

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Criminal Justice

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BILL: CS/SB 408

INTRODUCER: Criminal Justice Committee and Senators Brandes and Perry

SUBJECT: Drug Offenses

DATE: February 20, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>AP</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 408 creates a new drug trafficking offense called “trafficking in pharmaceuticals,” a first degree felony. This offense involves the unlawful possession, sale, etc., of 120 or more dosage units containing a controlled substance described in s. 893.135, F.S.

A “dosage unit” is defined as “an individual tablet, capsule, pill, transdermal patch, unit of sublingual gelatin, or other visually distinctive form, with a clear manufacturer marking on each unit, of a commercial drug product approved by the Food and Drug Administration and manufactured and distributed by a pharmaceutical company lawfully doing business in the United States.”

A person who unlawfully possesses, sells, etc., 120 or more dosage units containing a controlled substance described in s. 893.135, F.S., must be prosecuted for the new “trafficking in pharmaceuticals” offense. No other drug trafficking offense can be charged. If there are fewer than 120 dosage units involved, the person may not be charged with drug trafficking.

The bill does not affect prosecution of any current drug trafficking offense, if the controlled substance is not contained in a dosage unit.

The new “trafficking in pharmaceuticals” offense contains 3, 7, 15, and 25-year mandatory minimum terms of imprisonment and mandatory fines. The applicable mandatory minimum term

and mandatory fine are determined by the specified dosage unit range relevant to the number of dosage units trafficked.

The Legislature's Office of Economic and Demographic Research preliminarily estimates that the bill will have a "positive/negative indeterminate" prison bed impact, which means that the impact of the bill could be an unquantifiable increase or decrease in prison beds. See Section V. Fiscal Impact Statement.

The bill is effective on October 1, 2019.

## II. Present Situation:

### Florida's Controlled Substance Schedules

Section 893.03, F.S., classifies controlled substances into five categories or classifications, known as schedules. These schedules regulate the manufacture, distribution, preparation, and dispensing of the substances listed in the schedules. The most important factors in determining which schedule may apply to a substance are the "potential for abuse"<sup>1</sup> of the substance and whether there is a currently accepted medical use for the substance. The controlled substance schedules are as follows:

- Schedule I substances (s. 893.03(1), F.S.) have a high potential for abuse and no currently accepted medical use in treatment in the United States. Use of these substances under medical supervision does not meet accepted safety standards.
- Schedule II substances (s. 893.03(2), F.S.) have a high potential for abuse and a currently accepted but severely restricted medical use in treatment in the United States. Abuse of these substances may lead to severe psychological or physical dependence.
- Schedule III substances (s. 893.03(3), F.S.) have a potential for abuse less than the Schedule I and Schedule II substances and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to moderate or low physical dependence or high psychological dependence. Abuse of anabolic steroids may lead to physical damage.
- Schedule IV substances (s. 893.03(4), F.S.) have a low potential for abuse relative to Schedule III substances and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to limited physical or psychological dependence relative to Schedule III substances.
- Schedule V substances (s. 893.03(5), F.S.) have a low potential for abuse relative to the substances in Schedule IV and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to limited physical or psychological dependence relative to Schedule IV substances.

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<sup>1</sup> Pursuant to s. 893.035(3)(a), F.S., "potential for abuse" means a substance has properties as a central nervous system stimulant or depressant or a hallucinogen that create a substantial likelihood of the substance being: (1) used in amounts that create a hazard to the user's health or the safety of the community; (2) diverted from legal channels and distributed through illegal channels; or (3) taken on the user's own initiative rather than on the basis of professional medical advice.

## **Punishment of Prohibited Drug Acts**

Section 893.13, F.S., in part, punishes unlawful possession, sale, purchase, manufacture, and delivery of a controlled substance.<sup>2</sup> The penalty for violating s. 893.13, F.S., can depend on the act committed, the substance and quantity of the substance involved, and the location in which the violation occurred. For example, selling a controlled substance listed in s. 893.03(1)(c), F.S., which includes many synthetic controlled substances, is a third degree felony.<sup>3</sup> However, if that substance is sold within 1,000 feet of a K-12 school or other designated facility or location, the violation is a second degree felony.<sup>4</sup>

Drug trafficking, which is punished in s. 893.135, F.S., consists of knowingly selling, purchasing, manufacturing, delivering, or bringing into this state (importation), or knowingly being in actual or constructive possession of, certain Schedule I or Schedule II controlled substances in a statutorily-specified quantity. The statute only applies to a limited number of such controlled substances, and the controlled substances involved in the trafficking must meet a specified weight or quantity threshold.

