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FISCAL IMPACT REPORT

SPONSOR HF1 **ORIGINAL DATE** 3/09/19 **CS/CS/HB356/HJCS/**
LAST UPDATED 3/14/19 **HB** HFIS/aSPAC

SHORT TITLE Cannabis Regulation Act **SB** _____

ANALYST Daly/Iglesias

REVENUES (dollars in thousands)

Estimated Revenue*					Recurring or Nonrecurring	Fund(s) Affected
FY2019	FY2020**	FY2021	FY2022	FY2023		
--	\$600.0	\$1,700.0	\$2,400.0	\$3,000.0	Recurring	NEW Community Grants Reinvestment Fund
--	\$200.0	\$500.0	\$700.0	\$900.0	Recurring	NEW Cannabis Health and Safety Fund
--	\$100.0	\$200.0	\$200.0	\$300	Recurring	NEW Cannabis Research Fund
--	\$200.0	\$500.0	\$700.0	\$900.0	Recurring	Local DWI Grant Fund
	\$100.0	\$200.0	\$200.0	\$300.0	Recurring	Road Safety Fund
--	\$2,000.0	\$10,400.0	\$16,500.0	\$21,500.0	Recurring	General Fund
--	\$200.0	\$500.0	\$700.0	\$900.0	Recurring	TRD operating funds
--	\$3,400.0	\$14,000.0	\$21,400.0	\$27,800.0	Recurring	TOTAL State funds
--	\$5,900.0	\$19,100.0	\$28,600.0	\$36,500.0	Recurring	Municipalities & Counties

(Parenthesis () Indicate Revenue Decreases)

*This bill contemplates the state-controlled sale of cannabis, similar to how some states control the sale of liquor and spirits. However, states with state-controlled liquor stores do not impose a separate liquor excise tax. Because the state would earn revenue through the sale of cannabis, there is no need to apply an additional excise tax. Revenue distributions to various funds and local governments could occur from the proceeds of the sale. The state would set the price and retail markups may apply.

**Because the bill does not exempt medical cannabis from the imposition of the new taxes, and sales of medical cannabis will be ongoing as of the effective date of this bill (July 1, 2019), some revenues could be anticipated; however, collection of those taxes cannot take place until TRD has had the lead-time it needs to create the new taxation system, which it reports should be in

place by July 1, 2020. See Significant Issues, under the heading Implementation and Enforcement.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			\$222.7	\$222.7	Recurring	General Fund (AHO)
	\$144.0	\$1,100.0	\$1,800	\$3,044.0	Recurring	Food Service Sanitation Fund (NMED)
	Unknown	>\$150.0	>\$150.0	>\$300.0	Recurring	General Fund (NMSU/NMDA)
		\$6,419.0		\$6,419.0	Nonrecurring	TRD Information Technology Division
			\$437.0	\$437.0	Recurring	TRD Information Technology Division
	\$60.0	\$50.0		\$110.0	Nonrecurring	TRD Revenue Processing Division
		\$360.0	\$360.0	\$720.0	Recurring	TRD Revenue Processing Division

(Parenthesis () Indicate Expenditure Decreases)

Substantially Duplicates CS/SB577

Conflicts with HB581

SOURCES OF INFORMATION

LFC Files

Responses Received From (on this or similar bills, referenced as pertinent)

- Department of Health (DOH)
- New Mexico Department of Agriculture (NMDA)
- New Mexico Environment Department (NMED)
- Administrative Hearings Office (AHO)
- Human Services Department (HSD)
- Department of Public Safety (DPS)
- Department of Transportation (NMDOT)
- New Mexico Attorney General (NMAG)
- New Mexico State University (NMSU)
- Regulation and Licensing Department (RLD)
- Taxation and Revenue Department (TRD)

SUMMARY

Synopsis of SPAC Amendments

The Senate Public Affairs Committee amendments to the House Floor Substitute for the House Judiciary Committee Substitute for House Bill 356 make numerous changes, including:

- Striking language granting public members of the Cannabis Control Commission \$500 per day for every day or portion thereof that the member attends a commission meeting during a four year period beginning July 1, 2019 and ending June 30, 2023 (Section 3(E));
- Setting sample sizes for testing (Section 17(B));
- Making several scientific and technical changes, among them deleting and replacing some of the contaminants on the chemical testing list (Section 17(B),(C));
- Specifying certain rules to be adopted by the commission concerning testing sample collection protocols, transport and storage (Section 18(B));
- Striking Section 30, addressing unlicensed production of cannabis and setting penalties;
- Striking restrictions on use of distribution of state excise tax receipts to the local DWI grant fund (Section 47) ; and
- Striking language allowing use of money in the local DWI grant fund for research driving while impaired, including that caused by cannabis (Section 52).

In addition, additional Technical Issues have been noted in further review of this bill, as amended. Please see Technical Issues, below.

