

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.)

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/CS/SB 1528

INTRODUCER: Appropriations Committee (Recommended by Appropriations Subcommittee on Criminal and Civil Justice); Regulated Industries Committee; and Senator Simpson

SUBJECT: Illicit Drugs

DATE: February 26, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Caldwell</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>Clodfelter</u>	<u>Sadberry</u>	<u>ACJ</u>	<u>Recommend: Fav/CS</u>
3.	<u>Clodfelter</u>	<u>Kynoch</u>	<u>AP</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/CS/SB 1528 amends the schedule of controlled substances in s. 893.03, Florida Statutes, to describe, by core structure, the following synthetic controlled substances: synthetic cannabinoids; substituted cathinones; substituted phenethylamines; N-benzyl Phenethylamine compounds; substituted tryptamines; and substituted phenylcyclohexylamines. According to the Office of the Attorney General, the class descriptions define these groups of substances by specific core structure to limit the effect that possible alterations to these substances may have to remove a synthetic or designer drug from the list of controlled substances. Each class description includes examples of compounds that are covered by the class description. The criminal penalties relating to the possession, sale, manufacture, and delivery of controlled substances will apply to these synthetic substances.

The bill:

- Revises the definition of the term “substantially similar” for the purpose of determining whether a substance is an analog to a controlled substance. The bill defines the term according to the chemical structure of the substance instead of according to its physiological effect. The bill also provides additional factors for determining whether a substance is an analog of a controlled substance to include comparisons to the accepted methods of marketing, distribution, and sales of the substance.
- Revises the chemical terms for existing controlled substances by correcting errors in existing substance listings and deleting double entries. According to the Office of the Attorney

General, the chemical terms in these provisions were reviewed by chemists and the revisions in this bill are based on their recommendations.

- Creates a noncriminal penalty for selling, manufacturing, or delivering, or possessing with intent to sell, manufacture, or deliver, certain unlawful controlled substance in, on, or near an assisted living facility. The noncriminal penalty is a \$500 fine and 100 hours of community service in addition to any other penalty.
- Creates a third degree felony for a person 18 years of age or older who delivers certain illegal controlled substances to a person under the age of 18, who uses or hires a person under the age of 18 in the sale or delivery of such substance, or who uses a person under the age of 18 to assist in avoiding detection for specified violations.
- Creates a second degree felony for actual or constructive possession of a Schedule V controlled substance unless the controlled substance was lawfully obtained from a medical practitioner or pursuant to a valid prescription or order of a medical practitioner while acting in the course of his or her professional practice.
- Provides that a place or premises that has been used on two or more occasions within a six-month period as a site of a violation of ch. 499, F.S., may be declared a public nuisance and abated.
- Includes misbranded drugs in the listing of paraphernalia that are deemed to be contraband and subject to civil forfeiture.

The Criminal Justice Impact Conference has determined that the bill will have a positive indeterminate impact on the prison population, meaning that it will increase the prison population by an amount that cannot be quantified. The Department of Legal Affairs expects that any impact of the bill on criminal justice costs, such as increased costs to the Florida Department of Law Enforcement (FDLE) due to requirements to analyze the newly-scheduled drugs, would be short-lived because the market for the drugs will dry up shortly after they become illegal.

The bill provides an effective date of July 1, 2016.

II. Present Situation:

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act. This chapter classifies controlled substances into five schedules in order to regulate the manufacture, distribution, preparation, and dispensing of the substances. The schedules are as follows:

- A Schedule I substance has a high potential for abuse¹ and no currently accepted medical use in treatment in the United States and its use under medical supervision does not meet accepted safety standards. Examples: heroin and methaqualone.²
- A Schedule II substance has a high potential for abuse, a currently accepted but severely restricted medical use in treatment in the United States, and abuse may lead to severe psychological or physical dependence. Examples: cocaine and morphine.³

¹ “Potential for abuse” means that a substance has properties of a central nervous system stimulant or depressant or an hallucinogen that create a substantial likelihood of its being: (a) Used in amounts that create a hazard to the user’s health or the safety of the community; (b) Diverted from legal channels and distributed through illegal channels; or (c) Taken on the user’s own initiative rather than on the basis of professional medical advice. s. 893.02(20), F.S.

