

CERTAIN CONTROLLED SUBSTANCE PENALTIES

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House Bill 4243 as reported from committee
Sponsor: Rep. Julie Alexander

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4244 as reported
Sponsor: Rep. Sarah Anthony

House Bill 4245 as reported
Sponsor: Rep. David LaGrand

Committee: Rules and Competitiveness
Revised 4-12-22

SUMMARY:

House Bill 4243 would amend the Public Health Code to revise penalties for certain offenses involving the illegal manufacture, creation, delivery, or possession with the intent to manufacture, create, or deliver of cocaine and Schedule 1 and 2 narcotics. House Bills 4244 and 4245 would amend the Code of Criminal Procedure to make related changes to the sentencing guidelines and to allow probation for certain drug offenses. Of note, under the bills, terms such as “major controlled substance offense” in the Code of Criminal Procedure and “specified juvenile violation” in the Probate Code, which now apply to offenses involving cocaine and *all* Schedule 1 and 2 narcotics, would appear to apply only to cocaine and those narcotics that are *not* heroin, fentanyl, or other opiates. (See **Background**, below.)

House Bill 4243 would revise the maximum terms of imprisonment for certain violations involving the unlawful manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver of a Schedule 1 or 2 controlled substance that is a narcotic drug or cocaine.

The bill would divide cocaine and Schedule 1 and 2 narcotics into three groups of substances with different penalties. Broadly speaking, with *exceptions* described below, the bill would retain current penalties for violations that involve heroin, fentanyl, carfentanil, or other opiates and would reduce maximum terms of imprisonment for violations that involve cocaine or narcotics that are not heroin, fentanyl, carfentanil, or other opiates. (See **Background**, below, for a discussion of terminology. See **Table 1**, below, for a comparison of maximum penalties in current law and the bill.)

Currently, a violation involving a Schedule 1 or 2 controlled substance that is a narcotic drug or cocaine, or any mixture containing those substances, is a felony punishable as follows:

- For 1,000 grams or more: imprisonment for life or any term of years or a fine of up to \$1.0 million, or both.
- For at least 450 grams but less than 1,000 grams: imprisonment for up to 30 years or a fine of up to \$500,000, or both.
- For at least 50 grams but less than 450 grams: imprisonment for up to 20 years or a fine of up to \$250,000, or both.
- For less than 50 grams: imprisonment for up to 20 years or a fine of up to \$25,000, or both.

Under the bill, the above penalties would apply to a violation involving heroin, fentanyl, and carfentanil, a mixture of those substances, or a mixture of any derivative of those substances.

The above penalties also would apply to a violation involving an opiate other than heroin, fentanyl, or carfentanil (or any mixture or derivative of those substances) or involving any mixture containing such an opiate or any derivative of that opiate, *except that* the maximum term of imprisonment for a violation involving less than 50 grams would be reduced from 20 years to 10 years.

A violation involving cocaine or a Schedule 1 or 2 controlled substance that is a narcotic, other than those described above, would be a felony punishable as follows:

- For 1,000 grams or more: imprisonment for up to 30 years or a fine of up to \$1.0 million, or both.
- For at least 450 grams but less than 1,000 grams: imprisonment for up to 20 years or a fine of up to \$500,000, or both.
- For at least 50 grams but less than 450 grams: imprisonment for up to 20 years or a fine of up to \$250,000, or both. (*This is the same as current law.*)
- For less than 50 grams: imprisonment for up to 10 years or a fine of up to \$25,000, or both.

Table 1. Maximum Penalties under Current Law and House Bill 4243

	Current Law	House Bill 4243		
		A	B	C
	Schedule 1 or 2 controlled substance that is a narcotic or cocaine or any mixture containing those substances	Heroin, fentanyl, or carfentanil or a mixture that contains any of those substances or a derivative of those substances	Schedule 1 or 2 opiate not included in Column A or a mixture that contains such an opiate or a derivative of such an opiate	Cocaine or a Schedule 1 or 2 controlled substance that is a narcotic and is not included in Column A or B
1,000 grams or more	Life	Life	Life	30 years
	\$1.0 million	\$1.0 million	\$1.0 million	\$1.0 million
At least 450 but less than 1,000 grams	30 years	30 years	30 years	20 years
	\$500,000	\$500,000	\$500,000	\$500,000
At least 50 but less than 450 grams	20 years	20 years	20 years	20 years
	\$250,000	\$250,000	\$250,000	\$250,000
Less than 50 grams	20 years	20 years	10 years	10 years
	\$25,000	\$25,000	\$25,000	\$25,000

All violations are felonies punishable by imprisonment, a fine, or both. Penalties shown in the table are maximums. Shading denotes a proposed change from current law.