Most drug trafficking offenses are first degree felonies<sup>5</sup> and are subject to a mandatory minimum term of imprisonment and a mandatory fine, which is determined by the weight or quantity of the substance.<sup>6</sup> For example, trafficking in 28 grams or more, but less than 200 grams, of cocaine, a first degree felony, is punishable by a 3-year mandatory minimum term and a mandatory fine of \$50,000.<sup>7</sup> Trafficking in 200 grams or more, but less than 400 grams, of cocaine, a first degree felony, is punishable by a 7-year mandatory minimum term and a mandatory fine of \$100,000.<sup>8</sup>

## **Trafficking Exception**

Pharmaceutical drugs are approved by the Food and Drug Administration for many medical uses. Some of these drugs may contain a controlled substance described in the s. 893.135, F.S. For example, some of these drugs may contain amphetamine, codeine, morphine, hydromorphone, hydrocodone, oxycodone, fentanyl (and some of its analogs and derivatives), and methaqualone. All of these controlled substances are described in s. 893.135, F.S.

Section 893.135, F.S., does not apply to possession, sale, etc., of a pharmaceutical drug when that possession, sale, etc., is authorized by ch. 893, F.S. (Controlled Substance Act) or ch. 499, F.S. (Florida Drug and Cosmetic Act). Section 893.135(1), F.S., which proscribes numerous drug

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<sup>2</sup> See e.g., s. 893.13(1)(a) and (b), F.S.

<sup>3</sup> Section 893.13(1)(a)2., F.S. A third degree felony is punishable by up to 5 years in state prison and a fine of up to \$5,000. Sections 775.082 and 775.083, F.S.

<sup>4</sup> Section 893.13(1)(c)2., F.S. A second-degree felony is punishable by up to 15 years in state prison, a fine of up to \$10,000, or both. Sections 775.082 and 775.083, F.S.

<sup>5</sup> A first degree felony is generally punishable by up to 30 years in state prison and a fine of up to \$10,000. However, when specifically provided by statute, a first degree felony may be punished by imprisonment for a term of years not exceeding life imprisonment. Sections 775.082 and 775.083, F.S. Section 893.135, F.S., prescribes specific mandatory fines which are greater than the \$10,000 fine prescribed in s. 775.083, F.S., for a first degree felony. However, s. 772.083, F.S., authorizes any higher amount if specifically authorized by statute.

<sup>6</sup> See s. 893.135, F.S.

<sup>7</sup> Section 893.135(1)(b)1.a., F.S.

<sup>8</sup> Section 893.135(1)(b)1.b., F.S.

trafficking acts, is “prefaced by the following qualification: ‘Except as authorized in this chapter or in chapter 499 and notwithstanding the provisions of s. 893.13[.]’”<sup>9</sup>

An example of this exception is possession of a lawfully-prescribed pharmaceutical drug containing hydrocodone, a controlled substance described in s. 893.135(1)(c)2., 5., and 6., F.S. Section 499.03(1), F.S., in part, prohibits a person from possessing or possessing with intent to sell, dispense or deliver, “any prescription drug as defined in s. 499.003(40), *unless the possession of the drug has been obtained by a valid prescription by a practitioner licensed by law to prescribe the drug.*”<sup>10</sup>

Section 499.003(40), F.S., defines a “prescription drug” as

a prescription, medicinal, or legend drug, including, but not limited to, finished dosage forms or active pharmaceutical ingredients subject to, defined by, or described by s. 503(b) of the federal act or s. 465.003(8), s. 499.007(13), subsection (31), or subsection (47), except that an active pharmaceutical ingredient is a prescription drug only if substantially all finished dosage forms in which it may be lawfully dispensed or administered in this state are also prescription drugs.

