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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 02/07/17  
**SPONSOR** Ortiz y Pino **LAST UPDATED** 02/10/17 **HB** \_\_\_\_\_

**SHORT TITLE** Cannabis Revenue & Freedom Act **SB** 278

**ANALYST** Daly

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY 21		
To Be Determined	To Be Determined	\$12,000.0	Recurring	Public School Fund
To Be Determined	To Be Determined	\$6,900.0	Recurring	Substance Abuse Prevention and Behavioral Health Fund
To Be Determined	To Be Determined	\$6,000.0	Recurring	Cannabis Revenue Economic Development Fund
To Be Determined	To Be Determined	\$2,250.0	Recurring	District Attorney Public Safety Fund
To Be Determined	To Be Determined	\$2,250.0	Recurring	Public Defender Public Safety Fund
To Be Determined	To Be Determined	\$600.0	Recurring	Medical Cannabis Subsidy Fund
To Be Determined	To Be Determined	\$8,300.0	Recurring	General Fund
To Be Determined	To Be Determined	\$5,000.0	Recurring	Local Governments
To Be Determined	To Be Determined	To Be Determined	Recurring	Fees to Various Funds
To Be Determined	To Be Determined	\$43,300.0	Recurring	<b>Total</b>

(Parenthesis ( ) Indicate Revenue Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY17</b>	<b>FY18</b>	<b>FY19</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	\$3,008.0	\$0.0	\$0.0	\$3,008.0	Nonrecurring	TRD Operating Funds
	\$128.0	\$178.0	\$356.0	\$664.0	Recurring	TRD Operating Funds
	\$0.0	\$0.0	\$7,714.4	\$7,714.4	Recurring	RLD Operating Funds
	Unknown	Unknown	Unknown	Unknown	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 89 and HB 102  
Relates to SB 345

**SOURCES OF INFORMATION**

LFC Files

Responses Received From

- Administrative Office of the Courts (AODA)
- Office of the Attorney General (OAG)
- Children, Youth & Families Department (CYFD)
- Department of Health (DOH)
- Department of Public Safety (DPS)
- Economic Development Department (EDD)
- Human Services Department (HSD)
- Law Offices of the Public Defender (LOPD)
- New Mexico Department of Agriculture (NMDA)
- New Mexico Environment Department (NMED)
- Regulation & Licensing Department (RLD)
- Taxation & Revenue Department (TRD)

**SUMMARY**

Synopsis of Bill

Senate Bill 278 enacts the Cannabis Revenue and Freedom Act (CRFA), which establishes a comprehensive regulatory framework for the legal production, processing and sale (to persons 21 years of age and older) of industrial hemp, marijuana and marijuana items, as well as amending existing law governing the medical cannabis program (the Lyn and Erin Compassionate Care Act, or LECCA).

Applications to produce, process and sell medical marijuana under the existing law governing medical marijuana would be accepted beginning July 1, 2018. Applications to produce process and sell marijuana more generally begins July 1, 2020. The Act creates a new Cannabis Control Board to regulate and oversee both the existing medical cannabis program and the marijuana

program established under CRFA. It also assigns duties and grants powers to that board and the Departments of Regulation and Licensing (RLD), Taxation and Revenue (TRD), Agriculture (DOA) and Health (DOH). HB 89 also enacts the Cannabis Tax Act and amends other existing law consistent with the provisions of the CRFA.

Marijuana use in public places is prohibited, although a marijuana retailer may provide a location for on-site consumption upon license endorsement. A person's conduct in compliance with CRFA shall not be grounds for adverse employment action and other forms of discrimination in housing, child custody, visitation and parenting unless specified conditions exist. A limited amount of homegrown marijuana is exempted from CRFA, but it cannot be produced, processed or stored in public view. Municipalities and counties may enact regulations related to nuisance aspects of retail establishments. Municipalities with populations over 5,000 and all counties may hold local option elections to prohibit licensed premises.

The Cannabis Control Board is composed of 13 members appointed by the Governor, subject to Senate confirmation, including two licensees, two medical or public health professionals, two patients in the medical cannabis program, one public member, one banking or finance professional, one representative of the labor industry, and one representative each of RLD, DOA, DOH, and the Department of Environment. The control board's regulatory oversight duties include establishing a medical cannabis subsidy program to distribute a portion of cannabis tax revenue to qualified patients in the medical cannabis program, adopting rules regarding the medical cannabis program including what constitutes an adequate supply, forms of cannabis to be used, determining what debilitating medical conditions qualify a patients for the program and procedures for these patients to produce medical cannabis for personal use, develop a distribution system for medical cannabis, and limit the number of plants a producer and patient may possess.

