



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill No. 391 **Amendment in the Nature of a Substitute** **(Patron Prior to Substitute – Ebbin)**

LD#: 22105973

Date: 02/04/2022

Topic: Licensing and retail system for cannabis; cannabis control

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 552 of the Acts of Assembly of 2021, 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 include 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 creates a regulatory and licensing structure for the cultivation, manufacture, testing and sale of marijuana and marijuana products, as well as retail marijuana stores, to be administered by the Virginia Cannabis Control Authority. The bill satisfies the reenactment requirement of Chapters 550 and 551 of the Acts of Assembly of 2021, Special Session I, but makes numerous modifications to the provisions of the 2021 legislation related to criminal penalties, expungement, regulation of certain hemp products, and diversity, equity, and inclusion. Provisions of the bill take effect on either July 1, 2023, or January 1, 2024.

While the proposal repeals § 18.2-248.1, related to the manufacture and distribution of marijuana, the proposal establishes a number of new misdemeanor and felony offenses for engaging in these activities without the required license or otherwise engaging in prohibited practices related to the production, sale, etc., of marijuana. For example, cultivation or manufacture of marijuana without a license would be a Class 6 felony. The distribution or sale of marijuana without a license would be a Class 2 misdemeanor for the first offense and a Class 1 misdemeanor for a second or subsequent offense; however, any sale of marijuana to a person who is under the age of 21 or intoxicated would be a Class 1 misdemeanor. In addition, the proposal expands § 5.1-13 to make it a Class 6 felony to operate an aircraft while under the influence of marijuana and amends § 18.2-308.012 to make it a Class 1 misdemeanor to carry a concealed handgun while under the influence of marijuana. The proposal also expands the definition of a law enforcement officer in § 18.2-57 to include special agents of the Virginia Cannabis Control Authority; assault or assault and battery of a law enforcement officer is a Class 6 felony and requires a six-month mandatory minimum sentence.

Violations of specified licensing requirements on the part of licensees would be Class 1 misdemeanors; however, the proposal specifies that tax returns filed monthly by licensees must be made under oath (see proposed § 4.1-1005). Under § 18.2-434, a person to whom an oath is lawfully administered who willfully and falsely swears to any material matter may be prosecuted for perjury, a Class 5 felony. If a materially false statement on such a tax return could be prosecuted in the same manner as perjury and other false swearings, licensees may be subject to a felony perjury charge.

At the same time, the proposal reduces a number of existing crimes from felonies to misdemeanors. These include: distribution of marijuana to a minor (§ 18.2-255), delivery of marijuana to prisoners (§ 18.2-474.1), unlawfully transporting five pounds or more of marijuana into the Commonwealth (§ 18.2-248.01), and obstruction of justice by force or threat by a person charged with marijuana distribution (§ 18.2-460(C)). The proposal eliminates the felony for possessing a firearm while unlawfully distributing more than one pound of marijuana (§ 18.2-308.4), thereby removing the existing five-year mandatory minimum penalty for the offense. The proposal also removes marijuana from several existing provisions including: drug kingpin laws (§ 18.2-248), prohibitions on the sale of certain drugs near schools (§ 18.2-255.2), and prescription fraud (§ 18.2-258.1).

Legislation adopted by the 2021 General Assembly (Special Session I) legalized possession of up to one ounce of marijuana by persons who are 21 years of age or older and also permitted persons 21 years of age or older to cultivate up to four marijuana plants for personal use, effective July 1, 2021. Possession of more than one ounce of marijuana by a person 21 or older is subject to a civil penalty of up to \$25, while possession of more than one pound of marijuana on one's person or in a public place is a felony punishable by 1 to 10 years. *The proposal would add new misdemeanor offenses related to possession (§ 4.1-1100). Under the proposal, possession of more than four ounces up to one pound of marijuana on one's person or in a public place would be a Class 3 misdemeanor for the first offense and a Class 2 misdemeanor for a second or subsequent offense.* The existing felony penalty for possessing more than one pound on one's person or in a public place would remain the same. *However, the proposal would create a new felony, punishable by imprisonment of 1 to 10 years, for possessing more than four pounds of marijuana in one's residence or any place other than a public place.* As of July 1, 2021, cultivating more than four plants is subject to civil or criminal penalties, with cultivation of 50 or more plants punishable as a felony (§ 4.1-1101). The proposal establishes civil penalties for certain violations, such as not labeling each plant as required, and a Class 1 misdemeanor for manufacturing marijuana concentrate from home-cultivated marijuana.

Currently, under § 18.2-248.1, distribution of one ounce or less of marijuana is a Class 1 misdemeanor. Distribution of more than one ounce up to five pounds of marijuana is a Class 5 felony, while distribution of more than five pounds and manufacture of marijuana are both felonies punishable by up to 30 years in prison. A third or subsequent conviction for distribution of marijuana is punishable by up to life in prison and requires a five-year mandatory minimum prison sentence. The proposal repeals § 18.2-248.1 as of July 1, 2024.

Analysis:

While the number of offenders convicted under marijuana provisions prior to July 1, 2021, can be identified (see table below), the number of individuals who may be convicted of the new misdemeanors and felonies defined in the proposal, and the sentences these individuals may receive, is not known.

Offenders Convicted of Select Marijuana Offenses (as the Most Serious Offense), FY2021

Primary Offense	Total Number of Cases	Percent Sentenced to Probation	Percent Sentenced to Jail	Median Jail Sentence	Percent Sentenced to Prison	Median Prison Sentence
Distribution of marijuana as accommodation (§ 18.2- 248.1(a,3)) ¹	11	72.7%	27.3%	2.0 mos.	N/A	N/A
Distribution, etc., 1 oz. or less marijuana (§ 18.2-248.1(a,1)) ¹	549	63.0%	37.0%	1.0 mo.	N/A	N/A
Distribution, etc., > 1 oz. to 5 lbs. marijuana (§ 18.2-248.1(a,2)) ²	286	40.9%	40.6%	3.0 mos.	18.5%	1.5 yrs.
Distribution, etc., more than 5 lbs. marijuana (§ 18.2- 248.1(a,3)) ²	23	39.1%	21.7%	9.0 mos.	39.1%	2.0 yrs.
Manufacture marijuana – not for personal use (§ 18.2-248.1(c)) ²	7	42.9%	28.6%	8.0 mos.	28.6%	3.1 yrs.
Distribute marijuana – 3 rd or subseq. conviction (§ 18.2-248.1(d)) ²	1	100.0%	0.0%	N/A	0.0%	N/A
Sell less than 1 oz. marijuana to minor (§ 18.2-255(A,i)) ²	1	0.0%	0.0%	N/A	100.0%	10.0 yrs.
Sell 1 oz. or more marijuana to minor (§ 18.2-255(A,i)) ²	0	N/A	N/A	N/A	N/A	N/A
Transport 5 lbs.+ marijuana into Commonwealth (§18.2-248.01) ²	6	0.0%	0.0%	N/A	100.0%	3.2 yrs.

Notes: The analysis is based on cases in which the specified offense was the primary, or most serious, offense in the sentencing event.

¹ Source: Supreme Court of Virginia's General District Court Case Management System, as analyzed by the Sentencing Commission

² Source: Virginia Criminal Sentencing Commission's Sentencing Guidelines Data System

Impact of Proposed Legislation:

State adult correctional facilities. While the proposal would eliminate certain criminal penalties related to marijuana from the *Code* and reduce penalties for other offenses, it would establish a number of new misdemeanors and felonies for engaging in activities related to the cultivation, manufacture, testing and sale of marijuana without the required license or otherwise engaging in prohibited practices related to the production, sale, etc., of marijuana. The proposal also specifies that monthly tax returns filed by licensees must be made under oath, which may have felony implications for making a materially false statement on the return, and the proposal expands the Class 6 felony for assaulting a law enforcement officer to include special agents of the Virginia Cannabis Control Authority. The net effect on the number of convicted individuals and the impact on sentencing patterns cannot be estimated. Therefore, the net impact on the future state-responsible (prison) bed space needs of the Commonwealth cannot be quantified.

Local adult correctional facilities. Similarly, the net impact on local-responsible (jail) bed space needs cannot be estimated.

Adult community corrections programs. The net effect of the proposal on adult community corrections resources cannot be determined.

Virginia's Sentencing Guidelines. Felony violations under § 18.2-248.1 related to the manufacture or distribution of marijuana are covered by the Sentencing Guidelines. As new felony offenses, convictions under the proposed *Code* sections would not be covered by the Guidelines as the primary, or most serious, offense. Such convictions, however, could augment the Guidelines recommendation if the most serious offense at sentencing is covered by the Guidelines. If the proposal were enacted, the Sentencing Commission in the future would conduct detailed analyses of sentencing patterns under the new provisions to determine the feasibility of adding the new felonies to the Guidelines system.

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.

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 552 of the Acts of Assembly of 2021, Special Session I, requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4 of the Code of Virginia, 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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