

LFC Requester: _____

**AGENCY BILL ANALYSIS
2025 REGULAR SESSION**

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{Analysis must be uploaded as a PDF}

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 23 January 2025
Bill No: SB 25-280

Sponsor: Craig Brandt & Gabriel Ramos
Penalties for 1kg Fentanyl

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

Short Title: _____

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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)

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: SB 25 proposes a sentencing enhancement of three years, to be added to the basic sentence for drug trafficking offenses when they involve one kilogram or more of 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 DAs would be affected in similar measure to LOPD.

Given the increase in sentences, SB 25 would also be likely to have a fiscal impact on DOC.

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 those cases that involve a

kilo or more of fentanyl, Analyst anticipates that the State will rely on the fact that “the fentanyl amounts to one kilogram or more” both to prove 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.[P]owdered 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, 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).

PERFORMANCE IMPLICATIONS

See Fiscal Implications, above.

ADMINISTRATIVE IMPLICATIONS

See Fiscal Implications, above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None noted.

TECHNICAL ISSUES

While the court “shall” enhance the basic sentence, it does not indicate that the three-year enhancement is mandatory incarceration, and thus would be subject to suspension or deferral. This is consistent with the basic sentence for first-offense trafficking, which carries a 9-year basic sentence subject to suspension or deferral. However, second-offense trafficking is a first-degree felony with a basic sentence of 18 mandatory years (that *cannot* be suspended or deferred). It is therefore somewhat unclear whether the enhancement’s ability to be suspended would track the basic sentence, and thus be “mandatory” when enhancing a second or subsequent trafficking conviction. This ambiguity could be resolved by adding the language “which may be

suspended or deferred” within SB 25.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

Clarify that the enhancement requires actual knowledge of the presence and amount of fentanyl.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The conduct which is already criminalized will continue to be punished at existing levels.