

# Legislative Analysis



## CONTROLLED SUBSTANCE PENALTIES: REVISE

Phone: (517) 373-8080  
<http://www.house.mi.gov/hfa>

**House Bill 5137 (proposed substitute H-5)**  
**Sponsor: Rep. Julie Alexander**

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

**House Bill 5138 (proposed substitute H-5)**  
**Sponsor: Rep. Joe Tate**

**House Bill 5299 (proposed substitute H-1)**  
**Sponsor: Rep. David LaGrand**

**Committee: Judiciary**  
**Complete to 5-27-20**

### BRIEF SUMMARY:

House Bill 5137 would revise the maximum term of imprisonment for offenses involving the illegal manufacture, sale, delivery, and possession with intent to deliver Schedule 1 and 2 narcotics and cocaine.

House Bill 5138 would amend the sentencing guidelines to reflect the changes made to the maximum terms of imprisonment for offenses made by HB 5137 and to revise the felony classification for several offenses.

House Bill 5299 would amend the Code of Criminal Procedure to allow a court to order probation for certain controlled substance offenses for which probation is currently prohibited.

House Bills 5137 and 5138 are tie-barred to each other, and House Bill 5299 is tie-barred to House Bill 5137. A bill cannot take effect unless each bill to which it is tie-barred is also enacted.

Each bill would take effect 90 days after being enacted.

### DETAILED SUMMARY:

**House Bill 5137** would revise a provision in the Public Health Code that prohibits the unlawful manufacture, creation, delivery, or possession with intent to deliver a Schedule 1 or Schedule 2 controlled substance that is a narcotic drug or cocaine. Currently, the penalties for a violation involving such substances *or any mixture containing those substances* are as follows:

- 1,000 grams or more is a felony punishable by imprisonment for life or any term of years and/or a fine of up to \$1.0 million.
- 450 grams but less than 1,000 grams is a felony punishable by imprisonment for up to 30 years and/or a fine of up to \$500,000.
- 50 grams but less than 450 grams is a felony punishable by imprisonment for up to 20 years or a fine of up to \$250,000.
- Less than 50 grams is a felony punishable by imprisonment for up to 20 years and/or a fine of up to \$25,000.

Under the bill, the above penalties would apply to a violation involving heroin, fentanyl, and carfentanil; a mixture of heroin, fentanyl, and carfentanil; or a mixture of any derivative of heroin, fentanyl, or carfentanil.

The above penalties would also apply to a violation involving an opiate other than heroin, fentanyl, or carfentanil or any mixture or derivative of those substances, and to any mixture containing such an opiate or to any derivative of that opiate. However, the maximum term of imprisonment for a violation involving less than 50 grams of the opiate, or mixture or derivative, would be reduced from 20 years to 10 years.

The penalty for a violation involving a Schedule 1 or 2 controlled substance that is a narcotic or cocaine other than those described above would be revised as follows:

- 1,000 grams or more would be a felony punishable by imprisonment for not more than 30 years (instead of life or any term of years) and/or a fine of up to \$1.0 million.
- 450 grams but less than 1,000 grams would be a felony punishable by imprisonment for up to 20 (instead of 30) years and/or a fine of up to \$500,000.
- 50 grams but less than 450 grams would remain a felony punishable by imprisonment for up to 20 years or a fine of up to \$250,000.
- Less than 50 grams would be a felony punishable by imprisonment for up to 10 (rather than 20) years and/or a fine of up to \$25,000.

#### Note on terminology

Section 7107 of the Public Health Code defines “narcotic drug” as one or more of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

- Opium and opiate and any salt, compound, derivative, or preparation of opium or opiate.
- Any salt, compound, isomer, derivative, or preparation thereof that is chemically equivalent or identical with any of the substances referred to above, but not including the isoquinoline alkaloids of opium.

