

CONTROLLED SUBSTANCE PENALTIES

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<http://www.house.mi.gov/hfa>

House Bill 4243 as introduced
Sponsor: Rep. Julie Alexander

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

House Bill 4244 as introduced
Sponsor: Rep. Sarah Anthony

House Bill 4245 as introduced
Sponsor: Rep. David LaGrand

Committee: Rules and Competitiveness
Revised 3-4-21

SUMMARY:

House Bill 4243 would amend the Public Health Code to revise the maximum terms of imprisonment for certain offenses involving the illegal manufacture, creation, delivery, or possession with the intent to manufacture, create, or deliver of Schedule 1 and 2 narcotics and cocaine. 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.

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 Schedule 1 and 2 narcotics and cocaine into three groups of substances with different penalties (see **Background**, below). 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 description 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 would also 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 Schedule 1 or 2 controlled substances that are narcotics or cocaine. (See **Background**, below, for a discussion of felony classifications.) **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 reflect those in HB 4243. Shading denotes a proposed change from current law.

The bill would also 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 are not eligible for probation, including a prosecution of a **major controlled substance offense**.

Major controlled substance offense means a violation of section 7401(2)(a) or 7403(2)(a)(i) to (iv) of the Public Health Code. Currently, these provisions establish penalties related to the unlawful possession (section 7403) or unlawful manufacture, delivery, or possession with intent to do either (section 7401) of cocaine and Schedule 1 or 2 narcotics. [Under HB 4245, section 7401(2)(a) would apply to cocaine and Schedule 1 or 2 narcotics (other than heroin, fentanyl, carfentanil, or another opiate). See **Background**, below.]

The bill would provide that a defendant may be sentenced to probation for a violation of section 7401(2)(a)(iv) or (h)(iv) of the Public Health Code. Under HB 4243, this would mean the unlawful manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver of either of the following:

- 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.
- 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.

MCL 771.1

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.

Each bill would take effect 90 days after being enacted.

BACKGROUND AND DISCUSSION:

Drug terms and classifications

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

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.

¹ <http://legislature.mi.gov/doc.aspx?mcl-333-7212> and <http://legislature.mi.gov/doc.aspx?mcl-333-7214>

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

Section 7107 of the Public Health Code 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.²

The above definition of “narcotic drug” appears to include the drugs that are now more commonly called “opioids.” According to the federal Centers for Disease Control and Prevention (CDC), “Opiates refer to natural opioids such as heroin, morphine and codeine,” while “Opioids refer to all natural, semisynthetic, and synthetic opioids.”³ Generally speaking, opiates are seen as a subset of opioids/narcotics.

It is unclear, however, how this general understanding of “opiate” relates to the legal definition of “opiate” in the Public Health Code. It is not always clear in sections 7212 and 7214 which Schedule 1 and 2 drugs are opiates and which are other narcotic drugs. For example, section 7214(b) describes as “opiates” both fentanyl and methadone—which as synthetic drugs are generally considered to be opioids (or narcotics) but not opiates. As a result, it might also be unclear which drugs would be included in the categories proposed by HB 4243 (heroin, fentanyl, carfentanil / other opiates / other nonopiate narcotics and cocaine).

In addition, under the Public Health Code, “opiates” are legally defined as substances that can form or sustain an addiction. But it is not clear which, if any, Schedule 1 and 2 narcotics are not addictive. If all narcotics are addictive, then by definition all narcotics are opiates under the Public Health Code—and it is then unclear which, if any, narcotics would be included in the proposed category with cocaine.

Cocaine is a Schedule 2 drug. 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)⁴ to determine a sentence range appropriate for the offense and the offender. The score, and which grid must be used, can

² 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.

³ <https://www.cdc.gov/drugoverdose/opioids/terms.html>

⁴ There is also an M2 classification (second degree murder), with a maximum sentence of life or any term of years.

determine whether an offender may be sentenced to community sanctions, such as probation, or must be imprisoned (and, if so, for how long).

The length of a 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 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 likely increases the minimum sentence in the recommended range for an offense as well as increasing the maximum. Conversely, reclassifying from Class A to Class B or from Class B to Class C could decrease both the minimum and maximum sentences that may be imposed for that offense.

References to section 7401(2)(a) in other provisions of law

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

As seen above, the term “major controlled substance offense” in the Code of Criminal Procedure is defined in part as a violation of section 7401(2)(a) of the Public Health Code.

Several other provisions of law, in the Public Health Code, the Code of Criminal Procedure, and other acts, reference violations of section 7401(2)(a) for purposes of such things as jurisdiction, parole, enhanced penalties, and juvenile adjudication.

However, HB 4243 would move violations involving heroin, fentanyl, or carfentanil to section 7401(2)(g) and those involving other opiates to section 7401(2)(h). This means that the definition of “major controlled substance offense” and all of the other provisions of law that reference section 7401(2)(a) would no longer apply to offenses involving those drugs. As the bills are written, those provisions would apply only to cocaine and narcotics that are not heroin, fentanyl, carfentanil, or other opiates.⁵

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

⁵ Potentially affected provisions of law appear to include at least the following: MCL 333.7410, 333.7410a, 333.7411, 333.7415, 333.7416, 380.1535a, 380.1539b, 600.606, 700.7105, 700.7401, 712A.18d, 712A.2, 712A.2a, 712A.2d, 750.316, 761.2, 762.11, 762.12, 764.1f, 766.14, 767.29, 767.41, 768.28a, 768.32, 768.7b, 769.10, 769.11, 769.12, 769.9, 771A.6, 777.36, 777.43, 777.45, 791.233b, 791.234, 791.236, 791.240a, and 803.307.

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.

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■ 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.