² Section 893.03(1), F.S.

³ Section 893.03(2), F.S.

- A Schedule III substance has a potential for abuse less than the substances contained in Schedules I and II, a currently accepted medical use in treatment in the United States, and abuse may lead to moderate or low physical dependence or high psychological dependence or, in the case of anabolic steroids, may lead to physical damage. Examples: lysergic acid; ketamine; and some anabolic steroids.⁴
- A Schedule IV substance has a low potential for abuse relative to the substances in Schedule III, a currently accepted medical use in treatment in the United States, and abuse may lead to limited physical or psychological dependence relative to the substances in Schedule III. Examples: alprazolam; diazepam; and phenobarbital.⁵
- A Schedule V substance has a low potential for abuse relative to the substances in Schedule IV, a currently accepted medical use in treatment in the United States, and abuse may lead to limited physical or psychological dependence relative to the substances in Schedule IV. Examples: low dosage levels of codeine; certain stimulants; and certain narcotic compounds.⁶

A substance is a “controlled substance” if it is listed in any of the five schedules in s. 893.03, F.S. The particular scheduling determines penalties, i.e. which penalties may be imposed for unlawful possession, sale, manufacture, etc., and the conditions under which the substance can be legally possessed, prescribed, sold, etc.

The sale, manufacture, and delivery of a controlled substance listed in s. 893.03(1)(c), F.S., (Schedule I(c)), as well as the possession with intent to sell, manufacture, or deliver such substance, is considered a third degree felony.⁷ However, if any of these acts are committed within 1,000 feet of certain designated places, the felony degree and penalties are greater.⁸ For example, selling a controlled substance listed in Schedule I(c) within 1,000 feet of the real property of a child care facility or secondary school is a second degree felony.⁹ Other prohibited activities include bringing a controlled substance listed in Schedule I(c) into the state and the purchase or possession with intent to purchase such a controlled substance, which are all third degree felonies.¹⁰

Synthetic Drugs

Synthetic drugs mimic the effects of controlled substances. Synthetic drugs are also known as “new or novel psychoactive substances,” or “designer drugs.” Synthetic drugs are used to circumvent existing prohibitions on controlled substances. According to the Office of the

⁴ Section 893.03(3), F.S.

⁵ Section 893.03(4), F.S.

⁶ Section 893.03(5), F.S.

⁷ Section 893.13(9), F.S., provides that the provisions of s. 893.13(1)-(8), F.S., are not applicable to the delivery to, or actual or constructive possession for medical or scientific use or purpose only of controlled substances by, persons included in certain classes specified in this subsection, or the agents or employees of those persons, for use in the usual course of their business or profession or in the performance of their official duties. *See also* s. 893.13(1)(a)2., F.S. A third degree felony is punishable by up to five years in state prison, a fine of up to \$5,000, or both. ss. 775.082 and 775.083, F.S.

⁸ Section 893.13(1)(c)-(f) and (h), F.S.

⁹ 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.

¹⁰ Section 893.13(5)(b) and (2)(a)2., F.S.

Attorney General, the increasing number of synthetic drug variants available and the higher toxicity of the new variants poses an increasing public health threat.

Concerned about the use of synthetic drugs in Broward County, the State Attorney took the issue to the grand jury. On December 30, 2015, the 17th Judicial Circuit State Attorney's Office released a grand jury report. The report examined the extent of the problem of synthetic drugs in Broward County and made several recommendations, including a recommendation for legislation to address the problem.

The grand jury report attributed more than 60 recent deaths to "Flakka."¹¹ According to information provided by the Attorney General's Office and the grand jury report, synthetic drugs are typically manufactured in pharmaceutical factories in China or Southeast Asia and are often sold through the internet.