The board is also charged with promulgating rules addressing both the medical marijuana and the recreational marijuana programs by January 1, 2018. Those rules must include standards for growing, a system to track plants, conditions governing interstate sales, use of marijuana items for all purposes, prohibitions on advertising of marijuana items by a licensee, the number of plants in a producer's possession prior to sale of recreational marijuana under CRFA becomes legal, and labeling of THC concentration.

RLD, in consultation with the board, NMDA and DOH, is charged with licensing production, processing and wholesale and retail sales, including adopting rules and forms. Licenses are issued for a period of one year. An application fee of up to \$500 is authorized, as are annual license fees for processors, wholesalers, and retailers of up to \$2,000. Annual license fees for production are based on the number of plants, and range from \$15,000 for up to 150 plants to a cap of \$45,000. Licenses are void upon a licensee's death (except in certain, limited circumstances), and can only be transferred as allowed under the bill. RLD may disapprove a license under certain circumstances, including if RLD reasonably believes there are sufficient licensed premises in the locality, and sets forth grounds for suspending or cancelling licenses.

Additionally, by January 1, 2019, RLD must study the influence of marijuana on a person's ability to drive a car, and present the study results to interim legislative committees and recommend any changes to the Motor Vehicle Code to the Legislature.

NMDA is charged with regulating hemp production and possession of and commerce in commodities and products made from hemp. Licenses are valid for three years and cannot be transferred.

SB 278 also enacts the Cannabis Tax Act (CTA). It imposes a 15 percent excise tax on marijuana sales tax on retailers who sell marijuana items, the net receipts from which are to be distributed under the Tax Administration Act as follows:

- 40 percent to the public school fund to augment state equalization guarantee distribution appropriations;
- 23 percent to the substance abuse prevention and behavioral health fund (a new fund created in this act administered by the DOH for alcohol and substance abuse prevention, early intervention and treatment and related services);
- 20 percent to the cannabis revenue economic development fund (another new fund administered by the Economic Development Department for local and regional economic development and training, including for formerly incarcerated persons);
- 7.5 percent to the district attorney public safety fund (another new fund administered by AODA for certain arrest and incarceration diversion programs for low-level drug related offenses and development of intoxicated driving detection programs);
- 7.5 percent to the public defender public safety fund (another new fund administered by the public defender department for its operations); and
- 2 percent to the medical cannabis subsidy fund (the last new fund administered by DOH to support qualified patients).

The CTA also authorizes a five percent county and a five percent municipal cannabis tax, subject to approval by the electorate and a deduction of up to three percent by TRD to cover the administrative costs of collection. The balance may be used by the local public body for its general governmental purposes.

The amendments to LECCA and provisions in CRFA more generally substitute the control board for DOH as the rule-maker and overseer of the medical marijuana program generally, although DOH continues to perform identification and licensing functions. They also impose licensing fee amounts on producers consistent with those imposed in the recreational use program.

SB 278 also amends other existing state law, including the Controlled Substances Act, to exempt conduct authorized by the CRFA from their provisions. It also reduces some criminal penalties relating to possessing, possessing with intent to distribute, distributing, and trafficking marijuana.

The effective date of SB 278 is July 1, 2017.

## **FISCAL IMPLICATIONS**

This bill creates five funds and provides for continuing appropriations to them. The LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the legislature to establish spending priorities.

## Revenue

Although in a substantially similar bill (HB 89) TRD projects a new revenue stream beginning in FY 18 under the Cannabis Tax Act, its figures are based on its assumption that that bill authorizes medical marijuana providers to begin selling recreational marijuana as of its effective date of the bill (July 1, 2017). LFC staff does not read either HB 89 or SB 278 to allow sales of that nature at that time, and therefore has not included the TRD revenue estimates for FY 18 and FY 19 (nor, for SB 278, FY 20) in the revenue table. While SB 278 and HB 89 do appear to impose the same new cannabis tax authorized in the Cannabis Tax Act on medical marijuana providers beginning on July 1, 2017, LFC staff is unable to extrapolate estimates of those monies from the TRD data, and no estimates as to that revenue is provided but are shown as amounts to be determined.

