

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 262
Judiciary

(Delegate Haddaway-Riccio, *et al.*)

Judicial Proceedings

Criminal Law - Distribution of Faked Controlled Dangerous Substance -
Substantially Similar Chemical Structure

This bill requires a court, in determining if a person has violated the prohibition against distributing, attempting to distribute, or possessing with intent to distribute a noncontrolled substance meeting specified criteria, to consider whether the chemical structure of the noncontrolled substance is substantially similar to the chemical structure of a controlled dangerous substance.

Fiscal Summary

State Effect: Minimal increase in general fund incarceration expenditures if the bill results in the conviction of individuals who would not be prosecuted under current statutes. Revenues are not affected.

Local Effect: Minimal increase in local revenues from fines imposed in circuit court cases if the bill results in the conviction of individuals who would not be prosecuted under current statutes. Expenditures are not affected.

Small Business Effect: None.

Analysis

Current Law: Controlled dangerous substances 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.

Noncontrolled Substances: A “noncontrolled substance” is a substance not classified as a controlled dangerous substance under the State’s schedules.

A person may not distribute, attempt to distribute, or possess with intent to distribute a noncontrolled substance (1) that the person represents as a controlled dangerous substance; (2) that the person intends for use or distribution as a controlled dangerous substance; or (3) under circumstances where one reasonably should know that the noncontrolled substance will be used or distributed for use as a controlled dangerous substance. Violators are guilty of a felony, punishable by imprisonment for up to five years and/or a fine of up to \$15,000. It is not a defense to a prosecution for this offense that the defendant believed that the noncontrolled substance was a controlled dangerous substance.

To determine if a person has committed a violation, the court or other authority must consider:

- whether the noncontrolled substance was packaged in a manner normally used to distribute a controlled dangerous substance illegally;
- whether the distribution or attempted distribution included an exchange of or demand for money or other property as consideration, and whether the amount of consideration was substantially greater than the reasonable value of the noncontrolled substance; and
- whether the physical appearance of the noncontrolled substance is substantially identical to that of a controlled dangerous substance.

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 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 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. 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.

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 controlled dangerous substance 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 controlled dangerous substance listed in Schedule I or Schedule II. "Controlled dangerous substance analogue" does not include (1) a controlled dangerous substance; (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 controlled dangerous substance analogue is a substance listed in Schedule I.

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

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 until recently could be found at local convenience stores or smoke shops and remain widely available over the Internet. The popularity and availability of these substances has grown in recent years, and 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.

On July 9, 2012, President Obama signed the Synthetic Drug Abuse Prevention Act (SDAPA) of 2012. This legislation bans compounds found in synthetic stimulants, synthetic marijuana, and synthetic hallucinogens. These designer drugs are now 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 (HB 589), adding the chemical compounds in "bath salts" to the State's Schedule I. 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.

According to the Maryland State Commission on Criminal Sentencing Policy, there were 28 convictions for violations of the State's prohibitions against distributing, attempting to distribute, or possessing with intent to distribute a noncontrolled substance in Maryland circuit courts in fiscal 2012.

State Expenditures: Given that a substance with a chemical structure substantially similar to the chemical structure of a controlled dangerous substance listed in Schedule I or Schedule II is considered a controlled substance analogue and as such, is considered a Schedule I substance if it is intended for human consumption, the substances described by the bill are likely covered under existing statute. However, to the extent that the bill results in the conviction of individuals who would otherwise not be prosecuted, general fund expenditures increase minimally due to the application of current incarceration penalties.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$2,900 per month. This bill alone, however, should not create the need for additional beds, personnel, or facilities. Excluding overhead, the average cost of housing a new State inmate (including variable medical care and variable operating costs) is about \$370 per month. Excluding all medical care, the average variable costs total \$180 per month.

Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or a State correctional facility. Prior to fiscal 2010, the State reimbursed counties for part of their incarceration costs, on a per diem basis, after a person has served 90 days. Currently, the State provides assistance to the counties for locally sentenced inmates and for inmates who are sentenced to and awaiting transfer to the State correctional system. A \$45 per diem grant is provided to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of the State but are confined in a local facility. The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions.

Local Revenues: Revenues increase minimally as a result of the bill's application of the current monetary penalty provision from cases heard in the circuit courts.

Additional Information

Prior Introductions: None.

Cross File: SB 348 (Senators Colburn and Astle) - Judicial Proceedings.

Information Source(s): Maryland State Commission on Criminal Sentencing Policy, Judiciary (Administrative Office of the Courts), Governor's Office of Crime Control and Prevention, Office of the Public Defender, Department of Public Safety and Correctional Services, State's Attorneys' Association, *Tampa Bay Times*, *The Economist*, Department of Legislative Services

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mc/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.

Source: Department of Legislative Services