

LFC Requester: _____

**AGENCY BILL ANALYSIS
2025 REGULAR SESSION**

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SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original Amendment _____
Correction _____ Substitute _____

Date Feb. 6, 2025

Bill No: HB 16-280

Sponsor: Charlotte Little
Short Title: Fentanyl Trafficking Sentences

Agency Name and Code Number: 280 Law Offices of the Public Defender [LOPD]
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB 136 (relating to fentanyl and child abuse), HB 107 (relating to trafficking controlled substances), SB 25 (relating to possession of 1 kg of fentanyl)

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: HB 16 would enhance penalties for those convicted of trafficking fentanyl (as opposed to other controlled substances), in one of three ways. (1) The bill would enhance a basic trafficking sentence by **three** years where the person possessed either 100-500 pills/capsules/tablets or 10-50g of powder, whichever is less. (2) The bill would enhance a sentence by **five** years where the person possessed either more than 500 pills/capsules/tablets or more than 50g of powder, whichever is less. (3) The bill would also enhance a sentence by **five** years where the person “recruited, coordinated, organized, supervised, directed, managed or financed another to commit trafficking fentanyl.”

FISCAL IMPLICATIONS

Because this bill increases punishment for the trafficking of fentanyl based on the amount involved, there will be an increased need for more experienced attorneys to handle these cases and increase the likelihood such cases will be taken to trial and appealed as opposed to being resolved through a plea. If more trials result, LOPD may need to hire more attorneys with greater experience.

These felonies would be handled by mid-level felony capable attorneys (Associate Trial Attorneys). Depending on the volume of cases in the geographic location there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation. Associate Trial Attorney’s mid-point salary including benefits is \$136,321.97 in Albuquerque/Santa Fe and \$144,811.26 in the outlying areas (due to necessary salary differential to maintain qualified employees). Recurring statewide operational costs per attorney would be \$12,909.00 with start-up costs of \$5,210.00; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total \$123,962.51.

Presumably the courts and district attorneys would be affected in similar measure to LOPD.

Given the increase in sentences, HB 16 would also be likely to have a fiscal impact on NMCD.

SIGNIFICANT ISSUES

Trafficking may be committed by proof of actual manufacture or distribution, *or* by possession with intent to distribute. *See* § 30-31-20. In the latter scenario, that “intent to distribute” requirement (which distinguishes trafficking from simple possession for personal use) is often established by expert law enforcement opinion testimony indicating that a particular amount is consistent with distribution, but not consistent with personal use. In the case of each of the enhancements related to the amount of fentanyl possessed, Analyst anticipates that the State will rely on the amount that the person possessed to prove both the requisite intent (elevating possession to trafficking) *and* to incur this sentencing enhancement. In those cases, double jeopardy litigation is likely because generally, the State is not permitted to rely on the same conduct both to elevate the underlying basic sentence and to enhance it. *See State v. Elmquist*, 1992-NMCA-119, 114 N.M. 551; *State v. Franklin*, 1993-NMCA-135, 116 N.M. 565; and *State v. Varela*, 1999-NMSC-045, 128 N.M. 454.

Additionally, to be guilty of possessing fentanyl with intent to distribute, a defendant must *know* it is the substance they are charged with “*or* believe it to be some drug or other substance the possession of which is regulated or prohibited by law.” *See* UJI 14-3102 NMRA (elements of possession). As explained by the CDC, fentanyl is often possessed unknowingly because it is routinely added to other drugs and made to look like other drugs. In particular, the CDC cautions that “Illegally made fentanyl (IMF) is available on the drug market in different forms, including liquid and powder. Powdered fentanyl looks just like many other drugs. It is commonly mixed with drugs like heroin, cocaine, and methamphetamine and made into pills that are made to resemble other prescription opioids. Drugs mixed with fentanyl are extremely dangerous, and many people may be unaware that their drugs contain it.” *See* [The Facts About Fentanyl](https://www.cdc.gov/stop-overdose/caring/fentanyl-facts.html), Center for Disease Control Online, available at <https://www.cdc.gov/stop-overdose/caring/fentanyl-facts.html>. A person involved in a trafficking operation may well possess a drug stash without knowing precisely what substance it is. Because that person is still guilty of possessing fentanyl, while believing it to be some other substance, the bill may be more narrowly targeted by requiring *actual knowledge* that the substance is fentanyl, so that it is not used to enhance the penalty for persons who *unwittingly* possess fentanyl for sale or distribution (but who would still receive the basic sentence for trafficking fentanyl, either nine years for a first offense or a *mandatory* 18 years for a second or subsequent offense).