Section 465.003(8), F.S., defines “medicinal drugs” or “drugs” as “those substances or preparations commonly known as ‘prescription’ or ‘legend’ drugs which are required by federal or state law to be dispensed only on a prescription, but shall not include patents or proprietary preparations as hereafter defined.” Section 893.04(1), F.S., provides that “[a] pharmacist, in good faith and in the course of professional practice only, may dispense controlled substances upon a written, oral, or electronic prescription of a practitioner” under the conditions prescribed in that subsection.

Section 893.02(4), F.S., defines a “controlled substance” as “any substance named or described in Schedules I-V of s. 893.03.” Hydrocodone is a controlled substance, since it is scheduled in s. 893.03, F.S.<sup>11</sup> Therefore, hydrocodone is a “prescription drug” for purposes of s. 499.03(1), F.S., and its possession by lawful prescription is not prohibited by that subsection. Further, its possession by lawful prescription is not prohibited by s. 893.135, F.S., because the possession is authorized by chs. 893 and 499, F.S.

### **Determining Trafficking Weight of a Controlled Substance Contained in a Pharmaceutical Drug**

In order to determine if the unlawfully possessed, sold, etc., dosage units (pills, tablets, etc.) of a pharmaceutical drug containing a controlled substance described in s. 893.135, F.S., meet the threshold gram weight for charging drug trafficking, the gram weight of the dosage units must be weighed. Trafficking offenses include the described controlled substances and “mixtures”

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<sup>9</sup> *O’Hara v. State*, 964 So.2d 839, 841 (Fla. 2d. DCA 2007).

<sup>10</sup> Emphasis provided by staff.

<sup>11</sup> Section 893.03(2)(a)1.k. and (3)(c)3. and 4., F.S. A similar statutory analysis was conducted using earlier statutory provisions in *O’Hara v. State*, 964 So.2d 839, 841-842 (Fla. 2d. DCA 2007).

containing those controlled substances.<sup>12</sup> If a dosage unit of a pharmaceutical drug contains a controlled substance described in s. 893.135, F.S., and constituents which are not a controlled substance (as is almost invariably the case), the dosage unit is treated as a mixture.<sup>13</sup> For example, in the case of a pharmaceutical drug pill which contains a controlled substance, the weight of the controlled substance is the total weight of the pill. If a person unlawfully possesses, sells, etc., more than one pill containing the same controlled substance, the weight of the controlled substance possessed is calculated by aggregating the total weight of each pill.<sup>14</sup>

### **Criminal Punishment Code**

The Criminal Punishment Code<sup>15</sup> (Code) is Florida's primary sentencing policy. Noncapital felonies sentenced under the Code receive an offense severity level ranking (levels 1-10).<sup>16</sup> Points are assigned and accrue based upon the severity level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the severity level escalates. Points may also be added or multiplied for other factors such as victim injury or the commission of certain offenses like a level 7 or 8 drug trafficking offense. The lowest permissible sentence is any nonstate prison sanction in which total sentence points equal or are less than 44 points, unless the court determines that a prison sentence is appropriate. If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.<sup>17</sup> Absent mitigation,<sup>18</sup> the permissible sentencing range under the Code is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S.<sup>19</sup>

### **Mandatory Minimum Sentences**

Mandatory minimum terms of imprisonment limit judicial discretion in Code sentencing: "If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory

<sup>12</sup> See e.g., s. 893.135(1)(f)1., F.S., which punishes trafficking in amphetamines and methamphetamines, and includes "any mixture containing amphetamine or methamphetamine[.]"

<sup>13</sup> Section 893.02(16), F.S., defines a "mixture" as "any physical combination of two or more substances, including, but not limited to, a blend, an aggregation, a suspension, an emulsion, a solution, or a dosage unit, whether or not such combination can be separated into its components by physical means, whether mechanical or thermal." Section 893.135(6), F.S., provides that "[a] mixture, as defined in s. 893.02, containing any controlled substance described in this section includes, but is not limited to, a solution or a dosage unit, including but not limited to, a gelatin capsule, pill, or tablet, containing a controlled substance. For the purpose of clarifying legislative intent regarding the weighing of a mixture containing a controlled substance described in this section, the weight of the controlled substance is the total weight of the mixture, including the controlled substance and any other substance in the mixture. If there is more than one mixture containing the same controlled substance, the weight of the controlled substance is calculated by aggregating the total weight of each mixture."