MCL 333.7401

House Bill 4244 would amend the sentencing guidelines in the Code of Criminal Procedure to reflect the controlled substance categories and maximum terms of imprisonment proposed by HB 4243. The bill would also change the felony classification of certain crimes involving heroin, fentanyl, or carfentanil and of certain crimes involving cocaine or Schedule 1 or 2 controlled substances that are nonopiate narcotics. The heroin, fentanyl, or carfentanil classifications would be changed from Class B and Class D to Class A and Class B. The cocaine and nonopiate narcotics classifications would be changed from Class A and Class B to Class B and Class C. (See **Background**, below, for a discussion of felony classifications and the provisions of the bill.) **Table 2** shows the changes proposed by HB 4244.

Table 2. Statutory Maximums and Felony Classifications in the Sentencing Guidelines under Current Law and House Bill 4244

	Current Law	House Bill 4244		
		A	B	C
	Schedule 1 or 2 controlled substance that is a narcotic or cocaine or any mixture containing those substances	Heroin, fentanyl, or carfentanil or a mixture that contains any of those substances or a derivative of those substances	Schedule 1 or 2 opiate not included in Column A or a mixture that contains such an opiate or a derivative of such an opiate	Cocaine or a Schedule 1 or 2 controlled substance that is a narcotic and is not included in Column A or B
1,000 grams or more	Life Class A	Life Class A	Life Class A	30 years Class B
At least 450 but less than 1,000 grams	30 years Class A	30 years Class A	30 years Class A	20 years Class B
At least 50 but less than 450 grams	20 years Class B	20 years Class A	20 years Class B	20 years Class C
Less than 50 grams	20 years Class D	20 years Class B	10 years Class D	10 years Class D

The maximum terms of imprisonment above reflect those in HB 4243. Shading denotes a proposed change from current law.

The bill also would make a technical correction to a sentencing guidelines provision concerning certain prescription information disclosures to reflect changes made to the Public Health Code by 2001 PA 236.

MCL 777.13m

House Bill 4245 would amend the Code of Criminal Procedure to allow a court to order probation for certain controlled substance offenses. The code generally allows the court to place a defendant who has been found guilty of a crime on probation if it determines that the defendant is not likely to engage in an offensive or criminal course of conduct and that the public good does not require probation to be denied. However, certain crimes, including *major controlled substance offenses*, are not eligible for probation.

Major controlled substance offense means a violation of section 7401(2)(a) or 7403(2)(a)(i) to (iv) of the Public Health Code. **[Note:** Currently, these provisions establish penalties related to the unlawful possession (section 7403) or unlawful manufacture, delivery, or possession with intent (section 7401) of cocaine and Schedule 1 or 2 narcotics. However, under HB 4243, section 7401(2)(a) would apply *only* to cocaine and to Schedule 1 or 2 narcotics that are *not* heroin, fentanyl, or carfentanil (which would be moved to section 7401(2)(g)) or another opiate (which would be moved to section 7401(2)(h)). In other words, the bill would newly allow probation for offenses under section 7401 involving the unlawful manufacture, delivery, or possession with intent of heroin, fentanyl, carfentanil, or another opiate, but probation would not be allowed for possession of those drugs under section 7403.]

The bill would additionally provide that a defendant may be sentenced to probation for the unlawful manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver of either of the following:

- Cocaine or a narcotic drug (other than heroin, fentanyl, carfentanil, or another opiate) in an amount less than 50 grams of any mixture containing that substance.
- An opiate (other than heroin, fentanyl, or carfentanil) or a mixture or derivative of such an opiate in an amount less than 50 grams of any mixture containing that substance. **[Note:** As described above, section 7401(2)(h) is not included in the bill’s definition of *major controlled substance offense*, so probation for a violation of that provision would not seem to be ruled out in the first place, regardless of the amount of the opiate other than heroin, fentanyl, or carfentanil that is involved in the offense.]