The revenue table does reflect TRD estimates of revenues upon imposition of the 15 percent tax authorized by the Cannabis Tax Act in both bills to be charged for recreational marijuana sales that begin, in SB 278, some time after July 1, 2020 (FY 2021). The TRD methodology uses Oregon and Colorado demand, adjusted for New Mexico age groups and population. LFC staff assumes the numbers in the table for General Fund revenues are gross receipts tax estimates, and the numbers in the table for local governments assumes all municipalities and counties conduct elections and impose the additional 5 percent tax authorized in SB 278 as well as HB 89.

Additionally, there will be an unknown but positive effect on personal income tax (PIT) collections as a result of the likely creation of jobs resulting from the enactment of SB 278. According to a recent study<sup>1</sup>, over 11,400 new jobs—6,600 jobs in cannabis production and cannabis product manufacturing and 4,780 jobs in ancillary businesses—are expected to be created in the first year. This additional tax revenue is not reflected in the revenue table above. Similarly, demand from the El Paso/Juarez area (which has the same population as New Mexico, and its proximity to the state likely would result in additional retail sales) is expected but is not reflected in the revenue table.

In addition to new tax revenues, SB 278 sets specific licensing fees that RLD may charge, in addition to setting a cap on an application fee, for processors, wholesalers and retailers of marijuana. The revenue generated from those fees is appropriated to that department for administrative purposes. RLD provides no estimates as to what revenue may be generated by those fees. The bill also authorizes NMDA to industrial hemp growers and agricultural hemp seed producers a reasonable fee that NMDA will determine during its rulemaking process. Similarly, NMDA reports it cannot predict the level of revenue expected from the fees. Licensing fees charged by both of those departments are reflected in the second to last line of the Revenue Table as amounts to be determined.

## Operating Budget Impact

OAG states that it likely would be expected to provide legal counsel to the control board, which would result in additional staff and attorney resources, although no appropriation or other resources are provided under this bill. OAG provides no estimates of impact to its operating budget, so that impact to the General Fund is shown as unknown in the operating budget table.

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<sup>1</sup> O'Donnell Economics & Strategy, "The Legalization of Cannabis for Social Use", September 2016.

TRD reports that new tax imposed in HB 89 (and thus SB 278) will have an extreme impact on the Information Technology Division, requiring significant efforts in development, project management, and requiring independent verification and validation. The estimate for nonrecurring costs to implement a new tax program (based on similar implementations in other states) is approximately 12 – 18 months at a cost of approximately \$3.0 million. These estimates are based on a similar implementation for the state of Colorado. It also has a high, recurring, impact on the Revenue Processing Division. A number of different processes with respect to licensing, forms, instructional documentation, nontaxable transaction certificates and interfacing to other departments will have to be developed. These large modifications are also complicated by the fact that municipalities and counties can each elect to add another 5 percent tax. There is a nonrecurring moderate impact on the Financial Distribution Bureau due to the need to test functional changes in the GenTax system and create new accounts for collection and distribution of the different funds and possible local taxes. TRD's estimated operating budget impact is reflected in that table above.

RLD first notes that no appropriation or other funding is provided for the study of the influence of marijuana on driving that it must complete by January 1, 2019.

RLD then estimates that to regulate a new controlled substance industry, it likely will require double the number of licensing, compliance, investigation and enforcement staff as are needed to regulate the liquor industry, which has been regulated since the end of Prohibition in the 1930s. Currently, the Alcohol & Gaming Division (AGD), which performs similar licensing and regulatory functions within RLD, has 15 FTEs to perform licensing and compliance duties. The investigative and enforcement duties are performed by certified peace officers of the Special Investigation Division of DPS. The combined staff required to regulate the alcohol industry is currently 42, comprised of 27 (SID's authorized number of FTEs) plus 15 (AGD's authorized number of FTEs) and the current combined budgets are just under \$4 million (combined under \$1 million for Alcohol & Gaming Division and approximately \$3 million for Special Investigations Division).

RLD reports it will need up to 84 additional FTEs to start-up this unit; 24 to perform licensing & compliance duties and 60 to perform investigative and enforcement duties. There would be a need for attorneys on staff to design a comprehensive regulatory framework, draft rules and regulations as required and hold rule-making and administrative citation hearings. There may be a need for financial auditors and/or forensic accountants. Additional managers and staff would also be needed because there would be an influx of requests for licenses due to this legislation. RLD's overall estimate of the impact on its operating budget is included in the operating impact table.

