

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 372
Judiciary

(Charles County Delegation)

Criminal Law - Synthetic Drugs - Penalties

This bill prohibits a person from purchasing, using, or possessing a “synthetic drug,” as defined in the bill. A person who violates this prohibition is guilty of a misdemeanor and on conviction is subject to imprisonment for up to 60 days and/or a fine of up to \$500. A person may also not distribute a synthetic drug under specified circumstances. A person who violates this prohibition is guilty of a misdemeanor and on conviction is subject to imprisonment for up to three years and/or a fine of up to \$5,000. Additionally, a person who violates any of the bill’s prohibitions must pay all administrative fees and costs to the designated law enforcement agency for the chemical testing of the substance collected as evidence and any other costs that arise from the testing. The bill further specifies that property seized in connection with the bill’s crimes is subject to forfeiture.

Fiscal Summary

State Effect: Minimal increase in general fund revenues and expenditures due to the bill’s penalty provisions. General fund revenues also increase minimally due to the bill’s seizure and forfeiture provision and the bill’s requirement that violators pay all administrative fees and costs for the chemical testing of any evidence. Potential minimal increase in general fund expenditures for the Office of the Public Defender (OPD) to accommodate any increase in cases as a result of the bill. Any increase in District Court caseloads can be handled with existing resources. Enforcement can also be handled with existing resources.

Local Effect: Minimal increase in expenditures due to the bill’s penalty provisions. Local revenues also increase minimally due to the bill’s seizure and forfeiture provision and the bill’s requirement that violators pay all administrative fees and costs for the chemical testing of any evidence. Enforcement can be handled with existing resources.

Small Business Effect: None.

Analysis

Bill Summary: The bill's provisions do not apply to an accredited academic or medical institution or research facility or an authorized agent of the institution or facility that conducts research on synthetic drugs.

A person may not distribute a product (1) that the person represents as a synthetic drug; (2) that the person intends for use or distribution as a synthetic drug; or (3) under circumstances which the person reasonably knows the product will be used or distributed as a synthetic drug.

“Distribute” means to (1) give, sell, deliver, dispense, or issue; (2) offer to give, sell, deliver, dispense, or issue; or (3) cause or hire another person to give, sell, deliver, dispense, or issue.

“Synthetic drug” means a product distributed 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 narcotics. The definition includes products known as “bath salts” and synthetic marijuana.

“Synthetic marijuana” means a psychoactive designer drug, cannabimimetic agent, or synthetic cannabinoid sprayed on natural herbs, incense, or other dried leafy plant material that mimics the intoxicating effects of marijuana. The definition includes any compound, mixture, or preparation that would reasonably indicate under all the circumstances to be marijuana or synthetic marijuana.

The bill specifies factors to be considered in determining whether a product is being distributed with the intent or knowledge 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.

Current Law: Controlled dangerous substances (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.

State Revenues: General fund revenues increase minimally as a result of the bill’s monetary penalty provisions from cases heard in the District Court. General fund revenues also increase minimally due to the bill’s seizure and forfeiture provision. Additionally, general fund revenues increase minimally due to the bill’s requirement that violators pay all administrative fees and costs for the chemical testing of any evidence, to the extent the Maryland State Police Forensic Laboratory conducts testing for violations. The Department of State Police advises that it costs about \$57 per test for synthetic drug content.

State Expenditures: While some synthetic drugs as defined under the bill are illegal in the State, under the definition of cannabimimetic agents and as a result of the federal Synthetic Drug Abuse Prevention Act of 2012, as discussed above, it is unclear to what extent the provisions are being enforced and what level of increased enforcement occurs as a result of the bill. That being said, it is assumed that the number of additional arrests and convictions resulting from the bill is minimal. Thus, general fund expenditures increase minimally due to more people being committed to State correctional facilities and increased payments to counties for reimbursement of inmate costs. General fund expenditures may also increase minimally for OPD to handle any additional cases generated by the bill.

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 \$3,300 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 \$770 per month. Excluding all health care, the average variable costs total \$200 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 had 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 Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

Local Revenues: Revenues increase minimally due to the bill's seizure and forfeiture provision. Revenues also increase minimally due to the bill's requirement that violators pay all administrative fees and costs for the chemical testing of any evidence, to the extent that local government forensic laboratories conduct testing for violations. Data regarding the costs for synthetic substance testing incurred by local police departments are not readily available.

Local Expenditures: Expenditures increase minimally as a result of applicable CDS penalty provisions. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. A \$45 per diem State 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. Per diem operating costs of local detention facilities have ranged from approximately \$60 to \$160 per inmate in recent years.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Governor's Office of Crime Control and Prevention; Department of Public Safety and Correctional Services; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; State's Attorneys' Association; University System of Maryland; Maryland

Department of Transportation; Department of General Services; Comptroller's Office; Department of Natural Resources; Department of Health and Mental Hygiene; Department of State Police; Baltimore City; Kent, Montgomery, Washington, and Worcester counties; American Association of Poison Control Centers; Maryland Poison Center; National Institute on Drug Abuse; Department of Legislative Services

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md/kdm

Analysis by: Sasika Subramaniam

Direct Inquiries to:
(410) 946-5510
(301) 970-5510

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