

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 358
Judiciary

(The Speaker)(By Request - Administration)

Crimes - Controlled Dangerous Substances - Volume Dealers

This Administration bill adds the following quantities of controlled dangerous substances (CDS) to the existing prohibition against volume dealing: (1) 28 grams or more of *any mixture containing a detectable amount* of morphine or opium or any of their derivatives, salts, isomers, or salts of an isomer; (2) 5 grams or more of fentanyl or any structural variation of fentanyl that is scheduled by the U.S. Drug Enforcement Agency (DEA); and (3) 28 grams or more of any mixture containing a detectable amount of fentanyl or any structural variation of fentanyl that is scheduled by DEA. An individual who manufactures, distributes, dispenses, or possesses these quantities of CDS is subject to existing criminal penalties for volume dealers (mandatory minimum sentence of five years imprisonment and up to \$100,000 fine).

Fiscal Summary

State Effect: Potential significant decrease in general fund revenues due to fewer cases heard in the District Court. General fund incarceration expenditures increase minimally due to criminal penalties. General fund expenditures also decrease minimally from reduced CDS sample testing.

Local Effect: Potential significant increase in revenues due to more cases heard in the circuit courts and increased fines. Expenditures decrease minimally due to criminal penalties and reduced CDS sample testing.

Small Business Effect: The Administration has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services (DLS) concurs with this assessment.

Analysis

Current Law:

Volume Dealers

A person may not manufacture, distribute, dispense, or possess the following quantities of CDS:

- 50 pounds or more of marijuana;
- 448 grams or more of cocaine;
- 448 grams or more of any mixture containing a detectable amount of cocaine;
- 448 grams or more of any cocaine base (also known as “crack”);
- 28 grams or more of morphine or opium or any of their derivatives, salts, isomers, or salts of an isomer;
- any mixture containing 28 grams or more of morphine or opium or any of their derivatives, salts, isomers, or salts of an isomer;
- 1,000 dosage units or more of lysergic acid diethylamide (LSD);
- any mixture containing the equivalent of 1,000 dosage units of LSD;
- 16 ounces or more of phencyclidine (PCP) in liquid form;
- 448 grams or more of any mixture containing PCP;
- 448 grams or more of methamphetamine; or
- any mixture containing 448 grams or more of methamphetamine.

To determine the quantity of CDS involved in individual acts of manufacturing, distributing, dispensing, or possessing CDS, the acts may be aggregated if each act occurred within a 90-day period. Violators are subject to imprisonment for a minimum of five years and a fine of up to \$100,000.

No part of the mandatory minimum sentence may be suspended nor is a person eligible for parole during the mandatory minimum sentence.

Drug Kingpin

A “drug kingpin” is an organizer, supervisor, financier, or manager who acts as a coconspirator in a conspiracy to manufacture, distribute, dispense, transport in, or bring into the State a CDS. A drug kingpin who conspires to do one of these activities regarding the above-noted specified amounts of CDS for volume-dealing must receive a mandatory minimum sentence of 20 years and is subject to imprisonment for up to 40 years without the possibility of parole and/or a maximum fine of \$1.0 million.

Possession and Distribution of Controlled Dangerous Substances (Smaller Quantities)

Chapter 515 of 2016 (also known as the Justice Reinvestment Act) altered the criminal penalties associated with the possession, administration, obtainment, and procurement of a CDS and related offenses. Effective October 1, 2017, a person who violates these provisions is subject to the following penalties: (1) for a first conviction, imprisonment for up to one year and/or a fine of up to \$5,000; (2) for a second or third conviction, imprisonment for up to 18 months and/or a fine of up to \$5,000; and (3) for a fourth or subsequent conviction, imprisonment for up to two years and/or a fine of up to \$5,000. The authorization to double penalties for repeat offenders applies only when the person has also been previously convicted of a crime of violence.

Additionally, Chapter 515 reduced the maximum incarceration penalty for the use or possession of 10 grams or more of marijuana from one year to six months (but retained the maximum fine of up to \$1,000).

Further, pursuant to Chapter 515, before imposing a sentence for these offenses, the court is authorized to order the Maryland Department of Health (MDH), or a certified and licensed designee, to conduct an assessment of the defendant for a substance use disorder and determine whether the defendant is in need of and may benefit from drug treatment. MDH or the designee must conduct an assessment and provide the results, as specified. The court must consider the results of an assessment when imposing the defendant's sentence and, as specified, (1) must suspend the execution of the sentence, order probation, and require MDH to provide the medically appropriate level of treatment or (2) may impose a term of imprisonment and order the Division of Correction within the Department of Public Safety and Correctional Services (DPSCS) or a local correctional facility to facilitate the medically appropriate level of treatment.

