



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 1839 (Patron – Robinson)

LD#: 15101659

Date: 1/27/2015

Topic: Schedule III and IV controlled substances

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
\$50,000 *
- **Local Adult Correctional Facilities:**
Cannot be determined
- **Adult Community Corrections Programs:**
Cannot be determined

- **Juvenile Correctional Centers:**
Cannot be determined **
- **Juvenile Detention Facilities:**
Cannot be determined **

** Provided by the Department of Juvenile Justice

* The estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 2 of the 2014 Acts of Assembly, Special Session I, requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Summary of Proposed Legislation:

The proposed legislation amends §§ 54.1-3450 and 54.1-3452 of the *Code of Virginia*, relating to scheduling of certain controlled substances. Currently, except for compounds and mixtures listed in other schedules, hydrocodone is classified as a Schedule II controlled substance. Under the proposed modifications to § 54.1-3450, language that currently classifies hydrocodone combination products as Schedule III controlled substances would be removed. As a result, these hydrocodone mixtures would be reclassified as Schedule II controlled substances.

Possession of a Schedule III controlled substance is punishable as a Class 1 misdemeanor, while possession of a Schedule II drug is a Class 5 felony, punishable by imprisonment of 1 to 10 years. Selling, distributing, manufacturing, or possessing with the intent to distribute, etc., a Schedule III drug is a Class 5 felony, whereas distributing, etc., a Schedule I or II controlled substance is punishable by imprisonment from five to forty years. The maximum sentence for a second conviction of selling, distributing, etc., a Schedule I or II drug is life imprisonment, with a mandatory minimum sentence of three years; for a third conviction, the mandatory minimum sentence is ten years. Distribution of a Schedule I or II drug by accommodation is a Class 5 felony. The *Code* includes additional felonies for transporting a Schedule I or II drug into the Commonwealth, distributing a Schedule I or II drug to a person under the age of 18, distributing near schools or other specified properties, and for possessing a Schedule I or II drug while possessing a firearm.

In addition, the proposed modifications to § 54.1-3452 would add alfaxalone, suvorexant, and tramadol to Schedule IV of the Virginia Drug Control Act. The Drug Enforcement Administration (DEA) placed all three substances into Schedule IV of the federal Controlled Substances Act (CSA) in 2014.

Tramadol is a centrally-acting opioid analgesic used for the treatment of moderate to moderately severe pain in adults. A study by the DEA indicates that "obtained or diverted from legitimate sources, individuals take tramadol in the absence of medical supervision and in amounts sufficient to create a hazard to their health. Tramadol produces effects similar to opioids known to have an abuse potential and that are controlled under the CSA."¹ Recent results from the National Survey on Drug Use and Health (NSDUH) indicate that 3.2 million people in the U.S. aged 12 or older reported using tramadol for nonmedical purposes in 2012.²

According to the DEA, alfaxalone, a substance with central nervous system depressant properties, has an abuse potential similar to that of other sedatives with similar modes of action and effects (e.g. midazolam) that are currently classified as Schedule IV controlled substances.³ Similarly, the DEA has determined that the abuse potential for suvorexant, which was developed for the treatment of insomnia, is similar to zolpidem, another Schedule IV controlled substance.⁴

Currently, possession of a Schedule IV controlled substance is a Class 2 misdemeanor under § 18.2-250(A,b1), which is punishable by incarceration of up to six months in jail. Distribution of a Schedule IV controlled substance as an accommodation is a Class 1 misdemeanor under § 18.2-248(E3) carrying up to twelve months in jail. Manufacturing, selling, giving, distributing, or possessing with intent to distribute a Schedule IV controlled substance in violation of § 18.2-248(E2) is a Class 6 felony punishable by imprisonment from one to five years. The penalty for sale of a Schedule IV controlled substance to a minor and using a minor to assist in the distribution of a Schedule IV drug is imprisonment from ten to fifty years. The sale, distribution, etc., of an imitation Schedule IV drug is a Class 6 felony.

Analysis:

According to General District Court Case Management System (CMS) data for fiscal year (FY) 2013 and FY2014, there were 546 sentencing events involving a misdemeanor conviction for possession of a Schedule IV controlled substance. This offense was the primary, or most serious, offense in 335 cases. The majority of these offenders (69.6%) did not receive an active term of incarceration to serve after sentencing. The remaining offenders (30.4%) were sentenced to local-responsible (jail) terms with a median sentence of approximately one month. In addition, two offenders were convicted of distribution of a Schedule IV controlled substance as an accommodation (as the primary offense); these offenders did not receive an active term of incarceration to serve after sentencing.