MCL 771.1

Each bill would take effect 90 days after being enacted. House Bills 4243 and 4244 are tie-barred to each other, and House Bill 4245 is tie-barred to House Bill 4243. A bill cannot take effect unless each bill to which it is tie-barred is also enacted.

BACKGROUND:

Citations of section 7401(2)(a) in other law

Section 7401(2)(a) of the Public Health Code currently provides penalties for offenses involving the illegal manufacture, creation, delivery, or possession with the intent to manufacture, create, or deliver of cocaine and *all* Schedule 1 and 2 narcotics.

As noted above, the defined term “major controlled substance offense” in the Code of Criminal Procedure includes a “violation of section 7401(2)(a) of the Public Health Code.”¹ The term “major controlled substance offense” is similarly defined in provisions of the Michigan Penal Code and the Corrections Code. Other statutes cite section 7401(2)(a) for purposes such as

¹ <https://www.legislature.mi.gov/documents/mcl/pdf/mcl-761-2.pdf>

parole, juvenile adjudication, admissibility of evidence, and suspension of teaching certificates. For example, the term “specified juvenile violation” is defined in the Probate Code, the Code of Criminal Procedure, and the Revised Judicature Act as including a “violation of section 7401(2)(a)(i).” (Among other things, a juvenile who has committed a “specified juvenile violation” can be tried in circuit court as an adult.)

House Bill 4243 would move violations involving heroin, fentanyl, or carfentanil to section 7401(2)(g) and those involving other opiates to section 7401(2)(h). In other words, those drugs would no longer be addressed in section 7401(2)(a). As a result, under the bills as reported, “major controlled substance offense” and “specified juvenile violation” and other provisions of law that specifically cite section 7401(2)(a) would *not* apply to offenses involving those drugs, but would instead apply *only* to cocaine and those narcotics that are *not* heroin, fentanyl, carfentanil, or other opiates.²

Narcotic drugs and opiates

The changes made by House Bill 4243 would apply to cocaine and to *narcotic drugs* that are included in Schedule 1 or Schedule 2. Note that “narcotic drugs” is not a synonym for “drugs.” (Just as “opiates” is not a synonym for “opioids.”) Not all of the controlled substances in Schedules 1 and 2 are narcotic drugs. For example, the bill would not appear to apply to such Schedule 1 or 2 drugs as LSD, ecstasy (MDMA), psilocybin (“magic mushrooms”), methamphetamine, or stimulants such as Adderall and Ritalin. In addition, not all narcotic drugs are included in Schedules 1 and 2. For example, limited quantities of codeine, a narcotic drug, are listed in Schedule 3.

Section 7107 of the Public Health Code³ defines *narcotic drug* as one or more of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

- Opium and *opiate* and any salt, compound, derivative, or preparation of opium or opiate.
- Any salt, compound, isomer, derivative, or preparation thereof that is chemically equivalent or identical with any of the substances referred to above, but not including the isoquinoline alkaloids of opium.

Section 7108 defines *opiate* as a substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability.⁴

² For sections that cite section 7401(2)(a), see MCL [333.7410](#), [333.7410a](#), [333.7411](#), [333.7415](#), [333.7416](#), [380.1535a](#), [380.1539b](#), [600.606](#), [712A.2](#), [712A.2a](#), [712A.2d](#), [712A.18d](#), [750.316](#), [761.2](#), [764.1f](#), [766.14](#), [768.28a](#), [768.32](#), [777.43](#), [777.45](#), [791.233b](#), [791.233b\[1\]](#), [791.234](#), [791.236](#), [791.240a](#), and [803.307](#). In addition, the following sections cite to sections defining “specified juvenile violation” or “major controlled substance offense,” the scope of which would be changed as described above: MCL [330.1700](#), [333.16221](#), [380.1535a](#), [380.1539a](#), [500.3341](#), [600.606](#), [711.1](#), [712A.2](#), [712A.2a](#), [712A.2d](#), [712A.18d](#), [712A.19b](#), [722.822](#), [764.1f](#), [766.14](#), [768.28a](#), [769.1](#), [769.25](#), [769.25a](#), [770.9a](#), [771A.6](#), [780.983](#), [791.233b](#), [791.234](#), [791.234a](#), [791.234b](#), [791.236](#), [800.34](#), [803.225a](#), [803.307](#), and [803.307a](#).