NMDA reports that the fiscal impact of its new duties to license industrial hemp and agricultural hemp seed production on its operating budget is unknown, reflected in the operating budget table as an unknown impact to the General Fund. Whatever the amount, it believes it will be insufficient to fully enact and adequately maintain the provisions of the bill without compromising activities within existing regulatory programs. It does provide a general explanation of that impact: it will need to develop infrastructure necessary to initiate a new regulatory program, including additional staff, equipment, and laboratory upgrades. It also notes that while NMDA is not identified in the act as having responsibilities for cannabis production beyond hemp, aspects of the growing of marijuana plants fall under other current statutes overseen by NMDA. This includes pesticide application and fertilizer product regulation, plant

sales and phytosanitary inspection, and retail scale inspection. Additional responsibilities related to these areas for inspection, sampling, and analytical testing at licensed marijuana growing facilities will require extensive resources.

DOH reports that SB 278, transfers to RLD the fee revenues necessary for the continued operation of the medical cannabis program within DOH. That program does not (and would not, under both bills) receive tax revenue for its operations, and relies entirely on fees collected from medical cannabis producers, pursuant to Section 9-7-17.1 of the Medical Cannabis Fund Act. Further, HSD administers Medicaid, which funds substance abuse treatment services in the community for the program's recipients. With the increased availability of marijuana under HB 89 (and SB 278), HSD predicts substance abuse disorders may increase in the Medicaid population and the program may see increased costs but will be unable to access the funding set-aside for substance abuse treatment since it is statutorily dedicated to DOH. These changes also will impact the general fund to an unknown extent, as reflected in the operating budget table.

Both EDD and CYFD predict increased budgetary impacts at an unknown or moderate level. NMED notes that although HB 89 (which is true for SB 278 as well) establishes no oversight duties for NMED, a representative of that agency is a member of the control board, which will result in costs incurred for travel, administrative duties, and staff time for that representative.

## **SIGNIFICANT ISSUES**

### Recreational Marijuana

Federal laws classify marijuana as a controlled substance and provide criminal penalties for its manufacture, distribution, possession or use. These federal criminal laws are enforced by federal government agencies that act independently of state and local government law enforcement agencies. As such, federal marijuana laws could still be enforced in New Mexico

OAG reports that the state of Colorado, which has legalized cannabis/marijuana, is being sued by the States of Nebraska and Oklahoma, based on the alleged negative impact that Colorado's legalization has produced in having cannabis/marijuana transported into these neighboring states. It is possible that legalization of cannabis/marijuana in New Mexico would result in litigation by other states against New Mexico on similar grounds.

DPS provides its perspective on one public safety issue that may arise upon enactment of HB 89, which holds true for SB 278 as well:

Despite the potential revenue raising aspect of this bill, the DPS remains stalwart in its opposition to marijuana legalization for recreational use. This is a serious public safety issue. The danger to New Mexico's citizens emanating from a whole new category of legalized substances by which individuals could end up driving impaired cannot be overstated. This is particularly so because there is no simple means of testing for marijuana impairment. A breath test is only effective to detect alcohol. Under current law, after the U.S. Supreme Court's recent decision in *Birchfield v. North Dakota*, there is no implied consent for blood tests for criminal purposes. This means that in order to take a blood test, the driver must actually consent to the test, or there must be probable cause to believe the person has committed a felony while under the influence (4 or more

times DWI/DUID) or caused great bodily injury or death. Therefore, it would be very difficult to protect the public from drivers impaired by marijuana. Presumably, if legalized, there would be far more marijuana-impaired drivers on the road.

It should be noted that SB 278 does direct RLD to study the influence of marijuana on driving and report and make recommendations for any changes to the Motor Vehicle Code to interim legislative committees by January 1, 2019, some eighteen months prior to the beginning implementation date for recreational marijuana.

The Cannabis Tax Act (Sections 53 through 59) sets no delayed effective date, so the July 1, 2017 effective date of SB 278 appears to apply. TRD advises that such an effective date would not be feasible in terms of implementing the new tax program as required in that Act. However, since RLD is not authorized to begin accepting applications to produce, process and sell marijuana other than medical marijuana under SB 278 until July 1, 2020, the actual imposition of the tax for recreational marijuana may not occur until some time after that date. Assuming the tax is meant to apply to providers of medical marijuana, then the issue regarding implementation date raised by TRD likely needs to be addressed.