For information on crimes involving the distribution of CDS, please refer to **Appendix 1 – Penalties for Distribution of Controlled Dangerous Substances and Related Offenses.**

Background: According to the Judiciary, in fiscal 2017, there were 187 violations and 181 violations in the District Court and circuit courts, respectively, for volume dealing. Additionally, the Maryland State Commission on Criminal Sentencing Policy reports that, in fiscal 2017, there were 16 individuals sentenced in the circuit courts for volume dealing.

In January 2018, Governor Lawrence J. Hogan announced a package of proposed legislation targeting the State's growing opioid crisis. This bill is part of that package. In addition to expanding the State's volume dealer law to apply to specified quantities of fentanyl, the Administration stated that the bill is intended to update the law to treat heroin in a manner consistent with the law's treatment of cocaine and simplify applicable drug composition requirements, thereby reducing the need for detailed testing.

For more information on the State's opioid crisis, please refer to **Appendix 2 – Opioid Crisis**.

State Revenues: The bill prohibits the distribution *and* possession of (1) 5 grams or more of fentanyl and (2) 28 grams or more of any mixture containing a detectable amount of fentanyl. A violation results in a mandatory minimum of five years imprisonment and a fine of up to \$100,000.

Under current law, distribution of fentanyl is subject to criminal penalties applicable to the distribution of a Schedule I or II narcotic drug (see Appendix 1). Thus, maximum fines range from \$15,000 to \$25,000, depending on whether the offense is a first or subsequent offense. Under current law, possession of CDS (including fentanyl) is a misdemeanor with a maximum fine of \$5,000.

Under the bill, an individual who *possesses* 5 grams or more of fentanyl or 28 grams or more of any mixture containing a detectable amount of fentanyl is subject to at least five years imprisonment and a maximum fine of \$100,000, rather than the less stringent misdemeanor penalties. As such, offenders charged with this crime under the bill are subject to the jurisdiction of the circuit court rather than the District Court.

Thus, general fund revenues decrease, potentially significantly, due to fewer cases being heard in the District Court for the possession of specified amounts of fentanyl. According to DPSCS, there were 276 intakes for the possession of CDS in fiscal 2017. However, it is unknown how many of these offenses involved the bill's specified amounts of fentanyl. *For illustrative purposes only*, if 10% of these offenses involved the bill's specified amounts of fentanyl, general fund revenues could decrease by as much as \$138,000. This assumes that (1) all of these cases were brought in the District Court; (2) all of these cases were for first-time offenses; and (3) the maximum fine of \$5,000 was imposed for each case.

State Expenditures:

Department of Public Safety and Correctional Services

As noted previously, distribution of fentanyl is subject to criminal penalties applicable to the distribution of a Schedule I or II narcotic drug (see Appendix 1). Further, Chapter 569 of 2017 establishes an additional penalty of up to 10 years imprisonment for distributing fentanyl or a mixture of heroin and a detectable amount of fentanyl (to be served consecutively in addition to any other sentence imposed). Thus, maximum incarceration penalties relating to the distribution of fentanyl range from 30 to 50 years, depending on the level of the offense.

Additionally, possession of CDS (including fentanyl) is a misdemeanor subject to maximum incarceration penalties ranging from one to two years imprisonment, depending on the level of the offense.

Under the bill, a person who possesses or distributes specified amounts of fentanyl is subject to a mandatory minimum of 5 years imprisonment. According to DPSCS, in fiscal 2017, the average sentence for possession with intent to distribute CDS was 63.7 months (5.3 years); the average sentence for distribution of CDS was 83.2 months (6.9 years). Additionally, there were 276 intakes of possession of CDS with an average sentence of 25.4 months (2.1 years). However, it is unknown how many of these cases involved distribution or possession of the bill's specified amounts of fentanyl. Further, the average sentence imposed for possession of CDS likely decreases beginning in fiscal 2018, given the new penalty structure under Chapter 515 of 2016 (which was effective October 1, 2017).