Section 7108 defines “opiate” as a substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. The term does not include, unless specifically designated as controlled under section 7212 of the code, the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

A controlled substance is designated as Schedule 1 if it has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision. A Schedule 2 controlled substance also has high potential for abuse but has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions, and its abuse may lead to severe psychic or physical dependence.

MCL 333.7401

**House Bill 5138** would amend the sentencing guidelines in the Code of Criminal Procedure to change the felony classification for certain crimes involving Schedule 1 or 2 controlled substances that are narcotics or cocaine and to reflect the changes to the maximum term of imprisonment made by HB 5137 that may be imposed for certain violations, as follows:

*Heroin, fentanyl, carfentanil, or mixture or derivative of heroin, fentanyl, or carfentanil*

- 50 grams or more but less than 450 grams—Class A felony (instead of Class B).
- Less than 50 grams—Class B felony (instead of Class D).

*Schedule 1 or 2 narcotic drug other than heroin, fentanyl, or carfentanil or other opiates not containing heroin, fentanyl, or carfentanil*

- 1,000 grams or more—Class B felony (instead of Class A) and maximum term of imprisonment of 30 years (reduced from life imprisonment).
- 450 grams but less than 1,000 grams—Class B felony (instead of Class A) and maximum term of imprisonment of 20 years (reduced from 30 years).
- 50 grams but less than 450 grams—Class C felony (instead of Class B); maximum term of imprisonment remains at 20 years.
- Less than 50 grams—remains a Class D felony but maximum term of imprisonment of 10 years (reduced from 20 years).

The felony classifications and maximum terms of imprisonment would not be changed for offenses involving an opiate other than heroin, fentanyl, or carfentanil.

Further, the bill would make a technical correction to a provision pertaining to possession of a counterfeit prescription to reflect changes made to the Public Health Code by 2001 PA 236.

#### Note on felony classifications

Michigan uses an indeterminate sentencing structure in which the maximum term of imprisonment that may be imposed for an offense is established in statute and an appropriate range of imprisonment for a particular offender is determined by scoring various elements of the crime, known as offense variables, and then using a sentencing grid that relates to the felony classification of the offense to determine a sentence range appropriate for the offense and the offender. The score, and which grid is used, can make the difference as to whether an offender may be sentenced to community sanctions, such as probation, or is prison-bound, with a Class A felony typically resulting in a lengthier sentence than a Class E felony.

Scoring an offense as a Class A felony under the sentencing guidelines, rather than as a Class B, or a D felony as a Class B, as the bill would do, impacts the recommended sentence range for an offense by increasing the minimum sentence. Similarly, reducing a felony classification from Class A to Class B or from Class B to Class C, as the bill would do for certain substances, could result in a decrease in the minimum sentence that may be imposed for a violation.

MCL 777.13m

**House Bill 5299** would amend the Code of Criminal Procedure to allow a court to order probation for certain controlled substance offenses for which probation is now prohibited.

Currently, a defendant found to be guilty of, or who pleads guilty to, a felony, misdemeanor, or local ordinance violation may be placed on probation if the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law. However, prosecution for certain crimes resulting in a guilty verdict or plea are not eligible for probation, including a prosecution of a ***major controlled substance offense***.

***Major controlled substance offense*** is currently defined as a violation of section 7401(2)(a) of the Public Health Code and/or a violation of section 7403(2)(a)(i) to (iv) of the Public Health Code. Both sections establish penalties related to controlled substances classified in Schedule 1 or 2 as a narcotic drug or any derivative or preparation that is chemically equivalent to or identical with any of those substances (such as hydrocodone and oxycodone). Section 7401 pertains to the unlawful manufacture or possession with intent to deliver any amount of the substances, and section 7403 pertains to the unlawful possession of the substances in an amount of 25 grams or more.