In addition, TRD comments that from a tax policy and revenue adequacy perspective, rates should be set at a level designed to maximize industry participation in the new tax regime. Including gross receipts tax, the base rate of taxation is 21.6 percent, while the maximum possible local rate is 31.6 percent. These rates are significantly higher than Colorado's total rates (which include a wholesale tax and are calculated differently). Many states have found that high recreational cannabis taxation rates incentivize a continued black market, especially given the difficulty industry conditions participants face with respect to banking and high federal net income taxes due to continued illegality at the federal level.

HSD points out that although prior to 2011, DOH administered all behavioral health services in New Mexico, authority for community-based behavioral health was transferred in 2011 to the Human Services Department (HSD). The Division of Behavioral Health Services (BHSD) at HSD is currently the State Mental Health and Substance Abuse Authority. BHSD administers all prevention, treatment and recovery programs for behavioral health, including substance abuse programs. However, SB 278, like HB 89, authorizes DOH to administer the Substance Abuse Prevention and Behavioral Health Fund defined in the bill.

DOH comments on these issues that may arise under the provisions of Section 41, which requires district attorneys, the courts and municipal authorities:

Notify RLD of any conviction of a person who is licensed...that "relates to marijuana items." However, producers would typically be companies (corporations, LLCs, etc.), rather than individual persons capable of being prosecuted. Also, courts (and other specified authorities) would not necessarily be in a position to know whether a person who is prosecuted of an offense related to marijuana is licensed as a producer of marijuana. Requiring criminal history screening through the National Crime Information Center (NCIC) as a prerequisite to licensure as a producer would likely be a more feasible alternative to requiring notification of convictions from courts.



CYFD calls attention to Section 44, requiring destruction of certain arrest and conviction records, including those involving juveniles. (This provision is not contained in HB 89). CYFD states:

By establishing a retention and disposition requirement for juvenile delinquency records specific to marijuana possession, distribution, or intent to distribute, separate from those retention and disposition requirements affecting all other juvenile delinquency records, new procedures on records maintenance (creation, filing, notification, and destruction) will need to be developed and implemented. Currently, juvenile records are sealed upon the child turning 18 or no longer being under CYFD supervision, whichever comes later, maintained until the child's 22<sup>nd</sup> birthday, and thereafter securely destroyed, in accordance with NMAC requirements. Prior to sealing, in accordance with statute, the child is notified that they have 60 days to request a copy of their record prior to that record ceasing to legally exist (approximately 600 letters per month). This change in retention and disposition requirements will require dual notification to affected individuals.

EDD provides these comments concerning the new development fund that is created in both HB 89 and SB 278, which it is directed to administer:

Revenue from the fund would be used to support local entrepreneurs, for business development, business growth and marketing. These tasks are currently within EDD's core mission. It is unclear if the EDD support is meant to be geared toward cannabis and/or hemp businesses. If that is the intent, EDD staff would require significant training.

In addition, the revenue from this fund is to "support job training for and placement of formerly incarcerated persons." This is beyond the expertise of EDD and would be better suited to another agency. It is unclear if these incarcerated persons include all persons regardless of the reason for the initial incarceration. EDD has never encouraged the hiring of specific persons and this language seems to indicate the agency may be asked to do so.

### Medical Marijuana

DOH presents this general analysis of SB 378's changes to the medical marijuana program it currently administers:

SB278 would substantially alter the administration of the Medical Cannabis Program, transferring responsibilities that currently reside with NMDOH to RLD. RLD would assume the responsibility of regulating producers in the MCP, and the authority of NMDOH over medical cannabis producers under the existing Compassionate Use Act would be transferred to a Cannabis Control Board attached to RLD. NMDOH would retain responsibility for enrollment of patients and rule-making related to the enrollment process. SB278 would remove all authority from NMDOH to regulate medical cannabis producers, including personal production license holders.

In addition, DOH discusses issues that arise concerning personal production licensees in Section 6(C)(8), which allows those licensees in the medical cannabis program (MCP) to sell to licensed producers both in that program and producers generally:

NMDOH created two classifications of producers under existing MCP rules: 1) licensed nonprofit producers, who sell cannabis to qualified patients, and 2) personal production license (PPL) holders, who are qualified patients licensed to grow cannabis for their own use. The Compassionate Use Act does not currently reference either designation of producer.