Shifting the jurisdiction of these cases from the District Court to the circuit courts means that some persons may eventually serve longer incarcerations due to more stringent penalty provisions, applicable to some offenses for prior felony convictions. It is not known whether such a prospective shift may spur more plea bargains and affect actual sentencing practices for this offense.

Therefore, general fund expenditures for DPSCS increase minimally due to more people being committed to State correctional facilities for longer periods of time. The number of people convicted of this proposed crime is expected to be minimal.

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 \$3,800 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. The State provides assistance to the counties for locally sentenced inmates and for (1) inmates who are sentenced to and awaiting transfer to the State correctional system; (2) sentenced inmates confined in a local detention center between 12 and 18 months; and (3) inmates who have been sentenced to the custody of the State but are confined in or who receive reentry or other prerelease programming and services from 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 Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

DLS also notes that the bill may also result in additional prosecutions of drug kingpins, which may further increase incarceration expenditures. However, DLS advises that any additional prosecutions for such cases is expected to be minimal. (According to DPSCS, there was one drug kingpin intake in fiscal 2017, with a sentence of 240 months.)

Other Agencies

The bill also specifies that a person may not manufacture, distribute, dispense, or possess 28 grams or more of any mixture *containing a detectable amount* of morphine or opium. The Department of State Police (DSP) advises that this alteration conforms the standards of testing for mixtures containing heroin with those for mixtures containing cocaine for purposes of volume dealer prosecutions. Thus, under the bill, crime laboratories must only test for the “presence,” rather than for “purity,” of heroin in CDS mixtures to reach the required 28 grams threshold for volume dealing. Thus, fewer tests must be conducted. DSP advises that the cost of testing is \$56.61 per sample. In addition, DSP advises that reducing the number of required tests may also reduce associated instrument and personnel costs. The extent of any savings under the bill depends on the quantity of drug samples in need of testing at any given time. Therefore, DLS advises that general fund expenditures for DSP likely decrease minimally beginning in fiscal 2019.

Additionally, effective October 1, 2017, Chapter 515 of 2016 authorizes a court to order MDH to conduct a substance use disorder assessment of a defendant before imposing a sentence for possession of CDS. Thus, general fund expenditures for MDH may decrease minimally to the extent the bill results in fewer such assessments and/or associated treatment (as a result of more offenses being subject to criminal penalties for volume dealing, rather than existing penalties and provisions relating to possession of CDS).

Local Revenues: Revenues increase, potentially significantly, due to more cases for possession of specified quantities of fentanyl being heard in the circuit courts, as well as higher maximum fines for the distribution of specified quantities of fentanyl.

Local Expenditures: Expenditures decrease minimally due to fewer people being sentenced to local incarceration facilities. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. Per diem operating costs of local detention facilities have ranged from approximately \$40 to \$170 per inmate in recent years. Expenditures also decrease minimally from reduced CDS sample testing by local crime laboratories under the bill.

Additional Information

Prior Introductions: None.

Cross File: SB 313 (The President)(By Request - Administration) - Judicial Proceedings.

Information Source(s): Cities of Bowie and Takoma Park; Montgomery and Prince George's counties; Department of State Police; Judiciary (Administrative Office of the Courts); Maryland State Commission on Criminal Sentencing Policy; Department of Public Safety and Correctional Services; Maryland State's Attorneys' Association; Office of the Public Defender; Department of Legislative Services

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Appendix 1 – 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.

Chapter 515 of 2016 (also known as the “Justice Reinvestment Act”) 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 took effect October 1, 2017.

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

| Offense | Current Penalty ^{1,2} |
|---|---|
| CDS (Other than Schedule I or II Narcotic Drugs and Other Specified CDS)³ | |
| First-time Offender | Maximum penalty of 5 years imprisonment and/or \$15,000 fine |
| Repeat Offender | Maximum penalty of 5 years imprisonment and/or \$15,000 fine |
| CDS (Schedule I or II Narcotic Drug & Specified Drugs)⁴ | |
| First-time Offender | Maximum penalty of 20 years imprisonment and/or \$15,000 fine |
| Second-time Offender | Maximum penalty of 20 years imprisonment and/or \$15,000 fine |
| Third-time Offender | Maximum penalty of 25 years imprisonment and/or a \$25,000 fine (parole eligibility at 50% of sentence) |
| Fourth-time Offender | 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. Under Chapter 515 of 2016, effective October 1, 2017, this authorization 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).