<sup>14</sup> *Id.*

<sup>15</sup> Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, L.O.F. The Code is effective for offenses committed on or after October 1, 1998.

<sup>16</sup> Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S.

<sup>17</sup> Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

<sup>18</sup> The court may "mitigate" or "depart downward" from the scored lowest permissible sentence if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.

<sup>19</sup> If the scored lowest permissible sentence exceeds the maximum penalty in s. 775.082, F.S., the sentence required by the Code must be imposed. If total sentence points are greater than or equal to 363 points, the court may sentence the offender to life imprisonment. Section 921.0024(2), F.S.

minimum sentence takes precedence. If the lowest permissible sentence exceeds the mandatory sentence, the requirements of the Criminal Punishment Code and any mandatory minimum penalties apply.”<sup>20</sup> As previously noted, the sentencing range under the Code is generally the scored lowest permissible sentence up to and including the statutory maximum penalty. However, if there is a mandatory minimum sentence that is longer than the scored lowest permissible sentence, the sentencing range is narrowed to the mandatory minimum sentence up to and including the statutory maximum penalty.

### III. Effect of Proposed Changes:

The bill creates a new drug trafficking offense called “trafficking in pharmaceuticals,” which is committed if a person knowingly sells, purchases, delivers, or brings into this state, or is knowingly in actual or constructive possession of, 120 or more dosage units containing a controlled substance described in s. 893.135, F.S.

A person who unlawfully possesses, sells, etc., 120 or more dosage units containing a controlled substance described in s. 893.135, F.S., must be prosecuted for the new “trafficking in pharmaceuticals” offense. No other drug trafficking offense can be charged.

If there are fewer than 120 dosage units involved in the trafficking, the person may not be charged with drug trafficking, though a person could be charged under s. 893.13, F.S., which also punishes controlled substance offenses. However, penalties in s. 893.13, F.S., are generally lower than penalties in s. 893.135, F.S., and most violations of s. 893.13, F.S., do not involve a mandatory minimum term of imprisonment.

The bill does not affect prosecution of any current drug trafficking offense, if the controlled substance is not contained in a dosage unit.

The new “trafficking in pharmaceuticals” offense contains 3, 7, 15, and 25-year mandatory minimum terms of imprisonment and mandatory fines. The mandatory minimum term and mandatory fine are determined by the specified dosage unit range applicable to dosage units trafficked. Specifically, the bill provides for the following penalties:

- If the quantity involved is 120 or more dosage units, but less than 500 dosage units, a person is sentenced to a mandatory minimum term of imprisonment of 3 years and is ordered to pay a fine of up to \$25,000;
- If the quantity involved is 500 or more dosage units, but less than 1,000 dosage units, a person is sentenced to a mandatory minimum term of imprisonment of 7 years and is ordered to pay a fine of up to \$50,000;
- If the quantity involved is 1,000 or more dosage units, but less than 5,000 dosage units, a person is sentenced to a mandatory minimum term of imprisonment of 15 years and is ordered to pay a fine of up to \$100,000; and
- If the quantity involved is 5,000 or more dosage units, a person is sentenced to a mandatory minimum term of imprisonment of 25 years and is ordered to pay a fine of up to \$250,000.

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<sup>20</sup> Fla. R. Crim. P. 3.704(d)(26).

It is not possible to make a general comparison of trafficking penalties based upon dosage units (new “trafficking in pharmaceuticals” offense) and trafficking penalties based upon gram weight (current law),<sup>21</sup> but some drug offenders could receive a mandatory minimum term under the bill that is substantially less than the mandatory minimum term they could receive under current law. For example, the Office of Program Policy Analysis and Government Accountability determined that 215 oxycodone pills, each weighing 0.13 grams, equals 28 grams.<sup>22</sup> Under current law, trafficking in 28 grams of these pills would require a 15-year mandatory minimum term;<sup>23</sup> under the bill, 215 dosage units (pills) would require a 3-year mandatory term.