³ <http://legislature.mi.gov/documents/mcl/pdf/mcl-333-7107.pdf>

⁴ <http://www.legislature.mi.gov/documents/mcl/pdf/mcl-333-7108.pdf>

The provision further specifies that “opiate” does not include, unless specifically designated as controlled under section 7212 of the code, the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan (dextromethorphan) and its salts—but it does include its racemic and levorotatory forms.

The above definition of “narcotic drug” appears to include the drugs that are now commonly called “opioids.” According to the CDC, “Opioids refer to all natural, semisynthetic, and synthetic opioids,” while “Opiates refer to natural opioids such as heroin, morphine and codeine.”⁵ Generally speaking, opiates are seen as a subset of opioids/narcotic drugs.

It is not clear, however, how this conventional sense of “opiate” relates to the use of the term “opiate” in the Public Health Code. For example, section 7214(b) describes as “opiates” both fentanyl and methadone—which as synthetic drugs are generally considered to be opioids (narcotic drugs) but not opiates. As a result, it could also be unclear which drugs would be included in the categories proposed by HB 4243 (heroin, fentanyl, carfentanil / other opiates / other nonopiate opioids and cocaine).

In addition, under the Public Health Code, “opiates” are defined as substances that can form or sustain an addiction similar to morphine. It is not clear which, if any, Schedule 1 and 2 narcotic drugs (opioids) are *not* addictive in that way. If all Schedule 1 and 2 narcotic drugs are addictive, then all narcotic drugs would appear to be opiates under the Public Health Code—and it would then be unclear which, if any, narcotic drugs are to be included in the proposed new category with cocaine.

Schedule 1 and 2 drug classifications

Sections 7212 and 7214 of the Public Health Code list the substances that are included in Schedule 1 and Schedule 2, respectively.⁶

A controlled substance is placed in Schedule 1 if it has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

A Schedule 2 controlled substance also has high potential for abuse, and its abuse may lead to severe psychic or physical dependence, but it has currently accepted medical use in treatment in the United States, including medical use with severe restrictions.

Heroin is a narcotic drug that is made from morphine, a substance derived from opium poppy plants. It was first developed commercially by the Bayer Company in Germany at the end of the 1800s, in part to address the fact that many cough remedies of the day contained morphine or codeine and thus themselves were addictive and fostered user tolerance (the need for higher or more frequent doses to attain the same effect). Heroin is now a Schedule 1 controlled substance, which means that it has high potential for abuse and no accepted medical uses.

Fentanyl is a synthetic narcotic drug that was first synthesized in the 1950s by chemists at Janssen Pharmaceutical in Belgium. It is a Schedule 2 controlled substance, which means that it has high potential for abuse but some accepted medical uses—most commonly to mitigate the pain of certain patients with cancer.

⁵ <https://www.cdc.gov/drugoverdose/opioids/terms.html>

⁶ <http://legislature.mi.gov/doc.aspx?mcl-333-7212> and <http://legislature.mi.gov/doc.aspx?mcl-333-7214>

See also the rules: https://dtmb.state.mi.us/ORRDocs/AdminCode/1953_2019-057LR_AdminCode.pdf

A federal controlled substance list: https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf

Carfentanil is a fentanyl-related narcotic drug that was first synthesized by chemists at Janssen Pharmaceutical in 1974. It is a Schedule 2 controlled substance that is used by veterinarians as a tranquilizer for elephants and other large mammals. It is not approved for human use.

Cocaine is an addictive stimulant drug, made from the leaves of the coca plant, that was first isolated in a laboratory in the mid-1800s. It is a Schedule 2 controlled substance, with limited medical use as a topically applied local anesthetic. It is not separately defined in the Public Health Code.

Felony classifications

Michigan uses an indeterminate sentencing structure in which the maximum term of imprisonment that may be imposed for an offense is established in law and an appropriate range of imprisonment for a particular offender is determined by scoring his or her prior record and various elements of the crime and then using a sentencing grid based on the felony classification of the offense (Class A through Class H)⁷ to determine an advisory sentence range appropriate for the offense and the offender. The score, and which grid must be used, can determine whether an offender is recommended to be sentenced to community sanctions, such as probation, or recommended to be imprisoned (and, if so, for how long).⁸

The length of a recommended maximum sentence is generally highest for Class A felonies (life or any term of years) and goes down as one moves through the alphabet to, say, Class C (up to 15 years) or Class E (up to five years) or Class G (up to two years). Similarly, the recommended minimum sentence of the sentencing range is highest for Class A felonies and generally decreases with each class that follows.