²Chapter 569 of 2017 prohibits a person from knowingly distributing or possessing with the intent to distribute (1) a mixture of CDS that contains heroin and a detectable amount of fentanyl or any analogue of fentanyl or (2) fentanyl or any analogue of fentanyl. In addition to any other penalty imposed, a person 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.

³*E.g.*, marijuana

⁴*E.g.*, cocaine and heroin

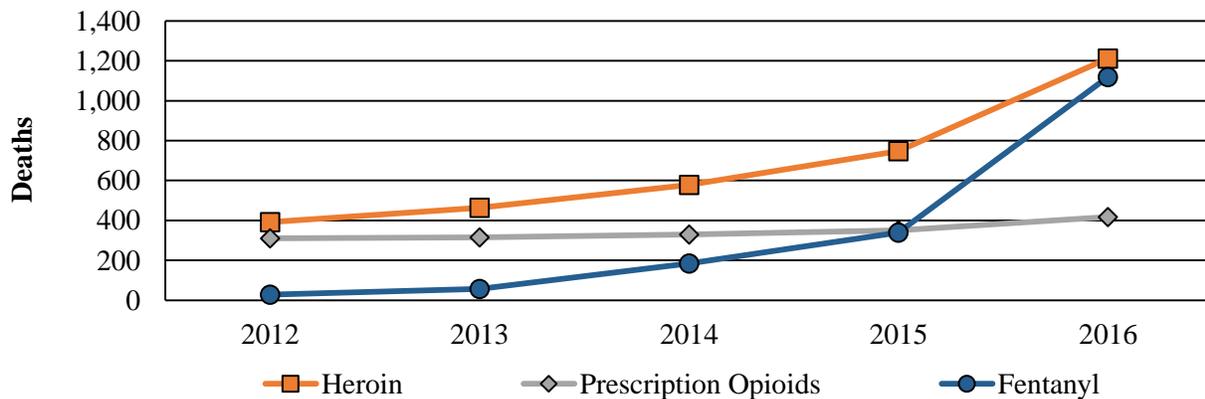
Source: Department of Legislative Services

Appendix 2 – Opioid Crisis

Opioid Overdose Deaths

The rate of opioid-related deaths continues to rise at an alarming rate. As seen in **Exhibit 1**, between 2015 and 2016, prescription opioid-related deaths in Maryland increased by 19% (from 351 to 418), heroin-related deaths increased by 62% (from 748 to 1,212), and fentanyl-related deaths increased by 229% (from 340 to 1,119). Between January and June 2017, there were 799 deaths related to fentanyl, a 70% increase over the same time period for 2016, and 46 deaths related to carfentanil, a drug used as an elephant tranquilizer, a substance which first appeared as a cause of death in April 2017.

Exhibit 1
Total Number of Drug-related Intoxication Deaths
By Selected Substances in Maryland
2012-2016



Source: Maryland Department of Health

Federal Actions to Address the Opioid Crisis

In 2016, the Comprehensive Addiction and Recovery Act authorized over \$181 million annually, and the 21st Century Cures Act (CURES Act) authorized up to \$970 million to be distributed through the State Targeted Response to the Opioid Crisis Grants. The grants are to be used by states to increase access to treatment and reduce unmet treatment needs and opioid-related overdose deaths. In 2017, Maryland received a two-year, \$20 million grant for the prevention and treatment of opioid abuse. In March 2017, President Donald J. Trump signed an executive order establishing the President's Commission on Combating Drug Addiction and the Opioid Crisis. The commission issued

a final report in November 2017, with 56 recommendations, including a recommendation for federal block grant funding for state activities relating to opioids and substance use disorders. The full report can be found here: <https://www.whitehouse.gov/ondcp/presidents-commission>

Maryland Actions to Address the Opioid Crisis

The General Assembly passed several comprehensive acts during the 2017 session to address the State's opioid crisis, which addressed prevention, treatment, overdose response, and prescribing guidelines.