Controlled substance "analogs" are new substances that are not controlled under ch. 893, F.S., but which have a "potential for abuse" and are manufactured, distributed, possessed, and used as substitutes for controlled substances.¹² Controlled substance analogs are treated, for purposes of drug abuse prevention and control, as a controlled substance in Schedule I of s. 893.03, F.S. Section 893.0356(3), F.S., defines the term "potential for abuse" in relation to properties as a central nervous system stimulant, depressant, or hallucinogen. The definition also requires that the substance create a substantial likelihood of being:

- (a) Used in amounts that create a hazard to the user's health or the safety of the community;
- (b) Diverted from legal channels and distributed through illegal channels; or
- (c) Taken on the user's own initiative rather than on the basis of professional medical advice.

Proof of potential for abuse can be based upon a showing that these activities are already taking place, or upon a showing that the nature and properties of the substance make it reasonable to assume that there is a substantial likelihood that such activities will take place, in other than isolated or occasional instances.

Section 893.0356(3), F.S., provides that the potential for abuse is proven by showing "that these activities are already taking place, or upon a showing that the nature and properties of the substance make it reasonable to assume that there is a substantial likelihood that such activities will take place, in other than isolated or occasional instances."

When a new synthetic drug is initially introduced, it may not necessarily be controlled or illegal under state or federal law. The Florida Attorney General may adopt emergency rules to add the new synthetic drug to the controlled substance schedule.¹³ The Legislature then can amend the

¹¹ See *Interim Report of the Broward County Grand Jury, July through December Term, 2015, Synthetic Drug Investigation*, December 30, 2015. A copy of the report is available at:

<http://www.bbhcfloida.org/sites/default/files/Signed%20Final%20Report-GJ%20Syn%20Drug%20Investigation.pdf> (last visited February 4, 2016).

¹² Section 893.0356, F.S.

¹³ See ss. 893.035 and 893.0356, F.S.

controlled substances schedule to incorporate the new synthetic drug. Since 2011, 136 chemical compounds commonly used to produce synthetic drugs have been added to the schedule of controlled substances, including alpha-PVP, which is the main ingredient in the synthetic form of cathinone drug popularly known as “Flakka.”¹⁴

According to the Office of the Attorney General, the core synthetic drugs of concern in Florida fall into the following categories or classifications:¹⁵

- Synthetic cannabinoids, such as “K2” or “Spice”, which produce a high similar to cannabis;
- Substituted cathinones, commonly sold as “bath salts,” which are central nervous system stimulants with stimulant properties related to cathinone, the psychoactive substance found in the shrub *Catha edulis* (khat) and produce pharmacological effects similar to methamphetamine, amphetamines, cocaine, Khat, LSD, and MDMA (Substituted Cathinones are central nervous system stimulants with no medicinal application and a tendency for dependence);
- Substituted phenethylamines, which mimic the effects of stimulants and/or hallucinogens, including amphetamine, methamphetamine, and MDMA;
- N-benzyl Phenethylamines, which are derivatives of the phenethylamine molecule by substitution that significantly increases the potency of the molecule, and are a potent hallucinogen and alternative to LSD;
- Substituted tryptamines, which are hallucinogenic substances; and
- Substituted phenylcyclohexylamines, which are comparable to PCP intoxication and results in behavioral/psychological effects from neurologic and physiologic abnormalities, stupor, or light or deep coma.

There are other potential classifications of drugs,¹⁶ but according to the Office of the Attorney General, these classifications describe the top designer drugs of concern in Florida.

Approaches to Synthetic Drug Enforcement¹⁷

Three states, the District of Columbia, and the federal government schedule synthetic cannabinoids using the “neurochemical approach.” This approach schedules the substances according to the effect they have on the brain rather than through either the listing of specific

¹⁴ See *Attorney General Pam Bondi News Release*, January 5, 2016, available at: <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/0C7B568A9CF4695385257F31005F4485> (last visited February 4, 2016).

