



# Impact Analysis on Proposed Legislation

## Virginia Criminal Sentencing Commission

### House Bill No. 437

(Patron – Arnold)

LD#: 24101629

Date: 01/03/2024

Topic: Manufacturing, selling, distributing, etc., fentanyl

#### Fiscal Impact Summary:

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

- **Juvenile Direct Care:**  
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 1 of the Acts of Assembly of 2023, Special Session I, requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4, fiscal impact statements prepared by the Virginia Criminal Sentencing Commission only address the estimated increase in operating costs associated with additional state-responsible prison beds and do not reflect any other costs or savings that may be associated with the proposed legislation.

#### Summary of Proposed Legislation:

The proposal amends § 18.2-248 of the *Code of Virginia* to establish weight-based criminal penalties for offenders who manufacture, sell, give, or distribute fentanyl.

The proposal would specify criminal offenses involving a certain amount of fentanyl and establish related penalties as follows:

- Any person who manufactures, sells, gives, or distributes five grams or more of fentanyl, or ten grams or more of a mixture or substance containing fentanyl is guilty of a felony punishable by a fine of not more than \$1 million and imprisonment for five years to life, five years of which shall be a mandatory minimum term of imprisonment (not applicable under certain conditions).
- Any person who manufactures, sells, gives, or distributes 25 grams or more of fentanyl, or 50 grams or more of a mixture or substance containing fentanyl is guilty of a felony punishable by a fine of not more than \$1 million and imprisonment for 20 years to life, 20 years of which shall be a mandatory minimum sentence (not applicable under certain conditions).
- Any person who was a principal in a continuing criminal enterprise is guilty of a felony if the person engaged in the enterprise to manufacture, sell, give, or distribute at least 50 grams but less than 100 grams of fentanyl, or at least 100 grams but less than 250 grams of a mixture or substance containing fentanyl, during any 12-month period. This offense is punishable by a fine of not more than \$1 million and imprisonment for 20 years to life, 20 years of which shall be a mandatory minimum sentence.

- Any person who was a principal in a continuing criminal enterprise is guilty of a felony if the person engaged in the enterprise to manufacture, sell, give, or distribute at least 250 grams of fentanyl, or at least 1.0 kilograms of a mixture or substance containing fentanyl, during any 12-month period. This offense is punishable by a fine of not more than \$1 million and imprisonment for life; however, the court may impose a mandatory minimum sentence of 40 years if the court finds that the defendant substantially cooperated with law-enforcement authorities.

Pharmaceutical fentanyl is a synthetic opioid, approved for treating severe pain; it is 50 to 100 times more potent than morphine.<sup>1</sup> Illicitly manufactured fentanyl is available on the drug market in different forms, including liquid and powder.<sup>2</sup> Powdered fentanyl looks just like many other drugs. It is commonly mixed with drugs like heroin, cocaine, and methamphetamine and made into pills that are made to resemble other prescription opioids.

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### Analysis:

Criminal justice data systems in the Commonwealth have not systematically captured the type or quantity of drug(s) associated with manufacturing, selling, giving, distributing, etc., controlled substances. In 2017, the Commission modified the Sentencing Guidelines cover sheet and began to collect the specific type of drug in cases in which a drug offense is the primary (or most serious) offense in the sentencing event. The cover sheet now includes check boxes for recording drugs such as: cocaine, codeine, fentanyl, heroin, hydrocodone, methadone, oxycodone and methamphetamine. The fiscal year (FY) 2022 through FY2023 Sentencing Guidelines data indicate that, among cases in which the manufacture, sale, distribution, etc., of a Schedule I or II drug is the most serious offense, 17% of the cases involved fentanyl. These data do not accurately record the exact quantity of fentanyl involved, since the drug is often found in combination with other drugs; therefore, data are insufficient to estimate the number of offenders who will be subject to the proposed criminal penalties specified for certain quantities of fentanyl.

The Virginia Department of Forensic Science (DFS) received over 5,000 illicit synthetic opioid submissions for analysis in each of calendar years (CY) 2021 and 2022. Approximately 99% of the illicit synthetic opioids submitted were found to contain fentanyl or fentanyl analogs.<sup>3</sup>

According to the Circuit Court Case Management System (CMS) for FY2018 through FY2023, 405 individuals were convicted of manufacturing, distributing, etc., large quantities of Schedule I or II drugs or marijuana under § 18.2-248 (subsections C, H, H1, and H2). In 381 cases, this offense was the primary, or most serious, offense at sentencing. Approximately 94% of these cases involved methamphetamine. Most of these individuals (92.1%) were sentenced to a state-responsible (prison) term for which the median sentence was five years. Another 3.7% were sentenced to a local-responsible (jail) term for which the median sentence was eight months. The remaining offenders (4.2%) received probation or were sentenced to the time served by the offender while awaiting trial.

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### Impact of Proposed Legislation:

**State adult correctional facilities.** By expanding existing penalties under § 18.2-248 to include certain amounts of fentanyl, the proposal may increase the state-responsible (prison) bed space needs of the Commonwealth. Since the number of individuals who may be subject to such penalties cannot be determined with available data, the magnitude of the impact on prison beds cannot be quantified.

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<sup>1</sup> <https://www.cdc.gov/opioids/basics/fentanyl.html>

<sup>2</sup> <https://www.cdc.gov/stopoverdose/fentanyl/index.html>

<sup>3</sup> Virginia Department of Criminal Justice Services, Criminal Justice Research Center. (2023). *Criminal Justice and Socioeconomic Trends*. Presented to the Offender Population Forecasting Technical Advisory Committee on 19 July 2023.

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

**Adult community corrections programs.** 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 cannot be quantified.

**Virginia’s Sentencing Guidelines.** The most frequently occurring felony convictions under § 18.2-248 related to the manufacture, sale, or distribution of Schedule I or II drugs are covered by the Sentencing Guidelines. In general, felonies under this section involving large quantities of drugs are not covered; a conviction for one of these crimes, however, could augment the Guidelines recommendation (as an additional offense) if the most serious offense at sentencing is covered by the Guidelines. These crimes are not defined as violent in § 17.1-805(C) for purposes of the Guidelines. No adjustment to the Guidelines would be necessary under the proposal.

**Juvenile direct care.** According to the Department of Juvenile Justice, the impact of the proposal on direct care (juvenile correctional center or alternative commitment placement) 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.

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**Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 1 of the Acts of Assembly of 2023, 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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