Some drug offenders could also receive a mandatory fine that is less than the mandatory fine under current law. The new trafficking in pharmaceuticals offense requires that a fine be imposed up to a specified cap (e.g., “fine of up to \$100,000”). Current trafficking offenses require a specified fine be imposed (e.g., “fine of 100,000”); there is no mandatory fine range.

Another difference between the new trafficking offense and current trafficking offense relates to ranking of offenses in the Code offense severity ranking chart.<sup>24</sup> Current trafficking offenses contain escalating (or tiered) gram weight ranges with escalating penalties and escalating rankings in the offense severity level ranking chart. For example, trafficking in “14 grams or more, but less than 28 grams” of amphetamines requires a 3-year mandatory minimum term,<sup>25</sup> and the offense is ranked in level 7 of the chart.<sup>26</sup> Trafficking in “28 grams or more, but less than 200 grams” of amphetamines requires a 7-year mandatory minimum term,<sup>27</sup> and the offense is ranked in level 8 of the chart.<sup>28</sup> The higher the ranking, the more sentence points. These sentence points are used in the calculation of the lowest permissible sentence (in prison months).<sup>29</sup>

In contrast, the bill also contains escalating ranges (or tiers) with escalating penalties for the new “trafficking in pharmaceuticals” offense, though these are dosage unit ranges rather than weight ranges. However, there is no escalation in the severity level ranking based on the dosage units tiers, and the bill does not rank the new offense. A first degree felony that is not ranked in the chart defaults to a level 7 ranking.<sup>30</sup> Therefore, regardless of the number of dosage units trafficked, the offense remains a level 7 offense. This could impact the scored lowest permissible sentence (in prison months) but would not preclude the court from imposing a sentence up to and including 30 years (the maximum penalty for a first degree felony).<sup>31</sup>

The bill is effective on October 1, 2019.

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<sup>21</sup> Gram weight of a dosage unit will vary depending on the pharmaceutical drug and its constituents, and gram weight thresholds for trafficking will vary depending on the controlled substance in the dosage units.

<sup>22</sup> *Opinions Are Mixed About Sentencing Laws for Painkiller Trafficking*, Report No. 12-02 (January 2012), at p. 5 (Exhibit 6), Office of Program Policy Analysis and Government Accountability, available at <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1202rpt.pdf> (last visited on Feb. 4, 2019).

<sup>23</sup> Section 893.135(1)(c)3.c., F.S.

<sup>24</sup> Section 921.0022, F.S.

<sup>25</sup> Section 893.135(1)(f)1.a., F.S.

<sup>26</sup> Section 921.0022(3)(g), F.S.

<sup>27</sup> Section 893.135(1)(f)1.b., F.S.

<sup>28</sup> Section 921.0022(3)(h), F.S.

<sup>29</sup> See discussion of the Code in the “Present Situation” section of this analysis.

<sup>30</sup> Section 921.0023(3), F.S.

<sup>31</sup> Section 775.082, F.S.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

## D. State Tax or Fee Increases:

None.

## E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official prison bed impact, if any, of legislation has not yet reviewed the bill. The Legislature's Office of Economic and Demographic Research (EDR) preliminarily estimates that the bill will have a "positive/negative indeterminate" prison bed impact, which means that the effect of the bill could be an unquantifiable increase or decrease in prison beds.



The EDR notes:

.... [F]or certain drugs, these new thresholds could lower the number of offenders receiving drug trafficking mandatory minimum sentences, as well as the number of mandatory minimum years served, due to the dosage unit number thresholds allowing greater weights for controlled substances before triggering mandatory minimum sentences than existing weight thresholds for the same substances. However, there isn't enough data on dosage units for commercial drug products containing substances listed under s. 893.135, F.S. to determine how prisons might be impacted....<sup>32</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 893.135 of the Florida Statutes.

This bill reenacts the following sections of the Florida Statutes: 373.6055, 397.4073, 414.095, 772.12, 775.087, 782.04, 810.02, 812.014, 893.13, 893.1351, 900.05, 903.133, 907.041, and 921.0024.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Criminal Justice on February 19, 2019:**

The committee substitute removes from the bill a newly created offense involving unlawful use or possession of a pill press or similar mechanical device.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>32</sup> This EDR estimate is on file with the Senate Committee on Criminal Justice.