¹⁵ The following information is derived from the Summary Bill Analysis provided by the Florida Office of the Attorney General. A copy is on file with the Senate Regulated Industries Committee.

¹⁶ These include: adamantoylindoles, adamantoylindazoles, benzoylindoles, cyclohexylphenols, cyclopropanoylindoles, naphthoylindoles, naphthoynaphthalenes, naphthoylpyrroles, naphthylmethylenes, naphthylmethylindoles, phenylacetylindoles, quinolinylindolecarboxylates, tetramethylcyclopropanoylindoles, and tetramethylcyclopropane-thiazole carboxamides. See National Alliance for Model State Drug Laws, *Neurochemical Approach to Scheduling Novel Psychoactive Substances in the United States*, 2015. A copy is available at: <http://www.namsdl.org/library/FF633AB8-AA08-77FD-6A4EB68D8CD0DE20> (last visited February 4, 2016)

¹⁷ For more information on how the federal government and other states and jurisdictions have addressed the issue of synthetic drug enforcement, see Gray, Heather, *Overview of Novel Psychoactive Substances and State Responses*, October 2014 at <http://www.wardwebsites.net/conference2014/presentations/gray.pdf> (last visited February 4, 2016).

substances or through the use of class definitions.¹⁸ The advantage of scheduling cannabinoids using the neurochemical approach is that states may not need to continually update the schedules of substances each time a new drug is created or introduced. However, there is uncertainty in determining the proof required to obtain a conviction under this method.¹⁹

Some states use an “analogue approach” to identify synthetic drugs. Under an analogue approach, prosecutors must prove that a substance is both substantially similar structurally to a Schedule I or II controlled substance and that it has either substantially similar effect on the body or that the person represents or intends the substance to have a substantially similar effect on the body as the controlled substance.²⁰ The advantage of using the analogue approach is that it covers every substance so long as it is structurally similar to a Schedule I or II substance. However, the analogue approach does not provide clear guidance on what constitutes “substantially similar.”²¹

Many states use these class definitions to schedule synthetic drugs or specify each novel psychoactive substance individually in the controlled substance schedule by its specific chemical structure or trade/street name. The vast majority of states in the United States use one of these two scheduling approaches or both in combination. The advantage of scheduling substances by class definition is that a prosecutor only needs to prove that the substance falls within a particular class. A prosecutor does not necessary have to prove its structural similarity to another substance or its effect on the body. Most states also include specific substances as examples of the particular class in the definition. The principal disadvantage to scheduling synthetic drugs through a classification approach is that if a substance does not fall within a particular named class and is not otherwise specifically listed, the substance is “legal” until it is particularly scheduled, although the state or federal analogue statute could fill the void until the substance is scheduled.²²

Among the recommendations in its report, the Broward County Grand Jury recommended that the Legislature adopt a classification system to include synthetic drugs within the existing provisions of s. 893.13, F.S.²³

Chapter 499 - Florida Drug and Cosmetic Act

The Florida Drug and Cosmetic Act in ch. 499, F.S., consists of three parts that cover drugs, devices, cosmetics, and household products; ether; and medical gas. Section 499.003(18), F.S., defines the term drug to mean an article that is:

- (a) Recognized in the current edition of the United States Pharmacopoeia and National Formulary, official Homeopathic

¹⁸ National Alliance for Model State Drug Laws, *Neurochemical Approach to Scheduling Novel Psychoactive Substances in the United States*, 2015. A copy is available at: <http://www.namsdl.org/library/FF633AB8-AA08-77FD-6A4EB68D8CD0DE20> (last visited February 4, 2016).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See note 11.

