

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 539

(The President, *et al.*) (By Request - Administration)

Judicial Proceedings

Judiciary

Criminal Law - Distribution of Controlled Dangerous Substances - Fentanyl

This emergency Administration bill prohibits a person from knowingly distributing or possessing with the intent to distribute (1) a mixture of controlled dangerous substances (CDS) that contains heroin and a detectable amount of fentanyl or any analogue of fentanyl or (2) fentanyl or any analogue of fentanyl. A violation is a felony and, in addition to any other penalty imposed, is subject to imprisonment for up to 10 years. A sentence imposed for a violation of this prohibition must be served consecutively to any other sentence imposed.

Fiscal Summary

State Effect: Potential significant increase in general fund expenditures beginning in FY 2017 due to the bill's penalty provisions. Impact may occur in the near term and may be delayed to future years depending on how sentences are imposed. Enforcement can be handled with existing resources. No effect on revenues.

Local Effect: Enforcement can be handled with existing resources. No effect on revenues.

Small Business Effect: The Administration has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services concurs with this assessment. (The attached assessment does not reflect amendments to the bill.)

Analysis

Current Law: 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 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.

Heroin is an opium derivative and is listed as a Schedule I CDS. Fentanyl is a Schedule II opioid.

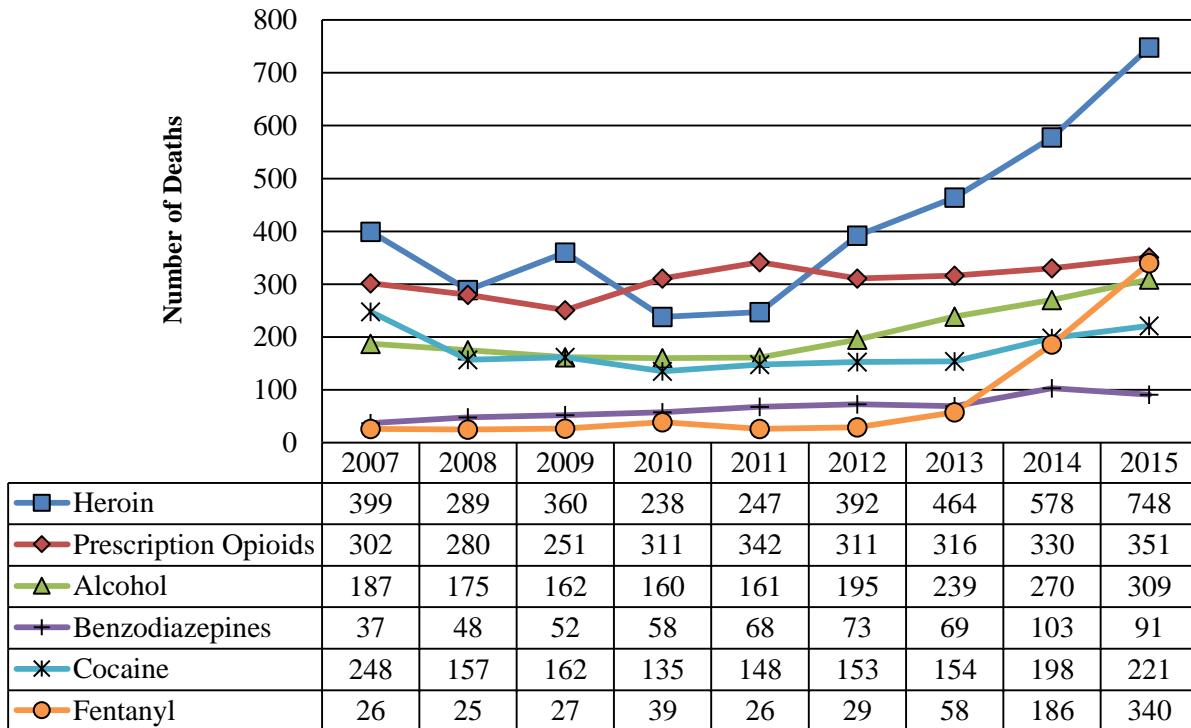
For information on crimes involving the *distribution* of CDS, please refer to the **Appendix – Penalties for Distribution of Controlled Dangerous Substances and Related Offenses**.

Background: According to a 2016 report of the Department of Health and Mental Hygiene (DHMH), *Drug and Alcohol-Related Intoxication Deaths in Maryland*, drug- and alcohol-related intoxication deaths in Maryland increased for the fifth year in a row, totaling 1,259 deaths in 2015 – a 21% increase since 2014 and an all-time high. Of all intoxication deaths, 1,089 deaths (86%) were opioid-related, including deaths related to heroin, prescription opioids, and nonpharmaceutical fentanyl. Opioid-related deaths increased by 23% between 2014 and 2015 and have more than doubled since 2010. Heroin- and fentanyl-related deaths have risen particularly sharply. The number of heroin-related deaths increased by 29% between 2014 and 2015 and has more than tripled between 2010 and 2015. The number of fentanyl-related deaths increased by 83% between 2014 and 2015 and has increased nearly twelvefold since 2012. **Exhibit 1** shows trends in drug- and alcohol-related intoxication deaths in Maryland from 2007 through 2015.

Preliminary data from DHMH indicates that the number of intoxication deaths increased at an even steeper rate in 2016, with 1,468 deaths from January through September 2016 compared to 904 deaths during the same period in 2015 (a 62% increase). Additionally, for January through September 2016, the number of heroin-related deaths increased 72% and the number of fentanyl-related deaths increased nearly fourfold compared to the same period in 2015.