Classifying an offense as a Class A felony under the sentencing guidelines, instead of Class B, or as Class B instead of Class D, thus would likely increase the recommended minimum sentence for an offense as well as increasing the recommended maximum. This could also increase an offender's chances of being sentenced to imprisonment for the crime. House Bill 4244 would make this change for offenses involving heroin, fentanyl, carfentanil, and their mixtures and derivatives.

Conversely, reclassifying from Class A to Class B or from Class B to Class C could decrease both the recommended minimum and recommended maximum sentences for that offense or decrease the likelihood of a sentence of imprisonment. House Bill 4244 would make this change for offenses involving cocaine and those narcotic drugs that are not heroin, fentanyl, carfentanil, or other opiates.

Previous legislation

House Bills 4243, 4244, and 4245 are similar to HBs 5137, 5138, and 5299 of the 2019-20 legislative session as those bills were passed by the House of Representatives and reported from the Senate Judiciary and Public Safety committee.

⁷ There is also an M2 classification (second degree murder), with a maximum sentence of life or any term of years.

⁸ Note, however, that the sentencing guidelines are advisory only, and not mandatory, following the Michigan Supreme Court's decision in *People v Lockridge*, 498 Mich 358 (2015). While the sentencing court is still required to determine the applicable guidelines range and take it into account when imposing a sentence, it may reasonably depart from the recommended range. See <https://mjeducation.mi.gov/documents/sgm-files/94-sgm/file>

FISCAL IMPACT:

House Bill 4243 would have an indeterminate fiscal impact on the state and on local units of government. Reducing the statutory maximum sentence for delivery of a controlled substance classified in Schedule 1 or 2 that is a narcotic drug other than the opiates and opioids specified in the bill or cocaine would result in a savings to the state due to a decrease in the amount of time offenders would serve in prison. In fiscal year 2020, the average cost of prison incarceration in a state facility was roughly \$42,200 per prisoner per year, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$4,300 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. Because there is no practical way to determine the number of maximum sentences that would be reduced under provisions of the bill, an estimate of the amount of savings to the state cannot be made. The fiscal impact to local units would depend on how provisions of the bill affected court caseloads and the related administrative costs. Any change in penal fine revenue would affect funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

House Bill 4244 is a companion bill to HB 4243 and would amend sentencing guidelines to change the felony classification for crimes involving the manufacture or delivery of heroin, fentanyl, carfentanil, or a mixture of the three from Class B and Class D felonies (depending on the amount manufactured and/or delivered) to Class A and Class B felonies, respectively. Increasing the minimum sentence of those who are convicted would have an indeterminate fiscal impact on the state's correctional system, because convicted offenders would more likely be sentenced to prison instead of sentenced to jail or other community alternative placements. In fiscal year 2020, the average annual cost of prison incarceration in a state facility was roughly \$42,200 per prisoner per year, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$4,300 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. Also, under the bill, sentencing guidelines would be amended to change the statutory sentence for delivery of Schedule 1 or 2 narcotic drugs or cocaine from Class A and Class B felonies (depending on the amount manufactured and/or delivered) to Class B and Class C felonies, respectively. Decreasing the minimum sentence of those who are convicted would have an indeterminate fiscal impact on the state and on local units of government because convicted offenders would more likely be sentenced to county jails or other community alternative placements instead of to prisons. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction.

House Bill 4245 would have an indeterminate fiscal impact on the state and on local units of government. Under provisions of the bill, specific offenses that currently are ineligible for probation would become eligible for probation. This would result in offenders spending less time in jails and/or prisons, which would result in a savings to the state and/or to local units of government. An increase in the number of offenders sentenced to terms of probation would mean an increase in probation supervision costs. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. In fiscal year 2020, the average cost of prison incarceration in a state facility was roughly \$42,200 per prisoner per year, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$4,300 per supervised offender in the same year. Those costs are financed with state general

fund/general purpose revenue. Any impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs. Any change in penal fine revenue would affect funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

POSITIONS:

The Jackson County Prosecuting Attorney testified in support of the bills. (3-4-21)

Legislative Analyst: Rick Yuille
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.