Pharmacopoeia of the United States, or any supplement to any of those publications;

(b) Intended for use in the diagnosis, cure, mitigation, treatment, therapy, or prevention of disease in humans or other animals;

(c) Intended to affect the structure or any function of the body of humans or other animals; or

(d) Intended for use as a component of any article specified in paragraph (a), paragraph (b), or paragraph (c), and includes active pharmaceutical ingredients, but does not include devices or their nondrug components, parts, or accessories. For purposes of this paragraph, an “active pharmaceutical ingredient” includes any substance or mixture of substances intended, represented, or labeled for use in drug manufacturing that furnishes or is intended to furnish, in a finished dosage form, any pharmacological activity or other direct effect in the diagnosis, cure, mitigation, treatment, therapy, or prevention of disease in humans or other animals, or to affect the structure or any function of the body of humans or other animals.

Section 499.005, F.S., specifies prohibited acts, including the manufacture, repackaging, sale, delivery, or holding or offering for sale of any drug, device, or cosmetic that is adulterated or misbranded or has otherwise been rendered unfit for human or animal use.

Section 499.0051, F.S., provides criminal acts and criminal penalties under ch. 499, F.S., including the knowing sale or transfer of a prescription drug to an unauthorized person in a wholesale transaction (second degree felony); the knowing sale or delivery, or possession with intent to sell, contraband prescription drugs (second degree felony); and knowing trafficking in contraband prescription drugs (first degree felony).²⁴

III. Effect of Proposed Changes:

Controlled Substances

The bill amends s. 893.02, F.S., to define and revise definitions for chemical terms used in ch. 893, F.S., including “cannabinoid receptor agonist,” “homologue,” “nitrogen-heterocyclic analog,” and “positional isomer.”

The bill amends s. 893.03, F.S., to describe, by core structure, the following synthetic controlled substances:

- Synthetic cannabinoids;
- Substituted cathinones;
- Substituted phenethylamines;
- N-benzyl phenethylamine compounds;
- Substituted tryptamines; and

²⁴ Section 499.003(11), F.S., defines a contraband prescription drug as follows: “any adulterated drug, as defined in s. 499.006, any counterfeit drug, as defined in this section, and also means any prescription drug for which a pedigree paper does not exist, or for which the pedigree paper in existence has been forged, counterfeited, falsely created, or contains any altered, false, or misrepresented matter.”

- Substituted phenylcyclohexylamines.

According to the Office of the Attorney General, the class descriptions define these groups of substances by specific core structure to limit the effect that possible alterations to these substances may have in regards to remaining subject to the prohibitions in ch. 893, F.S. Each class description includes examples of compounds that are covered by the class description. The criminal penalties relating to the possession, sale, manufacture, and delivery of controlled substances will apply to these synthetic substances.

The bill amends s. 893.0356(3), F.S., to revise the definition of the term “substantially similar” to relate to the chemical structure of the substance. A substance is substantially similar to a controlled substance if it has a single difference in the structural formula that substitutes one atom or functional group for another, including, but not limited to, one halogen for another halogen, one hydrogen for a halogen or vice versa, an alkyl group added or deleted as a side chain to or from a molecule, or an alkyl group added or deleted from a side chain of a molecule.

The bill also amends s. 893.0356(4)(j), F.S., to provide additional factors for determining whether a substance is an analog of a controlled substance, including comparisons to the accepted methods of marketing, distribution, and sales of the substance.

The bill also amends ss. 893.03, 893.033, and 893.135, F.S., to revise the chemical terms for existing substances by correcting errors in existing substance listings and deleting double entries. According to the Office of the Attorney General, the chemical terms in these provisions were reviewed by chemists and the revisions in this bill are based on their recommendations.

Prohibitions

The bill amends s. 893.13(1)(h), F.S., to create a noncriminal penalty for selling, manufacturing, or delivering, or possessing with intent to sell, manufacture, or deliver, any unlawful controlled substance in, on, or near an assisted living facility. The noncriminal penalty is a \$500 fine and 100 hours of community service and is in addition to any other lawful penalty for the offense. This noncriminal penalty refers to the remaining controlled substances listed in s. 893.03, F.S., that are not specifically listed in the paragraph.