The addition of a sentence enhancement for facilitating someone else’s trafficking is unnecessary and redundant, since such a crime already exists: NMSA 1978, § 30-28-3 (Criminal Solicitation). Criminal solicitation occurs when someone, with the intent that another person engage in conduct constituting a felony, he solicits, commands, requests, induces, employs, or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state. § 30-28-3(A); *see also State v. Pinson*, 1995-NMCA-045, 119 N.M. 752 (criminal solicitation may be charged when someone solicits someone else to traffic drugs, though not if they are a mere buyer). If the crime solicited is a first offense of trafficking a controlled substance, the penalty for solicitation would be a third-degree felony punishable by three years in prison; if the crime solicited is a second or subsequent offense of trafficking, the penalty for solicitation would be a second-degree felony punishable by nine years. *See* NMSA 1978, §§ 30-28-3(E); 30-31-20(B); 31-18-15(A). Each of these would be in addition to the nine years for a first-offense of trafficking and *mandatory* 18 years for a second or subsequent offense. Should HB 16 be enacted, this would certainly lead to extensive litigation about which statute can be applied, under principles of double jeopardy and/or a general-specific analysis. *See*

State v. Santillanes, 2001-NMSC-018, ¶¶ 7-21, 130 N.M. 464.

The proposed subsection C explicitly states that the enhancement would be applied in addition to any prosecution for conspiracy. Though this obviates a double-jeopardy challenge as to that crime, it would lead to higher sentences since the requirements for enhancements will necessarily also establish guilt for conspiracy as well, which would exacerbate the impacts outlined in *Fiscal Implications* above.

Finally, there is copious evidence that increasing penalties for drug possession and sale have either no statistically significant effect or a deleterious effect upon reentry and recidivism because drug addiction is a public-health problem, not a result of moral failure or criminal nature. *See, e.g.*, Nora D. Volkow et al., *Drug use disorders: impact of a public health rather than a criminal justice approach*, 16(2) *WORLD PSYCHIATRY* 213 (May 2017), available at <https://onlinelibrary.wiley.com/doi/10.1002/wps.20428> (inter alia, “criminal sanctions are ineffective at preventing or addressing [substance use] disorders” and recommending instead a “comprehensive public health approach [with] accessible evidence-based prevention, treatment, and recovery options to drug users, and engage those who commit criminal offences in evidence-based treatment during and following, or in lieu of, incarceration, to prevent relapse and recidivism”). Increasing penalties for possession or sale among low- to mid-level buyers and sellers ignores the root causes of drug trafficking, while also exacerbating the difficulties people face upon reentry into society after incarceration. *See, e.g.*, Federal Defender Fact Sheet on USSC’s “Length of Incarceration and Recidivism” Report (Aug. 1, 2022), available at https://www.fd.org/sites/default/files/sentencing/incarceration_and_recidivism_factsheet_2022_0_0.pdf.

PERFORMANCE IMPLICATIONS

See Fiscal Implications above.

ADMINISTRATIVE IMPLICATIONS

See Fiscal Implications above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

See Duplicates/Conflicts with/... above.

TECHNICAL ISSUES

While the court “shall” enhance the basic sentence, it does not indicate that the enhancements are mandatory incarceration, and thus would be subject to suspension or deferral. It is also not clear whether this enhancement must run consecutive to any other enhancements that will often apply, such as those for habitual offenders or the use of a gun during the crime’s commission. These ambiguities would likely require appellate litigation to resolve.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

See Technical Issues and Significant Issues above.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

People will continue to be charged with trafficking of a controlled substance and punished by either nine or a mandatory 18 years in prison. They can also already be charged with criminal solicitation and/or conspiracy for encouraging others to traffic, time which can be run consecutive to their trafficking sentence. Other enhancements will continue to be applied, such as habitual offender and firearm sentence enhancements.