

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 Fiscal Policy

BILL: CS/CS/CS/SB 1226

INTRODUCER: Fiscal Policy Committee; Appropriations Committee on Criminal and Civil Justice; Criminal Justice Committee; and Senator Burgess

SUBJECT: Controlled Substances

DATE: April 26, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Stokes</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Atchley</u>	<u>Harkness</u>	<u>ACJ</u>	<u>Fav/CS</u>
3.	<u>Erickson</u>	<u>Yeatman</u>	<u>FP</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 1226 punishes selling, trafficking, and other acts involving fentanyl and fentanyl-related substances or mixtures that are sold, etc., in a form that resembles or is combined with a product and the product or packaging contains any specified attribute. For example, one specified attribute is that the product or packaging resembles cereal, candy, a vitamin, a gummy, or a chewable product, such as a gum or gelatin-based product.

The bill amends s. 893.13, F.S. (sale and other acts), to provide the new offense is punishable as a first degree felony with a 3-year mandatory minimum term. The bill also amends s. 893.135, F.S., the trafficking statute, to provide that it is a first degree felony with a mandatory minimum term of imprisonment of 25 years to life imprisonment and a mandatory fine of \$1 million for a person 18 years of age or older to knowingly sell or deliver to a minor at least 4 grams of fentanyl or a specified fentanyl-related substance or mixture in a form that resembles or is combined with a product and the product or packaging contains any specified attribute.

The bill would address the problem of “rainbow” fentanyl, which is a descriptive term that is generally used to apply to a pill, powder, or block that contains fentanyl or fentanyl-related substances or mixtures and that are produced or packaged in a variety of bright colors, shapes, and sizes in order to attract young people.

The bill may have a positive indeterminate prison bed impact (an unquantifiable increase in prison beds) on the Department of Corrections. See Section V. Fiscal Impact Statement.

The bill takes effect October 1, 2023.

II. Present Situation:

“Rainbow” Fentanyl

The U.S. Drug Enforcement Administration (DEA) provided the following information regarding “rainbow” fentanyl:

The Drug Enforcement Administration is advising the public of an alarming emerging trend of colorful fentanyl available across the United States. Since August 2022, DEA and our law enforcement partners seized brightly-colored fentanyl and fentanyl pills in 26 states. Dubbed “rainbow fentanyl” in the media, this trend appears to be a new method used by drug cartels to sell highly addictive and potentially deadly fentanyl made to look like candy to children and young people.

“Rainbow fentanyl—fentanyl pills and powder that come in a variety of bright colors, shapes, and sizes—is a deliberate effort by drug traffickers to drive addiction amongst kids and young adults,” said DEA Administrator Anne Milgram. “The men and women of the DEA are relentlessly working to stop the trafficking of rainbow fentanyl and defeat the Mexican drug cartels that are responsible for the vast majority of the fentanyl that is being trafficked in the United States.”

Brightly-colored fentanyl is being seized in multiple forms, including pills, powder, and blocks that resembles sidewalk chalk. Despite claims that certain colors may be more potent than others, there is no indication through DEA’s laboratory testing that this is the case. Every color, shape, and size of fentanyl should be considered extremely dangerous.¹

Scheduling of Fentanyl as a Controlled Substance

Section 893.03, F.S., classifies controlled substances into five categories or classifications, known as schedules. The schedules regulate the manufacture, distribution, preparation, and dispensing of substances listed in the schedules. The most important factors in determining which schedule may apply to a substance are the “potential for abuse”² of the substance and whether there is a currently accepted medical use for the substance. The controlled substance schedules are described as follows:

¹ *DEA Warns of Brightly-Colored Fentanyl Used to Target Young Americans* (August 30, 2023), U.S. Drug Enforcement Administration, available at <https://www.dea.gov/press-releases/2022/08/30/dea-warns-brightly-colored-fentanyl-used-target-young-americans> (last visited on March 10, 2023).

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

- 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 Schedule IV 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 IV substances.

“Fentanyl is a powerful synthetic opioid that is similar to morphine but is 50 to 100 times more potent. It is a prescription drug that is also used and made illegally.”³ “Synthetic opioids, including fentanyl, are now the most common drugs involved in drug overdose deaths in the United States.”⁴ According to Florida’s Statewide Drug Policy Advisory Council, the majority of overdose deaths in Florida in 2021 were related to opioids, and “[t]he most significant increases [in overdose deaths relative to the previous year] were deaths involving fentanyl which increased by 11 percent, and deaths caused by fentanyl increased by 9 percent.”⁵

Fentanyl and fentanyl-related substances (e.g., alfentanil, carfentanil, and sufentanil) are Schedule (2)(b) controlled substances.⁶

Controlled Substance Analog

A “controlled substance analog” is a substance which, due to its chemical structure and potential for abuse, meets the following criteria:

- The substance is substantially similar to that of a controlled substance listed in Schedule I or Schedule II of s. 893.03, F.S.; and
- The substance has a stimulant, depressant, or hallucinogenic effect on the central nervous system or is represented or intended to have a stimulant, depressant, or hallucinogenic effect