The bill amends s. 893.13(4)(c), F.S., to create a felony of the third degree for a person 18 years of age or older who delivers any illegal controlled substance to a person younger than 18 years of age, who uses or hires a person younger than 18 years of age in the sale or delivery of such substance, or who uses a person younger than 18 years of age to assist in avoiding detection for specified violations. This criminal violation refers to the remaining controlled substances listed in s. 893.03, F.S., that are not specifically listed in the subsection.

The bill amends s. 921.0022, F.S., to revise the offense severity ranking chart that must be used with the Criminal Punishment Code worksheet to compute a sentence score for each felony

offender whose offense was committed on or after October 1, 1998. The bill revises the chart to include a violation of s. 893.13(4)(c), F.S., as a “Level 3” violation.²⁵

The bill amends s. 893.13(6)(d), F.S., to create a felony of the second degree for actual or constructive possession of a Schedule V controlled substance unless the controlled substance was lawfully obtained from a practitioner²⁶ or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice.

The bill amends s. 895.02(1)(a)9., F.S., to specify that crimes in s. 499.0051, F.S., relating to misbranded drugs are included in the definition of “racketeering activity.”

Nuisance Violations

The bill amends s. 893.0138(2), F.S., to provide that a place or premises that has been used on two or more occasions within a six-month period as a site of a violation of ch. 499, F.S., may be declared a public nuisance and abated.

Drug Paraphernalia

The bill amends s. 893.145, F.S., to include misbranded drugs in the listing of paraphernalia that is deemed to be contraband and subject to civil forfeiture.

Effective Date

The bill provides an effective date of July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

²⁵ The offense severity ranking chart in s. 921.0022, F.S., has 10 offense levels, ranked from least severe, which are level 1 offenses, to most severe, which are level 10 offenses, and each felony offense is assigned to a level according to the severity of the offense.

²⁶ Section 893.02(21), F.S., defines the term “practitioner” to mean “a physician licensed pursuant to chapter 458, a dentist licensed pursuant to chapter 466, a veterinarian licensed pursuant to chapter 474, an osteopathic physician licensed pursuant to chapter 459, a naturopath licensed pursuant to chapter 462, a certified optometrist licensed pursuant to chapter 463, or a podiatric physician licensed pursuant to chapter 461, provided such practitioner holds a valid federal controlled substance registry number.”

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the Attorney General and the Florida Department of Law Enforcement anticipate that, under CS/CS/SB 1528, the FDLE's Crime Laboratory workload may experience an initial increase in costs associated with the testing of confiscated substances. However, the agencies further anticipate that the increase will be short-lived as the market for the substances is disrupted.

The Criminal Justice Impact Conference determined that CS/SB 1528, as filed, will have a positive indeterminate impact on the prison population, meaning that it will increase the prison population by an amount that cannot be quantified. CS/CS/SB 1528 likely would have a similar impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 893.02, 893.03, 893.033, 893.0356, 893.13, 893.135, 893.138, 893.145, 895.02, and 921.0022.

This bill reenacts the following sections of the Florida Statutes: 39.01, 316.193, 322.2616, 327.35, 440.102, 456.44, 458.326, 458.3265, 459.0137, 463.0055, 465.0276, 499.0121, 499.029, 782.04, 787.06, 817.563, 831.31, 893.0301, 893.035, 893.05, 893.055, 893.07, 893.12, 893.138, 944.474, 893.149, 397.451, 435.07, 772.12, 775.084, 810.02, 812.014, 831.311, 893.1351, 893.15, 903.133, 921.187, 893.147, 16.56, 655.50, 896.101, and 905.34.

IX. Additional Information:

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

CS/CS by Appropriations on February 25, 2016:

The committee substitute includes technical amendments to the description of the chemical properties of certain synthetic cannabinoids.

CS by Regulated Industries on January 27, 2016:

The committee substitute does not amend ss. 561.29 and 569.003, F.S., to require the division to suspend an alcoholic beverage license for one year upon a finding a person has been convicted of a violation of ch. 499, F.S.

- B. **Amendments:**

None.