According to Circuit Court CMS data for the same time period, 164 offenders were convicted of a felony for manufacturing, selling, giving, distributing, or possessing with intent to distribute, etc., a Schedule IV controlled substance. This offense was the primary offense in 49 of the cases. Of these, 42.9% did not result in an active term of incarceration to serve after sentencing. Slightly less than half (49%) of the offenders were sentenced to local-responsible (jail) terms, with a median sentence of 3 months. The remaining 8.2% received state-responsible (prison) terms, for which the median sentence was approximately one year.

Circuit Court CMS data for FY2013 and FY2014 also indicate that a felony conviction under §18.2-255(A,i) for selling a Schedule III or IV controlled substance to a minor was the primary offense in two

¹ Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice. Available at http://www.deadiversion.usdoj.gov/fed_regs/rules/2013/fr1104.htm.

² Drug Enforcement Administration (July 2014). Tramadol. Available at http://www.deadiversion.usdoj.gov/drug_chem_info/tramadol.pdf.

³ Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice. Available at http://www.deadiversion.usdoj.gov/fed_regs/rules/2014/fr0227_2.htm.

⁴ Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice. Available at http://www.deadiversion.usdoj.gov/fed_regs/rules/2014/fr0828.htm.

cases. While one of these offenders was sentenced to a local-responsible (jail) term of 10 months, the other received a state-responsible (prison) term of five years. Four additional offenders were convicted of distributing an imitation Schedule IV drug under §18.2-248(G) during this time period. The distribution offense was not the most serious offense in any of the cases. According to available data, there were no convictions in circuit court for using a minor to assist in the distribution of a Schedule III or IV drug in FY2013 or FY2014.

According to fiscal year (FY) 2013 and FY2014 Sentencing Guidelines data, a felony conviction involving a Schedule I or II controlled substance was the primary, or most serious, offense in 12,914 felony sentencing events. More than half (58%) of these convictions involved the simple possession of a Schedule I or II drug. Of the offenders convicted of simple possession, roughly half were sentenced to a term of incarceration: 37.8% were given a local-responsible (jail) term and 11.5% received a state-responsible (prison) term. For possession offenders committed to prison, the median sentence was 1.6 years. Offenders convicted of selling, distributing, etc., a Schedule I or II controlled substance under § 18.2-248(C) were much more likely to be incarcerated. While 23.7% of these offenders were sentenced to serve time in jail, 65% received a prison term. For offenders committed to prison for a sales or distribution-related offense, the median sentence was 2.5 years.

Impact of Proposed Legislation:

State adult correctional facilities. The proposed legislation expands the list of Schedule IV controlled substances by adding alfaxalone, suvorexant, and tramadol. In addition, the proposal classifies hydrocodone combination products, which are currently listed as Schedule III controlled substances, as Schedule II drugs. By expanding the applicability of several existing felony offenses, the proposal may increase the future state-responsible (prison) bed space needs of the Commonwealth. However, data sources available to the Commission do not contain sufficient detail to estimate the number of additional convictions that may result from the proposal. Therefore, the impact of the proposal on prison bed space needs cannot be quantified.

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

Adult community corrections resources. Because the proposal could result in felony convictions and subsequent supervision requirements for an additional number of offenders, the proposal may increase the need for adult community corrections resources. Since the number of cases that may be affected cannot be determined, the potential impact on community corrections resources cannot be quantified.

Virginia's sentencing guidelines. Several sales and distribution-related offenses defined in § 18.2-248(C), relating to Schedule I and II controlled substances, are currently covered by the sentencing guidelines when this offense is the primary, or most serious, offense in a case. Offenses involving Schedule IV controlled substances are not covered by the guidelines as the primary offense; however, such a conviction 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 (DJJ), the impact of the proposal on juvenile correctional center (JCC) bed space needs cannot be determined.

Juvenile detention facilities. The Department of Juvenile Justice reports that the proposal's impact on the bed space needs of juvenile detention facilities cannot be determined.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 2 of the 2014 Acts of Assembly, Special Session I, requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.

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