³ *Fentanyl DrugFacts*, National Institute on Drug Abuse (footnotes omitted), available at <https://nida.nih.gov/publications/drugfacts/fentanyl> (last visited on March 10, 2023). As a medicine, fentanyl is “typically used to treat patients with severe pain, especially after surgery[,]” and “is also sometimes used to treat patients with chronic pain who are physically tolerant to other opioids.” *Id.*

⁴ *Id.*

⁵ *2020 Annual Report* (Dec. 1, 2022), p. 8, Statewide Drug Policy Advisory Council, available at https://www.floridahealth.gov/provider-and-partner-resources/dpac/documents/2022_DPAC_Annual_Report.pdf (last visited on March 10, 2023).

⁶ Section 893.03(2)(b)1., 6., 9., and 30., F.S.

on the central nervous system substantially similar to or greater than that of a controlled substance listed in Schedule I or Schedule II of s. 893.03, F.S.⁷

Punishment for Acts Involving Fentanyl and Fentanyl-related Substances

Section 893.13, F.S., punishes various unlawful acts involving Schedule (2)(b) controlled substances:

- Selling, manufacturing, or delivering the substance, or possessing the substance with intent to sell, manufacture, or deliver⁸ it are generally second degree felonies;⁹
- Purchasing or possessing the substance with intent to purchase it are generally second degree felonies;¹⁰
- Bringing the substance into this state (importing) is generally a second degree felony;¹¹
- Possessing 10 grams of more of the substance is generally a first degree felony¹² but possessing a lesser amount is generally a third degree felony;¹³ and
- Distributing¹⁴ the substance, except through an authorized order form, is generally a first degree misdemeanor.¹⁵

Section 893.135, F.S., punishes drug trafficking, which consists of knowingly selling, purchasing, manufacturing, delivering, or bringing into this state (importing), 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, including fentanyl and fentanyl-related substances. The controlled substance involved in the trafficking must meet a specified weight or quantity threshold. Most drug trafficking offenses are first degree felonies and are subject to a mandatory minimum term of imprisonment and a mandatory fine, which is determined by the weight or quantity range applicable to the weight or quantity of the substance involved in the trafficking.

Trafficking in 4 grams or more of the following is a first degree felony:

- Alfentanil;
- Carfentanil;
- Fentanyl;

⁷ Section 893.0356(2)(a), F.S.

⁸ “Deliver” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. Section 893.02(6), F.S.

⁹ Section 893.13(1)(a)1., F.S. A second degree felony is punishable by not more than 15 years in state prison and a fine not exceeding \$10,000. Section 775.082 and 775.083, F.S.

¹⁰ Section 893.13(2)(a)1., F.S.

¹¹ Section 893.13(5)(a)1., F.S.

¹² Section 893.13(6)(c), F.S. A first degree felony is generally punishable by not more than 30 years in state prison and a fine not exceeding \$10,000. Sections 775.082 and 775.083, F.S.

¹³ Section 893.13(6)(a), F.S. A third degree felony is generally punishable by not more than 5 years in state prison and a fine not exceeding \$5,000. Sections 775.082 and 775.083, F.S. *But see* ss. 775.082(10) and 921.00241, F.S. (prison diversion).

¹⁴ “Distribute” means to deliver, other than by administering or dispensing, a controlled substance. Section 893.02(8), F.S. “Dispense” means the transfer of possession of one or more doses of a medicinal drug by a pharmacist or other licensed practitioner to the ultimate consumer thereof or to one who represents that it is his or her intention not to consume or use the same but to transfer the same to the ultimate consumer or user for consumption by the ultimate consumer or user. Section 893.02(7), F.S. “Administer” means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a person or animal. Section 893.02(1), F.S.

¹⁵ Section 893.13(7)(a)4., F.S.

- Sufentanil;
- A fentanyl derivative;¹⁶
- A controlled substance analog¹⁷ of any previously-described substance or a fentanyl derivative; or
- A mixture containing any previously-described substance or a fentanyl derivative or analog.¹⁸

If the quantity involved in the drug trafficking violation is:

- 4 grams or more, but less than 14 grams, the person must be sentenced to a mandatory minimum term of imprisonment of 7 years, and must be ordered to pay a fine of \$50,000;
- 14 grams or more, but less than 28 grams, the person must be sentenced to a mandatory minimum term of imprisonment of 20 years, and must be ordered to pay a fine of \$100,000; or
- 28 grams or more, the person must be sentenced to a mandatory minimum term of imprisonment of 25 years, and must be ordered to pay a fine of \$500,000.¹⁹

III. Effect of Proposed Changes:

The bill amends s. 893.13, F.S., to provide that it is a first degree felony²⁰ with a 3-year mandatory minimum term to:

- Sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, any of the following:
 - Alfentanil, as described in s. 893.03(2)(b)1., F.S.;
 - Carfentanil, as described in s. 893.03(2)(b)6., F.S.;
 - Fentanyl, as described in s. 893.03(2)(b)9., F.S.;
 - Sufentanil, as described in s. 893.03(2)(b)30., F.S.;
 - A fentanyl derivative, as described in s. 893.03(1)(a)62., F.S.;
 - A controlled substance analog, as described in s. 893.0356, F.S., of any substance previously described; or
 - A mixture containing any substance previously described or an analog of the substance;
- AND**
- The substance or mixture previously described is in a form that resembles, or is mixed, granulated, absorbed, spray dried, or aerosolized as or onto, coated on, in whole or in part, or solubilized with or into, a product, when such product or its packaging further has at least one of the following attributes:
 - Resembles the trade dress of a consumer food product, branded food product, or logo food product;
 - Incorporates an actual or fake registered trademark, service mark, or copyright;
 - Resembles cereal, candy, a vitamin, a gummy, or a chewable product, such as a gum or gelatin-based product; or
 - Contains a cartoon character imprint.

¹⁶ See s. 893.03(1)(a)62., F.S.

¹⁷ See s. 893.0356(2)(a), F.S.

¹⁸ Section 893.135(1)(c)4.a.(I)-(VII), F.S.

¹⁹ Section 893.135(1)(c)4.b.(I)-(III), F.S.

²⁰ The first degree felony is not ranked in s. 921.0022, F.S., the Criminal Punishment Code (Code) offense severity level ranking, so it defaults to a level 7 ranking pursuant to s. 921.0023, F.S. The mandatory minimum term may supersede the minimum prison sentence scored under the Code.

The bill also amends s. 893.135, F.S., the trafficking statute, to provide that it is a first degree felony with a mandatory minimum term of 25 years to life imprisonment²¹ and a mandatory fine of \$1 million for a person 18 years of age or older to:

- Knowingly sell or deliver to a minor at least 4 grams of fentanyl or a specified fentanyl-related substance or mixture; **AND**
- The substance or mixture previously described is in a form that resembles, or is mixed, granulated, absorbed, spray dried, or aerosolized as or onto, coated on, in whole or in part, or solubilized with or into, a product, when such product or its packaging further has at least one of the attributes previously described (see description of changes to s. 893.13, F.S.).

As previously noted, the bill would address the problem of “rainbow” fentanyl, which is a descriptive term that is generally used to apply to a pill, powder, or block that contains fentanyl or fentanyl-related substances or mixtures and that are produced or packaged in a variety of bright colors, shapes, and sizes in order attract young people.

The bill takes effect October 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State Constitution.

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.

²¹ The trafficking provisions of the bill relating to trafficking do not impact the ranking of trafficking in fentanyl in the Code offense severity level ranking chart (level 7, 8, or 9, depending on the quantity trafficked). See s. 921.0022(3)(g), (h), and (i), F.S. The trafficking provisions of the bill are only relevant to the applicable mandatory minimum term and fine.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC), which provides the final, official estimate of the prison bed impact, if any, of legislation, has determined that the bill may have an indeterminate prison bed impact (an unquantifiable increase in prison beds). The CJIC provides the following additional information regarding its estimate:

Per [Department of Corrections], in FY 18-19, there were 766 new commitments to prison for sale/manufacture/delivery drug violations, of which fentanyl offenses represent an unknown share of that total. In FY 19-20, there were 443 new commitments, and there were 426 new commitments in FY 20-21. There were 520 new commitments in FY 21- 22. There were 19 new commitments to prison for fentanyl trafficking violations in FY 18-19, and there were 35 new commitments in FY 19-20. There were 63 new commitments in FY 20-21, and there were 169 new commitments in FY 21-22. It is not known how many of these offenders would fit the newly added language in this bill.²²

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 893.13 and 893.135.

²² *SB 1226 – Controlled Substances*, Office of Economic and Demographic Research (on file with the Senate Committee on Criminal Justice).

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/CS by Fiscal Policy on April 25, 2023:

The committee substitute:

- Amends the elements of the trafficking offense created by the bill to punish a person 18 years of age or older who knowingly sells or delivers to a minor at least 4 grams of fentanyl or a specified fentanyl-related substance or mixture in a form that resembles or is combined with a product and the product or packaging contains any specified attribute.

CS/CS by Appropriations Committee on Criminal and Civil Justice on April 12, 2023:

The committee substitute:

- Revises attributes of product or packaging containing fentanyl or fentanyl-related substance or mixture to remove reference to a bright color or color scheme.
- Replaces the life imprisonment penalty for the trafficking offense with a penalty of 25 years to life imprisonment.

CS by Criminal Justice on March 20, 2023:

The committee substitute:

- Revises attributes of product or packaging containing fentanyl or fentanyl-related substance or mixture to include a bright color or coloring scheme.
- Provides that the new fentanyl trafficking offense is punishable by a mandatory minimum term of imprisonment of life imprisonment and a mandatory fine of \$1 million.

- B. **Amendments:**

None.