SB278 proposes to include references to personal production licenses in the Compassionate Use Act and elsewhere, although it also suggests that, by permitting up to six mature and six immature marijuana plants per person, individuals could grow marijuana for their own use without a license. This raises the question of why a qualified patient would seek to become licensed as a PPL holder. Under the proposal, persons holding a PPL would be permitted to sell cannabis plants to commercial medical cannabis producers. In this way, the bill would turn personal production license holders into quasi-commercial enterprises. NMDOH created the PPL designation for the purpose of enabling qualified patients to grow cannabis for their own consumption. Allowing PPL holders to sell those plants would undermine that purpose. Also, because PPL licensees are not regulated to the same degree as commercial producers, allowing PPL holders to sell plants to commercial medical cannabis producers would also have the potential of introducing contaminated cannabis into the medical cannabis market.

More generally, NMED notes that it does periodically interact with DOH in relation to medical cannabis (in the form of “edibles”) because it regulates the state food program, the New Mexico Food Service Sanitation Act, and the New Mexico Food Act, and should continue to be part of the discussion because of that connection.

### Industrial Hemp

NMDA reports that under the current United States drug policy, all cannabis varieties, including hemp, are considered Schedule I controlled substances under the Controlled Substances Act. Federal law is silent in regard to tetrahydrocannabinol (THC) levels. Industrial hemp as defined in HB 89 is controlled and regulated by the United States drug enforcement administration (DEA). The DEA is responsible for providing federal permits to growers for the cultivation of hemp. Historically, it has not done so except in rare cases for research plots and not, since 1999, even to those states which have legalized hemp production. Domestic hemp seed is not readily available, and seed cannot be legally mailed or distributed across state or national borders without a DEA permit. The federal 2014 Farm Bill included provisions to legitimize hemp research in states. In accordance with mandates outlined in the 2014 Farm Bill, hemp research is limited to departments of agriculture and to institutions of higher education in those states that have addressed the legalization of hemp. The scope of SB 278 is much broader than what is allowed under that federal law.

### **PERFORMANCE IMPLICATIONS**

NMDA calls attention to issues arising from its performance of duties under SB 278. Even though hemp is excluded in New Mexico’s controlled substance act under this bill, the

involvement of NMDA staff in the handling, possession of, testing, or transportation of cannabis-based material creates a number of unique legal issues for border states. New Mexico contains five customs and border protection check points on major highways in southern New Mexico. Without written federal memorandums of understanding clarifying customs and border protection's policies directed at hemp and marijuana possession at federal check points, NMDA expresses concern regarding an ambiguous legal status in which state employees may be placed when passing through customs and border protection check points as part of their duties.

NMDA also raises issues concerning the legality of funds collected in relation to hemp, as a registration, inspection, or analysis fee, since under federal law cannabis in all forms is still classified as marijuana and is a Schedule I drug. Federally, collection of monies associated with illegal drugs may be money laundering. Banks have refused or are reluctant to provide any financial services of funds associated with activities related to marijuana and hemp production, even if legal under state law.

### **ADMINISTRATIVE IMPLICATIONS**

RLD raises numerous administrative issues it will have to address should SB 278 become law.

### **CONFLICT, RELATIONSHIP**

SB 278 conflicts with HB 102, which enacts an excise tax of \$25 per ounce of marijuana distributed, while this bill imposes a 15 percent excise tax on the marijuana product sold. SB 278 also conflicts with HB 89, which enacts a slightly different version of the Cannabis Revenue & Freedom Act. For example, HB 89 prohibits advertising by licensees, producers, wholesalers and retailers; SB 278 only bars licensee advertising. Additionally, the penalties provided in the two bills are different: SB 278 provides for civil penalties of \$50 in many instances where in HB 89 violations constitute misdemeanors. Other differences are discussed throughout this FIR. It also relates to SB 345, concerning expansion of the medical marijuana program by agreements to members of Indian tribes, pueblos and nations.

### **TECHNICAL ISSUES**

Section 6(C) requires by January 1, 2018 the Cannabis Control Board promulgate rules that restrict the number of mature plants a producer may possess before that date. See Subsection (7)(a). The deadline for promulgation of rules (or the date in subsection (7)(a)) should be adjusted accordingly.