According to the Department of Public Safety and Correctional Services, in fiscal 2016 there were 241 cases involving the distribution of CDS, with an average sentence of 78.3 months; there were 531 cases involving the possession with the intent to distribute CDS, with an average sentence of 68.3 months. However, it is unknown how many of these cases involved a mixture of heroin and fentanyl, or fentanyl alone. The Department of State Police (DSP) advises that when testing a substance for heroin in relation to an arrest for distribution of CDS, DSP also tests for the presence of fentanyl as a matter of procedure.

Exhibit 1
Total Number of Drug- and Alcohol-related Intoxication Deaths
By Selected Substances in Maryland
2007-2015



Source: Department of Health and Mental Hygiene

State Expenditures: This analysis assumes that relevant provisions of Chapter 515 of 2016 (also known as the Justice Reinvestment Act) take effect October 1, 2017. Chapter 515 reduces the maximum incarceration penalties for distribution of CDS and related offenses.

General fund expenditures may increase significantly beginning in fiscal 2017, due to the emergency designation of the bill, as a result of the bill's incarceration penalty due to a potentially significant additional number of people being committed to State correctional facilities. General fund expenditures also increase, potentially significantly, beyond the five years addressed in this analysis, due to a potentially significant number of people being committed to State correctional facilities for longer periods of time. The increase in expenditures is dependent on the sentence imposed for underlying crimes of distribution of CDS and related offenses. The bill requires that the sentence imposed for the crime created by the bill be separate from and consecutive to the sentence for the underlying crime. Sentences that could be imposed for an underlying drug-related crime range from 2 to 40 years imprisonment (under current law) or from 5 to 40 years imprisonment (under SB 539/ Page 3

Chapter 515). As a result, the bill may have an immediate fiscal impact and a delayed fiscal impact, depending on when the separate and consecutive sentence required by the bill is imposed.

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 \$3,600 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 health care costs) is about \$800 per month. Excluding all health care, the average variable costs total \$210 per month.

Additional Information

Prior Introductions: None.

Cross File: HB 687 (The Speaker, *et al.*) (By Request - Administration) - Judiciary.

Information Source(s): Baltimore City; Kent, Montgomery, and Worcester counties; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of State Police; Department of Legislative Services

Fiscal Note History: First Reader - February 27, 2017

mm/kdm Third Reader - March 24, 2017

Revised - Amendment(s) - March 24, 2017

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Appendix – Penalties for Distribution of Controlled Dangerous Substances and Related Offenses

Under Title 5, Subtitle 6 of the Criminal Law Article, a person may not:

- distribute, dispense, or possess with the intent to distribute a controlled dangerous substance (CDS);
- manufacture a CDS or manufacture, distribute, or possess a machine, equipment, or device that is adapted to produce a CDS with the intent to use it to produce, sell, or dispense a CDS;
- 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 CDS 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 CDS with the intent to distribute the CDS.

Exhibit 1 shows the applicable sentences for these crimes under current law, and under Chapter 515 of 2016 (also known as the “Justice Reinvestment Act”), which repealed mandatory minimum penalties applicable to a repeat drug offender (or conspirator) convicted of distribution of CDS and related offenses and established new maximum penalties. The changes take effect October 1, 2017.

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

Offense	Current Penalty ¹	New Penalty ²
CDS (Other than Schedule I or II Narcotic Drugs and Other Specified CDS)		
First-time Offender	Maximum penalty of 5 years imprisonment and/or \$15,000 fine	Maximum penalty of 5 years imprisonment and/or \$15,000 fine
Repeat Offender	2-year mandatory minimum sentence. Maximum penalty of 5 years imprisonment and/or \$15,000 fine	Maximum penalty of 5 years imprisonment and/or \$15,000 fine
CDS (Schedule I or II Narcotic Drug & Specified Drugs)		
First-time Offender	Maximum penalty of 20 years imprisonment and/or \$25,000 fine	Maximum penalty of 20 years imprisonment and/or \$15,000 fine
Second-time Offender	10-year mandatory minimum sentence (20 years maximum imprisonment) and a fine of up to \$100,000	Maximum penalty of 20 years imprisonment and/or \$15,000 fine
Third-time Offender	25-year mandatory minimum sentence and a fine of up to \$100,000	Maximum penalty of 25 years imprisonment and/or a \$25,000 fine (parole eligibility at 50% of sentence)
Fourth-time Offender	40-year mandatory minimum sentence and a fine of up to \$100,000	Maximum penalty of 40 years imprisonment and/or a \$25,000 fine (parole eligibility at 50% of sentence)

CDS: controlled dangerous substance

¹Repeat offenders are subject to twice the term of imprisonment and/or fines that are otherwise authorized. 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.

²Under Chapter 515 of 2016, effective October 1, 2017, the authorization to double penalties for repeat offenders is made applicable only when the person has also been previously convicted of a crime of violence. Additionally, a person serving a term of confinement that includes a mandatory minimum sentence, imposed on or before September 30, 2017, for specified crimes generally involving the manufacture, sale, and distribution of CDS may apply to the court for a modification or reduction of the mandatory minimum sentence, regardless of whether the defendant filed a timely motion for reconsideration or if a motion for reconsideration was denied by the court (the court is authorized to depart from the specified mandatory minimum sentences).

Source: Department of Legislative Services

ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Criminal Law - Distribution of Opioids Resulting in Death

BILL NUMBER: SB539/HB687

PREPARED BY: GLO
(Dept./Agency/GLO)

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

**WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND
SMALL BUSINESSES**

OR

**WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND
SMALL BUSINESSES**

PART B. ECONOMIC IMPACT ANALYSIS