



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 1141

(Patron – Hodges)

LD#: 12103798

Date: 1/23/2012

Topic: Schedule V controlled substances

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
None (\$0)
- **Local Adult Correctional Facilities:**
Cannot be determined
- **Adult Community Corrections Programs:**
Cannot be determined

- **Juvenile Correctional Centers:**
None (\$0)
- **Juvenile Detention Facilities:**
None (\$0)

Summary of Proposed Legislation:

The proposed legislation amends § 54.1-3454 of the *Code of Virginia* to add ezogabine (trade name: Potiga), a prescription anticonvulsant, to Schedule V of the Virginia Drug Control Act. Ezogabine is a new chemical substance with central nervous system depressant properties. The Food and Drug Administration approved a New Drug Application for ezogabine as a treatment for partial onset seizures on June 10, 2011.¹ On December 15, 2011, the Administrator of the Drug Enforcement Administration (DEA) placed ezogabine into Schedule V of the federal Controlled Substances Act.² Although the drug had not been marketed in the United States prior to the scheduling decision of the DEA, the Administration determined that ezogabine would have an abuse potential similar to two current Schedule V controlled substances, namely pregabalin and lacosamide.

Currently, under § 18.2-250(A,b2), possession of a Schedule V controlled substance without a valid prescription is a Class 3 misdemeanor. This offense is punishable by a fine of not more than \$500. The manufacture, sale, or distribution of a Schedule V drug or the distribution of a Schedule V drug as an accommodation are Class 1 misdemeanors punishable by up to twelve months in jail under § 18.2-248(F). The sale, distribution, etc., of an imitation Schedule V drug is also a Class 1 misdemeanor.

Under § 18.2-247, the term “controlled substance,” as used in Title 18.2 of the *Code*, has the same meaning as it is defined in the Drug Control Act (§ 54.1-3400 et seq.). Pursuant to § 54.1-3041, the term “controlled substance” refers to a drug, substance, or immediate precursor listed in Schedules I through VI of the Drug Control Act. Under § 18.2-255.2, the distribution of a controlled substance on school property as an accommodation is a Class 1 misdemeanor and distribution, etc., of a controlled substance

¹ FDA Approves Potiga to Treat Seizures in Adults. U.S. Food and Drug Administration. Available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm258834.htm>.

² Proposed Rules 2011 – Placement of Ezogabine Into Schedule V. Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice. Available at http://www.deadiversion.usdoj.gov/fed_regs/rules/2011/fr1215_2.htm.

on school property not as an accommodation is a Class 6 felony. A second or subsequent conviction for distribution, etc., of a controlled substance on school property carries a mandatory minimum term of one year. The sale of an imitation controlled substance to a minor and using a minor to assist in the distribution of an imitation controlled substance are also punishable as Class 6 felonies.

Analysis:

According to General District Court Automated Information System (CAIS) data for fiscal year (FY) 2010 and FY2011, 16 offenders were convicted of a Class 3 misdemeanor for possession of a Schedule V controlled substance. Six additional offenders were convicted of a Class 1 misdemeanor for distribution of a Schedule V drug in violation of § 18.2-248(F). Of these offenders, two did not receive an active term of incarceration to serve after sentencing while the remaining four offenders were sentenced to local-responsible (jail) terms. The median sentence length for these offenders was one month. No offenders were convicted of a Class 1 misdemeanor for distribution of a Schedule V controlled substance as an accommodation.

Data from the General District Court Automated Information System also indicate that there were no misdemeanor convictions for distribution of a controlled substance on school property as an accommodation between FY2010 and FY2011. According to Sentencing Guidelines data for the same time period, 169 offenders were convicted of a Class 6 felony under § 18.2-255.2 for distribution, etc., of a controlled substance on school property as a first offense. None of these offenders were convicted of an offense involving a Schedule V controlled substance in the same sentencing event. The charge for distributing a controlled substance in a school zone was the primary, or most serious, offense in 25 of the cases. While slightly more than half (52%) of these offenders did not receive an active term of incarceration to serve after sentencing, 32% received a local-responsible (jail) sentence, with a median sentence length of three months. The remaining four offenders were all sentenced to a state-responsible (prison) term of one year. According to CAIS Circuit Court data for FY2010 and FY2011, two offenders were convicted of a Class 6 felony for a second or subsequent violation of § 18.2-255.2. The primary offense in both of these sentencing events related to distribution of a Schedule I or II drug.

Sentencing Guidelines data for FY2010 and FY2011 indicate that one offender was convicted of a Class 6 felony under § 18.2-255(B,i) for distributing an imitation controlled substance to a minor. This offense was the primary, or most serious, offense for the case. The offender did not receive an active term of incarceration to serve after sentencing. According to CAIS Circuit Court data for FY2010 and FY2011, no offenders were convicted of a Class 6 felony under § 18.2-255(B,ii) for using a minor to distribute an imitation controlled substance.

Impact of Proposed Legislation:

State adult correctional facilities. Expanding the existing definition of a Schedule V controlled substance, as defined in § 54.1-3454, to include ezogabine is unlikely to increase the state-responsible (prison) bed space needs of the Commonwealth during the six-year window specified by § 30-19.1:4 for legislative impact statements.

First, the majority of criminal offenses that would be directly impacted by the proposal, including possession or distribution of a Schedule V controlled substance, are misdemeanors and, as such, only provide for incarceration in local-responsible facilities.

Second, the felonies that might be impacted rarely occur in conjunction with charges relating to existing Schedule V controlled substances. By adding ezogabine to the list of Schedule V controlled substances, the proposal expands the definition of “controlled substance,” as defined in § 54.1-3041. As a result, certain acts relating to ezogabine would be eligible for prosecution as felonies. Specifically, under

§ 18.2-255.2, the distribution, etc., of a controlled substance on school property is a Class 6 felony. In addition, the sale of an imitation controlled substance to a minor and using a minor to assist in the distribution of an imitation controlled substance are punishable as Class 6 felonies. Since no felony convictions for any of these offenses in recent years have occurred in conjunction with a Schedule V drug, it is unlikely that expanding these offenses to include limited acts relating to ezogabine or imitation ezogabine will result in convictions and subsequent state-responsible (prison) sentences under these provisions.

Local adult correctional facilities. The proposal may increase local-responsible (jail) bed space needs; however, the magnitude of the impact cannot be determined.

Adult community corrections programs. The proposal's impact on the need for adult community corrections resources cannot be determined.

Virginia's sentencing guidelines. Violations involving Schedule V controlled substances are not covered by the guidelines as the primary (or most serious) offense; however, convictions may augment the guidelines recommendation if the most serious offense at sentencing is covered by the guidelines. No adjustment to the guidelines would be necessary under the proposal.

Juvenile correctional centers. According to the Department of Juvenile Justice, the proposal is not expected to increase juvenile correctional center bed space needs.

Juvenile detention facilities. The Department of Juvenile Justice reports that the proposal is not expected to increase the bed space needs of juvenile detention facilities.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$0 for periods of imprisonment in state adult correctional facilities.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.

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