SB 278 appears to give both DOH and RLD authority to license medical cannabis producers.

It is unclear whether the duties to be performed by the cannabis control board set forth in Section 6(E), (F), (G), (H) and (I) are stand-alone, or more appropriately be included in the listing of item to be addressed by the board under rulemaking pursuant to Section 6(D).

## OTHER SUBSTANTIVE ISSUES

This bill imposes the cannabis tax on retail sales. A special report published by the non-partisan Tax Foundation in May 2016<sup>2</sup> states, “tax rates on final retail sales have proven the most workable form of taxation” for marijuana. The report indicates states have encountered difficulties with other types of taxation (such as a per ounce tax similar to the one proposed in this bill, taxing at the processor or producer level, or taxing products by their level of THC), including issues with tax pyramiding and practical implementation of the tax given the varied types of marijuana products.

In its analysis of HB 89, which would apply to SB 278 as well, LOPD reports that, according to a study of FY12-16 by its IT staff, public defenders were appointed in well over 2500 cases in which possession of marijuana or synthetic cannabinoids was the primary charge. According to LOPD, the proposed reduction in penalty for many of these cases could only have a positive effect on the workload of the LOPD. To the extent this results in fewer trials, fewer additional resources would have to be allocated to other agencies of criminal justice system, including district attorneys, the OAG, and the courts.

AODA notes other legal issues arise as a result of conflicts between state and federal law regarding medical marijuana. The United States District Court for New Mexico has held that it could not force an insurance company to pay for medical marijuana prescribed for treatment of injuries sustained in an accident because it was contrary to federal law and federal policy. *See, Hemphill v. Liberty Mutual Ins. Co.* (2013). The court determined that payment of those expenses would violate clearly expressed federal law and New Mexico state law that prevents enforcement of an illegal contract. However, appellate courts in New Mexico have upheld the employer’s duty to pay for medical marijuana prescribed for their injured workers. *See, Vialpando v. Ben’s Automotive Services*, 2014-NMCA-084, cert. den. (2014); *Accord, Maez v. Riley Industrial*, 2015-NMCA-049 and *Lewis v. American General Media*, 2015-NMCA-090. The New Mexico Court of Appeals determined that requiring the employers, and their workers compensation insurers, to pay for medical marijuana did not violate federal law and federal policy—which they found to be ambiguous-- but instead was required by the clear state policy as expressed by the Compassionate Use Act (Sect. 26-2B-1, *et seq.*, NMSA 1978). They relied, *inter alia*, upon the memoranda issued by the Deputy United States Attorney General giving guidelines to federal prosecutors in light of state ballot initiatives that legalize marijuana under state law and provide for the regulation of state marijuana production, processing and sale. The *Lewis* decision also cited the Consolidated and Further Appropriations Act, enacted December 16, 2014, to fund the federal government in 2015 and quoted part of its language: “(N)one of the funds made available in this Act to the Department of Justice may be used with respect to the (S)tate of...New Mexico...to prevent such States from implementing their own State laws that authorize the use distribution, possession or cultivation of medical marijuana.”

Additionally, AODA points out the federal-state law conflict has had a direct effect on financial transaction in the states that have legalized marijuana. Financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under money laundering and other federal statutes. It is a federal criminal offense to engage in certain financial and monetary transactions with the proceeds of a “specified unlawful activity,” including proceeds from marijuana-related violations of the federal Controlled Substances Act (CSA).

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<sup>2</sup> Tax Foundation, “Marijuana Legalization and Taxes: Lessons from Other States from Colorado and Washington,” Special Reprt No. 331, May 2016.

Transactions by or through a money transmitting business involving funds “derived from” marijuana-related conduct can also serve as predicate for prosecution under 18 U.S.C. Sec. 1960. Additionally financial institutions that conduct transactions with money generated by marijuana-related conduct could face criminal liability for, among other things, failing to identify or report financial transactions that involved the proceeds of marijuana-related violations of the CSA. Notably for these purposes, prosecution under these offenses based on transactions involving marijuana proceeds does not require an underlying marijuana-related conviction under federal or state law. At least one Colorado marijuana business has been charged with money laundering and an additional charge accuses as individual of attempting an illegal financial transaction by trying to deposit proceeds from a medical marijuana dispensary into a bank account. See, *U.S. v. Hector Diaz, et al.*, 13-CR-00493 REB (D-Colo)

MD/sb/al