Chapters 571 and 572 of 2017, the Heroin and Opioid Prevention Effort and Treatment Act, among other things, require (1) the Behavioral Health Administration to establish crisis treatment centers that provide individuals in a substance use disorder crisis with access to clinical staff, requiring at least one center be established by June 1, 2018; (2) the Maryland Department of Health (MDH) to establish and operate a toll-free health crisis hotline; (3) certain health care facilities and systems to make available to patients the services of health care providers who are trained and authorized under federal law to prescribe opioid addiction treatment medications, including buprenorphine; (4) each hospital, by January 1, 2018, to have a protocol for discharging a patient who was treated for a drug overdose or identified as having a substance use disorder; (5) the Governor's proposed budget for fiscal 2019 through 2021 to include specified rate adjustments for community behavioral health providers; (6) the Department of Public Safety and Correctional Services and MDH to develop a plan to increase the provision of substance use disorder treatment, including medication assisted treatment, in prisons and jails; (7) the authorization of the provision of naloxone through a standing order and that MDH establish guidelines to co-prescribe naloxone to high-risk individuals; and (8) the expansion of private insurance coverage for opioid use disorders by prohibiting certain carriers from applying a pre-authorization requirement for a prescription drug when used for treatment of an opioid use disorder and that contains methadone, buprenorphine, or naltrexone.

Chapters 573 and 574 of 2017, the Heroin and Opioid Education and Community Action Act (Start Talking Maryland Act), require (1) the State Board of Education to expand an existing program in public schools to encompass drug addiction and prevention education that specifically includes instruction related to heroin and opioid addiction and prevention and information relating to the lethal effect of fentanyl; (2) each local board of education to establish a policy requiring each public school to obtain and store naloxone and other overdose-reversing medication to be used in an emergency situation; (3) each local board of education or local health department to hire a sufficient number of community action officials or develop and implement a program that provides community relations and education functions that coordinate forums and conduct public relations efforts; and (4) specified institutions of higher education in Maryland to establish a policy that

addresses heroin and opioid addiction and prevention, including awareness training for incoming students, obtaining and storing naloxone, and campus police training.

Chapter 570 of 2017 requires a health care provider, on treatment for pain and based on the provider's clinical judgment, to prescribe the lowest effective dose of an opioid and a quantity that is no greater than that needed for the expected duration of pain severe enough to require an opioid that is a controlled dangerous substance (CDS). The Act establishes that the quantity limitations do not apply to opioids prescribed to treat a substance-related disorder; pain associated with a cancer diagnosis; pain experienced while the patient is receiving end-of-life, hospice, or palliative care services; or chronic pain. A violation of the Act is grounds for disciplinary action by the appropriate health occupations board.

In January 2017, Governor Lawrence J. Hogan issued an executive order establishing an Opioid Operational Command Center (OCC) to facilitate collaboration between State and local public health, human services, education, and public safety entities to combat the heroin and opioid crisis. OCC will (1) develop operational strategies to continue implementing the recommendations of the Governor's Heroin and Opioid Emergency Task Force; (2) collect, analyze, and facilitate the sharing of data relevant to the epidemic from State and local sources; (3) develop a memorandum of understanding among State and local agencies that provides for the sharing and collection of health and public safety information and data relating to the heroin and opioid epidemic; (4) assist and support local agencies in the creation of opioid intervention teams; and (5) coordinate the training of and provide resources for State and local agencies addressing the threat to the public health, security, and economic well-being of the State.

In March 2017, Maryland became the first state to declare a state of emergency for the opioid crisis, activating the Governor's emergency management authority and enabling increased and more rapid coordination between the State and local jurisdictions. In conjunction with the declaration, Governor Hogan included a supplemental budget appropriation of \$10 million, part of a \$50 million, five-year commitment to address the State's heroin and opioid epidemic.

In July 2017, \$22 million was appropriated for fiscal 2018, including \$10 million in CURES Act funding, to be used for prevention, treatment, and enforcement activities. Prevention efforts include distribution of opioid intervention teams for each jurisdiction, a public awareness campaign, funding to train community teams on overdose response and linking to treatment, a pilot program to create school-based teams for early identification of the problems related to substance use disorders, and distribution of opioid information to health care facilities and providers that offer treatment. Enforcement initiatives include funding to disrupt drug trafficking organizations for the heroin coordinator program and to increase MDH's regulatory oversight of CDS. Treatment funding will be used to expand treatment beds and implement a tracking system to identify available beds; improve access to naloxone; establish a 24-hour crisis center in Baltimore City; expand use of peer

recovery support specialists; expand Screening, Brief Intervention, and Referral to Treatment to hospitals and parole, probation, and correctional facilities; increase access to medication-assisted treatment; expand law enforcement diversion programs; and improve the State's crisis hotline.

ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Crimes - Controlled Dangerous Substances - Volume Dealers

BILL NUMBER: SB0313/HB0358

PREPARED BY: Melissa Ross

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS