

## **Department of Planning and Budget**

### **2022 Fiscal Impact Statement**

**1. Bill Number:** SB391S1

**House of Origin**    ☐ Introduced    ☒ Substitute    ☐ Engrossed  
**Second House**    ☐ In Committee    ☐ Substitute    ☐ Enrolled

**2. Patron:** Ebbin

**3. Committee:** Senate Committee on Rehabilitation and Social Services

**4. Title:** Cannabis retail market

**5. Summary:** The substitute bill establishes a framework for the creation of a retail marijuana market in the Commonwealth.

The bill amends § 2.2-2499.8 (Cannabis Equity Reinvestment Fund) to allow moneys from the Fund to be used to cover the staffing and administrative costs of the Cannabis Equity Reinvestment Board. Expenditures for staffing and administration are to be limited to those that are reasonable and necessary for carrying out the powers and duties of the Cannabis Equity Reinvestment Board.

The bill amends § 3.2-3906 to require the Board of Agriculture and Consumer Services (Board) to establish criteria for or a list of pesticides that may be used on cannabis cultivated in compliance with Chapter 41.1 (§ 3.2-4112 et seq.) or the Cannabis Control Act (§ 4.1-600 et seq.). The bill adds Article 6 (Edible Marijuana Products and Edible Hemp Products) which requires the Agriculture Commissioner to inspect locations where edible marijuana products are manufactured (§ 3.2-5145.8) and to adopt and enforce (§ 3.2-5145.9).

The bill amends § 4.1-603 (Cannabis Public Health Advisory Council; purpose; membership; quorum; meetings; compensation and expenses; duties) by increasing the membership of the Cannabis Public Health Advisory Council from 21 to 24 members, one of whom must be a person with expertise in marijuana consumer safety, and one of whom must be a representative of a marijuana testing laboratory that has operated in the Commonwealth for no less than one year.

The bill places the regulation of regulated hemp products under the authority of the Cannabis Control Authority (§ 4.1-604).

The bill establishes that the Cannabis Control Authority may not issue more than 400 retail marijuana store licenses (§ 4.1-606).

The bill establishes licensure requirements and civil penalties for licensees who refuse to pay (§ 4.1-700 through § 4.1-703). The bill authorizes the Cannabis Control Authority (CCA) to issue marijuana cultivation facility licenses (§ 4.1-800), marijuana manufacturing facility license (§ 4.1-801), marijuana testing facility licenses (§ 4.1-802), marijuana wholesaler

license (§ 4.1-803) and retail marijuana store licenses (§ 4.1-804). The annual fees on state licenses are to be determined by the CCA Board (§ 4.1-1001). Except as otherwise permitted by Board regulation promulgated pursuant to subdivision C 4 of § 4.1-606, no person can be granted or have interest in a license in more than one of the following license categories: marijuana cultivation facility license, marijuana manufacturing facility license, marijuana wholesaler license, retail marijuana store license, or marijuana testing facility license. Any pharmaceutical processor that wishes to possess a license in more than one license category pursuant to this subsection must (a) pay a \$6 million fee to the Board, unless the processor has already paid a \$6 million fee to the Board to engage in the lawful sale of cannabis products prior to January 1, 2024, and (b) submit a diversity, equity, and inclusion plan to the Cannabis Business Equity and Diversity Support Team (the Support Team) for approval and, upon approval, implement such plan in accordance with the requirements set by the Support Team. Fees collected by the Board pursuant to this subsection must be allocated to (1) the Virginia Cannabis Equity Loan Fund or (2) the Virginia Cannabis Equity Reinvestment Fund (§ 4.1-805).

The CCA Board may also suspend or revoke licenses for certain violations and impose civil penalties (§ 4.1-901 through § 4.1-904).

The bill establishes that a tax of 21 percent is levied on the sale in the Commonwealth of any retail marijuana, retail marijuana products, marijuana paraphernalia sold by a retail marijuana store, non-retail marijuana, and non-retail marijuana products. This tax is in addition to the Virginia Retail Sales and Use Tax. Any locality may by ordinance levy a three percent tax on any taxable sale (§ 4.1-1003 and § 4.1-1004). Any locality that enacts an ordinance, must within 30 days, notify the Authority and any retail marijuana store in such locality of the ordinance's enactment.

With the exception of a licensee in the course of his duties related to such licensee's marijuana establishment, any person who possesses on his person or in any public place (i) more than four ounces but not more than one pound of marijuana or an equivalent amount of marijuana product as determined by regulation promulgated by the Board is guilty of a Class 3 misdemeanor and, for a second or subsequent offense, a Class 2 misdemeanor. With the exception of a licensee in the course of his duties related to such licensee's marijuana establishment, any person who possesses in his residence or in any place other than a public place more than four pounds of marijuana or an equivalent amount of marijuana product as determined by regulation promulgated by the Board is guilty of a felony punishable by a term of imprisonment of not less than one year nor more than 10 years and a fine of not more than \$250,000, or both (§ 4.1-1100).

The bill establishes the following penalties for violations of § 4.1-1101 (Home cultivation of marijuana for personal use; penalties) as follows:

- For possession of more than four marijuana plants but no more than 10 marijuana plants, (i) a civil penalty of \$250 for a first offense, (ii) a Class 3 misdemeanor for a second offense, and (iii) a Class 2 misdemeanor for a third and any subsequent offense;

- For possession of more than 10 but no more than 49 marijuana plants, a Class 1 misdemeanor;
- For possession of more than 49 but no more than 100 marijuana plants, a Class 6 felony; and
- For possession of more than 100 marijuana plants, a felony punishable by a term of imprisonment of not less than one year nor more than 10 years and a fine of not more than \$250,000, or both.

The bill establishes criminal and civil penalties for the illegal cultivation or manufacture of marijuana or marijuana products (§ 4.1-1102) and the illegal sale of marijuana or marijuana products in general (§ 4.1-1103). Section 4.1-1106 also sets forth penalties, forfeitures for purchasing retail marijuana or retail marijuana products for one to whom they should not be sold to, and § 4.1-1111 details the penalties for the illegal importation, shipment, and transportation of marijuana or marijuana products. Additionally, §4.1-1113 through §4.1-1119 provides for criminal penalties for various violations of Chapter 11 (Possession of Retail Marijuana and Retail Marijuana products).

Section 4.1-1105 establishes that no person to whom retail marijuana or retail marijuana products may not lawfully be sold under § 4.1-1104 may consume, purchase, or possess, or attempt to consume, purchase, or possess, any marijuana or marijuana products, except (i) pursuant to § 4.1-700 or (ii) by any federal, state, or local law-enforcement officer or his agent when possession of marijuana or marijuana products is necessary in the performance of his duties. Violations of this regulation could result in a civil penalty of no more than \$25 and the court may require the accused to enter a substance abuse treatment or education program or both, if available, that in the opinion of the court best suits the needs of the accused. Any civil penalties collected are to be deposited into the Drug Offender Assessment and Treatment Fund.

The bill establishes the process by which marijuana and marijuana products may be forfeited, confiscation proceedings, and punishment for related violations (§ 4.1-1301 through § 4.1-1312).

The bill requires the Cannabis Control Authority Board to establish regulations for marijuana and regulated hemp product testing (§ 4.1-1400).

The bill amends § 9.1-1101 to make the Department of Forensic Science responsible for determining the proper methods for detecting the concentration of tetrahydrocannabinol (THC) in substances for the purposes of Chapter 11 (§ 4.1-1100 et seq.) of Title 4.1 and §§ 54.1-3401 and 54.1-3446. The testing methodology must use post-decarboxylation testing or other equivalent method and must consider the potential conversion of tetrahydrocannabinol acid (THC-A) into THC. The test must include the total available THC derived from the sum of the THC and THC-A content.

The bill amends §18.2-247 to remove “marijuana” from being considered a controlled substance.

The bill amends §18.2-248.01 (Transporting controlled substances into the Commonwealth; penalty) to state that except as authorized in the Drug Control Act (§ 54.1-3400 et seq.), it is unlawful for any person to transport into the Commonwealth by any means with intent to sell or distribute one ounce or more of cocaine, coca leaves, or any salt, compound, derivative, or preparation thereof as described in Schedule II of the Drug Control Act or one ounce or more of any other Schedule I or II controlled substance. If convicted, the person must be sentenced to not less than five years nor more than 40 years imprisonment, three years of which must be a mandatory minimum term of imprisonment, and a fine not to exceed \$1 million. A second or subsequent conviction hereunder shall be punishable by a mandatory minimum term of imprisonment of 10 years, which shall be served consecutively with any other sentence.

The bill amends § 19.2-303.03 (Modification of sentence for marijuana-related convictions) to establish that notwithstanding other provisions of law or rule of court, if a person who (i) was convicted of a felony offense in violation of §§ 18.2-248, 18.2-248.01, 18.2-248.1, 18.2-250, 18.2-255, 18.2-255.2, 18.2-256, 18.2-257, 18.2-258, 18.2-258.1, 18.2-258.02, 18.2-265.3, or 18.2-474.1 as it relates to marijuana committed prior to July 1, 2021; (ii) was sentenced to jail or to the Department of Corrections or placed on community supervision as defined in § 53.1-1 for such conviction; and (iii) remains incarcerated in a state or local correctional facility or secure facility, as defined in § 16.1-228, serving the sentence for such conviction or a combination of such convictions or remains on community supervision as defined in § 53.1-1 for such conviction or a combination of such convictions on July 1, 2022, the circuit court that entered the original judgment or order must schedule a hearing by July 1, 2023, to consider modification of such person's sentence. The Commonwealth must be made party to the proceeding and receive notice of such hearing.

The bill amends § 19.2-392.2:3 (Automatic expungement; certain former marijuana offenses) to require the Department of State Police (VSP) to determine which offenses in the Central Criminal Records Exchange meet the criteria for automatic expungement, as set forth in the bill, no later than July 1, 2025. VSP must provide an electronic list of all offenses that meet the criteria for automatic expungement to the Executive Secretary of the Supreme Court and to any circuit court clerk who maintains a case management system that interfaces with VSP. The bill establishes that the Department of Motor Vehicles (DMV) must not expunge any conviction or any charge that was deferred and dismissed after a finding of facts sufficient to justify a finding of guilt.

A person who has been convicted of a felony violation of former § 18.2-248.1 or a violation of subsection A of § 18.2-265.3 as it relates to marijuana, or charged under either section and the charge is deferred and dismissed, may file a petition setting forth the relevant facts and requesting expungement of the police records and the court records relating to the arrest, charge, or conviction. A person will not be required to pay any fees or costs for filing a petition pursuant to this section if such person files a petition to proceed without the payment of fees and costs, and the court with which such person files his petition finds such person to be indigent (§ 19.2-392.2:4).

The bill amends enactment clauses 10 and 23:

Enactment #10 - That the Board of Directors of the Virginia Cannabis Control Authority (the Board) shall promulgate regulations to implement the provisions of this act by January 1, 2023; however, the Board shall not adopt such regulations prior to July 1, 2022, and shall present such regulations to the Cannabis Oversight Commission for review prior to adoption. With the exception of § 2.2-4031 of the Code of Virginia, neither the provisions of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) nor public participation guidelines adopted pursuant thereto shall apply to the initial adoption of any regulations pursuant to this act. Prior to adopting any regulations pursuant to this act, the Board shall publish a notice of opportunity to comment in the Virginia Register of Regulations and post the action on the Virginia Regulatory Town Hall. Such notice of opportunity to comment shall contain (i) a summary of the proposed regulations; (ii) the text of the proposed regulations; and (iii) the name, address, and telephone number of the agency contact person responsible for receiving public comments. Such notice shall be made at least 60 days in advance of the last date prescribed in such notice for submittals of public comment. The legislative review provisions of subsections A and B of § 2.2-4014 of the Code of Virginia shall apply to the promulgation or final adoption process for regulations pursuant to this act. The Board shall consider and keep on file all public comments received for any regulations adopted pursuant to this act. The provisions of this enactment shall become effective in due course.

Enactment #23 - That the initial referendum authorized by § 4.1-629 of the Code of Virginia, as created by this act, on the question of whether the operation of marijuana establishments shall be prohibited in a particular locality shall be held and results certified by December 31, 2022. A referendum on such question shall not be permitted in a locality after January 1, 2023, unless such referendum follows a referendum held prior to December 31, 2022, and any subsequent referendum, in which a majority of the qualified voters voting in such referendum voted "Yes" to prohibit the operation of marijuana establishments. The provisions of this enactment shall become effective July 1, 2022.

The bill satisfies the reenactment requirement of Chapters 550 and 551 of the Acts of Assembly of 2021, Special Session I.

6. **Budget Amendment Necessary:** Yes, Items 45, 98, and 429. Item 404, as introduced (HB30/SB30) provides \$50,000 (woodrum) for certain criminal penalties.
7. **Fiscal Impact Estimates:** Preliminary (see Item #8)
8. **Fiscal Implications:** The substitute bill impacts several state agencies:

**Office of the Executive Secretary of the Supreme Court (OES)**

**Petition Expungements**

The bill provides that a person convicted or adjudicated delinquent of a felony violation of former § 18.2-248.1 or any violation of § 18.2-265.3(A) as it relates to marijuana, or the charge under either section was deferred and dismissed, may petition the court for expungement of the court and police records. According to OES, this provision would increase the workload on general district court and juvenile and domestic relations district court clerks who would be tasked with locating the physical case file for each expunged case, sealing its contents, indexing the case and deleting the electronic record for each case in the case management system.

It is estimated that the tasks required of a district court deputy clerk to expunge a case would consume 10 minutes. Available information indicates there are 147 adjudications of felony delinquency under §18.2-248.1 in juvenile and domestic relations district courts (JDR). OES records indicate that there were 10,734 guilty verdicts for violations of § 18.2-248.1 in circuit court between 2010 and 2019. Assuming that 50 percent of the 10,881 convictions would be expunged in accordance with the bill's provisions, and that the vast majority of the circuit court convictions had a preliminary hearing within general district court, this would increase the statewide workload of district clerks in a manner equivalent to that performed by 0.7 of a full-time employee of a clerk's office. The number of cases deferred and dismissed for felony violations of § 18.2-248.1 within the timeframe in JDR and circuit court is minimal and is not expected to have a material impact on the district court workload. The number of cases brought for violations of subsection A of § 18.2-265.3 as it relates to marijuana cannot be determined from available information.

### **Automatic Expungements**

The bill also provides that police and court records of a person charged with a misdemeanor violation of § 18.2-248.1 or a violation of former § 18.2-250.1 must be expunged. The Department of State Police (VSP) is responsible for identifying such cases and electronically submitting a list to the Office of the Executive Secretary of the Supreme Court (OES) and any circuit court clerk who maintains a case management system that interfaces with VSP. OES must then provide an electronic list of all offenses that meet the criteria for automatic expungement to the circuit court clerks that utilize the case management system it maintains. The clerk receiving the list would then be required to prepare an order to be entered by the chief judge directing that the offenses that meet the criteria be automatically expunged. The circuit court clerk must provide an electronic copy of any order entered by the chief judge regarding automatic expungement to VSP. Upon receipt of such order, VSP would notify any agency or individual known to maintain or to have obtained the records to be expunged. VSP and any such agency or individual must expunge such records under the process set forth by VSP pursuant to rules and regulations adopted pursuant to § 9.1-134.

The bill contemplates a manual process upon receipt of the order from the circuit court. As noted under petition expungements, OES estimates that the tasks required of a district court deputy clerk to expunge a case would consume 10 minutes. Electronic case management systems for district courts include 1,203 misdemeanor cases brought under § 18.2-248.1 in juvenile and domestic relations district court (JDR) and 6,730 in general district court (GDC). Also, OES records indicate there are 17,835 cases in JDR for violations of §18.2-

250.1 and 239,449 in GDC. If the cases for misdemeanor violations of § 18.2-248.1 and for violations of § 18.2-250.1 were to be expunged, this would increase the statewide workload of clerks in a manner equivalent to that performed by 36.5 full time employees of a clerk's office.

The total increase in workload to expunge cases, both by petition and automatically initiated, is 36.5 employees of a district court clerk's office. This is an annual increase in work equal to \$2,413,886 in general fund resources.

#### **Virginia Department of Agriculture and Consumer Services (VDACS)**

In order to administer the requirements pertaining to the food safety oversight of edible marijuana products, VDACS indicates the agency will need 7 FTEs and \$710,000 general fund annually to support these positions.

#### **Cannabis Control Authority (CCA)**

The bill requires the CCA to promulgate regulations to implement the bill provisions by January 1, 2023. According to the CCA, the Authority will likely accelerate the hiring of staff and use of outside vendors to be able to draft "transitional" rules for early pharmaceutical participation in the retail market while at the same time drafting general rules to create the overall regulatory and licensing structure. The CCA anticipates retail sales to existing cannabis providers to begin on or shortly after January 1, 2023. Assuming all four of the existing pharmaceutical processors enter the retail market on or after January 1, 2023, this will provide at least \$24 million (one-time) in fees with tax proceeds from retail sales.

#### **Virginia State Police (VSP)**

VSP reports that fingerprint-based criminal background checks may be required for each cannabis retail license applicant. Based on the JLARC report, VSP estimates approximately 1,550 licenses will be issued for marijuana establishments. VSP anticipates that fingerprint submissions would be cards, as opposed to electronic submissions. Within the fingerprint based criminal record check process, Fingerprint Technicians are used to establish the identification of the fingerprints in order to match the information to the appropriate criminal history record. Once this match, or no match takes place, a Program Support Technician in the CARE section processes the criminal history record results and forwards the information to the requesting agency. According to VSP, its Civil and Applicant Records Exchange (CARE) section does not have the capacity to take on the additional workload of this bill without additional resources. VSP indicates the agency would need one Fingerprint Technician Trainee and one Program Support Technician. The general fund cost for these positions, including IT hardware, is \$151,316 the first year and \$150,414 the second year.