The bill would delete the reference to *major controlled substance offenses*. The bill would instead specifically prohibit eligibility for probation for those found guilty upon verdict or plea of a violation of section 7401(2)(a)(i) to (iii), section 7401(2)(g), or section 7401(2)(h)(i) to (iii) of the Public Health Code, the latter two of which would be added by HB 5137.

The bill would therefore allow a court, after conviction, to place a defendant on probation for offenses involving possession for personal use of a controlled substance classified in Schedule 1 or 2 as a narcotic and also offenses involving the manufacture or possession with intent to deliver those substances in amounts of less than 50 grams (with the exception of heroin, fentanyl, or carfentanil).

The bill would prohibit eligibility for probation for offenses involving 50 grams or more of Schedule 1 or 2 controlled substances that are narcotics and also any amount of heroin, fentanyl, or carfentanil or a mixture of or mixture of any derivative of those substances.

MCL 771.1

## **BACKGROUND:**

Many use the terms “opiate,” “opioid,” and “narcotic” interchangeably, but various online medical and addiction treatment resources say that all *opiates* are *opioids*, but not all *opioids* are *opiates*. Generally speaking, an opiate is a natural substance derived from a poppy, whereas an opioid generally refers to a substance that is chemically made (not found in nature) or is derived from or contains an opiate. For example, morphine is an opiate, and heroin, which contains molecules of morphine, is an opioid. Many sources

also maintain that all opioids and opiates are narcotics, but not all narcotics are opioids and opiates. According to the federal Drug Enforcement Administration (DEA), “narcotic” refers to opium, opium derivatives, and their semi-synthetic substitutes. To the DEA, morphine, heroin, and fentanyl, for example, are all considered narcotics.

The Public Health Code defines the terms “opiate” and “narcotic drug,” as described above, but the term “opioid” is not currently defined in statute.

## **FISCAL IMPACT:**

**House Bill 5137** would have an indeterminate fiscal impact on the state and on local units of government. Reducing the statutory maximum sentence for delivery of a controlled substance classified in schedule 1 or 2 that is a narcotic drug other than the opiates and opioids specified in the bill or cocaine would result in a savings to the state due to a decrease in the amount of time offenders would serve in prison. In fiscal year 2019, the average cost of prison incarceration in a state facility was roughly \$39,400 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$3,800 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. The fiscal impact on local court systems would depend on how provisions of the bill affected caseloads and related administrative costs. Any change in penal fine revenue would affect funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

**House Bill 5138** is a companion bill to HB 5137 and would amend sentencing guidelines to change the felony classification for crimes involving the manufacture or delivery of heroin, fentanyl, carfentanil, or a mixture of the three from Class B and Class D felonies (depending on the amount manufactured and/or delivered) to Class A and Class B felonies, respectively. Increasing the minimum sentence of those who are convicted would have an indeterminate fiscal impact on the state’s correctional system, because convicted offenders would more likely be sentenced to prison instead of sentenced to jail or other community alternative placements. In fiscal year 2019, the average annual cost of prison incarceration in a state facility was roughly \$39,400 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$3,800 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. Also, under the bill, sentencing guidelines would be amended to change the statutory sentence for delivery of Schedule 1 or 2 narcotic drugs or cocaine from Class A and Class B felonies (depending on the amount manufactured and/or delivered) to Class B and Class C felonies, respectively. Decreasing the minimum sentence of those who are convicted would have an indeterminate fiscal impact on the state and on local units because convicted offenders would more likely be sentenced to county jails or other community alternative placements instead of to prisons. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction.

**House Bill 5299** would have an indeterminate fiscal impact on the state and on local units of government. Under provisions of the bill, specific offenses that currently are ineligible for probation would become eligible for probation. This would result in offenders spending less time in jails and/or prisons, which would result in a savings to the state and/or local units of government. An increase in the number of offenders sentenced to terms of probation would mean an increase in probation supervision costs. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. In fiscal year 2019, the average cost of prison incarceration in a state facility was roughly \$39,400 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$3,800 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. Any impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs. Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.