
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Second-time Offender – Schedule I or II narcotic drug	10-year mandatory minimum sentence (20 years maximum imprisonment) and a fine of up to \$100,000
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Third-time Offender – Schedule I or II narcotic drug	25-year mandatory minimum sentence and a fine of up to \$100,000
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Fourth-time Offender – Schedule I or II narcotic drug	40-year mandatory minimum sentence and a fine of up to \$100,000
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CDS (Specified Drugs)

First-time Offender – Specified Drugs	Maximum penalty of 20 years imprisonment and/or a fine of up to \$20,000
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Second-time Offender – Specified Drugs	10-year mandatory minimum sentence (20 years maximum imprisonment) and a fine of up to \$100,000
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Third-time Offender – Specified Drugs	25-year mandatory minimum sentence and a fine of up to \$100,000
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Fourth-time Offender – Specified Drugs	40-year mandatory minimum sentence and a fine of up to \$100,000
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Note: All mandatory minimum sentences listed in the exhibit are nonsuspendable and nonparolable. Pursuant to Chapter 490 of 2015, a court may depart from the listed mandatory minimum sentences under specified circumstances.

Source: Department of Legislative Services