Under the provisions of the substitute bill, changes were made that would require the automatic expungement of previous marijuana charges of §18.2-248.1 and §18.2-250.1. In addition, the changes allow for a petition based expungement of felony convictions of §18.2-248.1, §18.2-265.3 subsection A, and misdemeanor convictions of §18.2-265.3 subsection A. Currently, the expungement of criminal history record information is conducted through the Department's Central Criminal Records Exchange (CCRE) Expungement Section. The expungement of criminal history information is a time consuming manual process. Currently,

the Expungement Section is comprised of 8 expungement employees and 1 Supervisor, with each employee capable of completing 500 expungements within a year. VSP indicates that under the substitute bill there are 356,084 offenses that would be eligible for the automatic expungement and 26,040 offenses would be eligible for the petition based expungement. It is unknown as to how many individuals would take advantage of the petition based expungement. Assuming 10 percent (2,604) of eligible offenses, VSP estimates the agency would need 712 contract personnel (356,084) to handle the automatic expungements and approximately 7 FTE's (\$589,703 on-going) to handle the petition based expungements (2,604/500). The one-time general fund cost for 712 contract personnel is estimated to be \$47,996,000. The need for the above contract personnel assumes automatic expungements would be completed within one year. The legislation is silent on how long the agency has to complete the automatic expungement.

However, if VSP completed the automatic expungements in two years, the agency estimates that 449 Contractors (392 front-line personnel, 49 first-line supervisors, 7 managers, and one senior manager) would be needed each year.

The general fund cost breakdowns if the the automatic expungement are to be completed in two years are as follows:

Required staff (quantity)	First Year Costs	Second Year Costs	Total Costs
Contract front-line personnel (392)	\$20,384,000	\$20,384,000	\$40,768,000
Contract front-line supervisors (49)	\$3,057,600	\$3,057,600	\$6,115,200
Contract managers (7)	\$509,600	\$509,600	\$1,019,200
Contract senior manager (1)	\$83,200	\$83,200	\$166,400
Totals	\$24,034,400	\$24,034,400	\$48,068,800

The bill requires that anyone convicted prior to July 1, 2021, of certain felony offenses related to marijuana and was sentenced to jail or to the Department of Corrections or placed on community supervision and remains incarcerated in a state or local correctional facility or secure facility are to have a new sentencing hearing conducted no later than January 1, 2023.

If a sentencing modification is granted, the clerk of the court is to forward the new sentencing order to the Department to be recorded on the criminal history record. VSP is not able to determine how many individuals remain in a state or local correctional facility or a secure facility. However, the agency notes that the total number of felony convictions for the qualifying offenses will range between the offense dates of January 1, 2015 and June 30,



2021, as those most likely to still be in custody (74,784). In addition to qualifying offenses, VSP is not able to determine which of those offense convictions are related to marijuana. Due to the unknown number of marijuana related convictions, VSP estimates 10 percent of the qualifying offenses as an estimate of those requiring a sentencing modification (7,479). Currently, one employee within the records research section can review the order, modify the sentencing information in the Computerized Criminal History (CCH) system and electronically archive the sentencing order in a total of 20 minutes (which equates to 24 per 8 hour work day). At this rate, 312 days would be required to process the sentencing modifications (7,479/24). Since the majority of sentencing modifications will be within a short span of time, VSP believes the task can be accomplished with the use of two contract front-line personnel processing a total of 3,740 sentencing orders each at the contract rate of \$25.00 an hour. The general fund cost estimate for the two contract personnel to handle sentencing modifications is \$62,400 ( $312 \times 8 = 2,496$  hours...  $2,496 \text{ hours} \times \$25.00 = \$62,400$ )

Finally, VSP reports the agency has space available to house 2 positions, the Program Support Technician and the Fingerprint Technician Trainee. Office space would have to be identified for all other necessary personnel. However, the cost is indeterminate at this time.

**Department of Motor Vehicles (DMV)**

DMV is still assessing the fiscal impact of this bill. If the agency reports a material fiscal impact as a result of this bill, the fiscal impact statement will be updated to reflect the information received.

**Department of Corrections (DOC)**

DOC is still assessing the fiscal impact of this bill. If the agency reports a material fiscal impact as a result of this bill, the fiscal impact statement will be updated to reflect the information received.

- 9. Specific Agency or Political Subdivisions Affected:** Courts, Cannabis Control Authority, Department of Agriculture and Consumer Services, Virginia State Police, Department of Motor Vehicles and Department of Corrections

**10. Technical Amendment Necessary:** No

**11. Other Comments:** None