Synopsis of Original Bill

The House Floor Substitute for the House Judiciary Substitute for House Bill 356 enacts the Cannabis Regulation Act (CRA), which decriminalizes the possession of not more than one ounce of cannabis (or eight grams of cannabis extracts) and ingestion of cannabis in various forms for nonmedical (adult-use) purposes by a person who is 21 or older, from a state-owned store. It establishes the Cannabis Control Commission, composed of the secretaries, or the secretaries' designees, of the Departments of Environment and Health and the director of NMDA or the director's designee, all acting in advisory capacities, along with five public members appointed by the governor with the consent of the senate. These public members include a commercial cultivator of a non-cannabis crop, a currently or previously certified law enforcement officer, and a current or formerly licensed medical or osteopathic physician. The commission is charged with promulgating regulations by March 1, 2020, to govern the activities authorized in the act, including licenses issued by the commission, NMED, and DOH. Not later than June 1, 2020, the commission shall offer cannabis items for retail sale to the public (in locations subject to certain restrictions) through state stores, whose employees are subject to the State Personnel Act. (A timeline reflecting these and other deadlines applicable to the various actions required by the bill is set out in Attachment 1.) This bill creates the cannabis regulation fund, and money in the fund is appropriated to the commission to support its duties under the act. It also creates the community grants reinvestment fund, the Community Grants Reinvestment Program, the cannabis health and safety fund.

DOH must establish a medical cannabis subsidy program, funded by distributions of a portion of the cannabis excise tax revenue to provide medical cannabis to patients qualified as sick and

indigent under the Lynn and Erin Compassionate Use Act (LEUCA). It must also monitor emerging scientific and medical information relevant to the health effects of cannabis use and monitor changes in cannabis use patterns for children and adults in the state. By September 1, 2019, the secretary of DOH must appoint a public health and safety advisory committee to provide to the Legislature and DOH an annual report, beginning December 1, 2020, on the effects of legalizing adult use cannabis, including child access, work and road safety, and other factors. DPS must annually collect and compile reports from every police and sheriff's department concerning arrests and citations for cannabis-related violations and motor vehicle accidents, in both aggregated and disaggregated forms. DPS must issue that report by November 1 of each year.

NMED is charged with regulating and licensing cannabis manufacturers pursuant to commission rules and must begin issuing licenses for currently operating medical cannabis manufacturers no later than July 1, 2020. Renewal of such a license requires the manufacturer sell medical cannabis at a minimum percentage set by rule but not less than 20 percent nor more than 40 percent. Licensing of other manufacturers cannot begin until July 1, 2021. The Commission is also charged with licensing cannabis manufacturers. NMDA shall regulate and license current medical cannabis producers operating pursuant to LECUA no sooner than July 1, 2020, and begin issuing licenses for cannabis production to others no sooner than July 1, 2021. On December 31, 2019, NMDA shall begin licensing collective medical cannabis cultivation subject to limitations in CRA. The commission must regulate and license on-site consumption of cannabis items in lounges operating under dispenser incenses under LECUA no sooner than July 1, 2020, and to other lounges no sooner than July 1, 2021. The commission may also issue dual medical and adult-use cannabis sale licenses subject to stated restrictions (including requiring locations to be at least 25 miles of a state store within the same county), which shall expire on July 1, 2025. Either NMED or the Commission licenses testing laboratories. DOH must regulate and license the dispensing of medical cannabis items under LECUA pursuant to commission rules. CRA imposes some limitations on the application and licensing fees to be established by the commission, designed to reflect the size of the business seeking licensure, and whether the licensee limits its activities to medical cannabis. CRA also provides for transport of cannabis products by a courier and requires the commission promulgate rules concerning advertising and marketing with explicit provisions.

A municipality or county can prohibit or limit the operation of a state store or dual-licensed dispensary but cannot prevent transportation of cannabis products on public roads, prohibit personal production for personal use pursuant to LECUA, or prohibit medical-cannabis-only retail businesses. It can, however, limit sale of adult use cannabis for off-site consumption to sales only at a state-owned store. CRA also requires destruction of arrest and conviction records for possession of one ounce or less of cannabis, and possible recall or dismissal of sentences for that same offense.

The bill also enacts the Cannabis Tax Act that establishes a state 4 percent cannabis excise tax. It imposes a 4 percent excise tax in municipalities and counties that do not prohibit adult-use cannabis sales, the revenue from which may be dedicated to general purposes of the local political subdivision.

Net receipts attributable to the state excise tax are distributed as follows:

- 20 percent to the community grants reinvestment fund, a new fund administered by DOH

for the purpose of reinvesting in communities disproportionately affected by past federal and state drug polices, including supporting job placement, mental health treatment, substance use disorder treatment, navigation of government programs, legal services to address barriers faced by formerly incarcerated persons and linkages to medical care and women’s health services, as well as eleven other enumerated subjects;

- 6 percent to the cannabis health and safety fund, a new fund created to support qualified patients participating in the medical cannabis program pursuant to LECUA and to fund development and execution of a comprehensive and sustained public education campaign, based on the principle of harm reduction, to promote road safety, discourage DWI, promote abstinence for persons under 21, and encourage responsible use by adults;
- 2 percent to the cannabis research fund, a new fund created to fund research related to medical and recreational cannabis use and substance use disorder treatment at the University of New Mexico Health Sciences Center;
- 6 percent to the local DWI grant fund, as amended in Section 53, to make grants to municipalities and counties to research to determine if a driver is operating a motor vehicle while impaired, including impairment due to cannabis; best practices in law enforcement and Drug Recognition Expert (DRE) field test certification training for law enforcement officers and to purchase roadside impairment tests validated for testing cannabis impairment; and
- 2 percent to the road safety fund, a new fund administered by DPS for purposes similar to the local DWI grant fund: to conduct research to determine if a driver is operating a motor vehicle while impaired, including impairment due to cannabis; best practices in law enforcement and Drug Recognition Expert (DRE) field test certification training for law enforcement officers and to purchase roadside impairment tests validated for testing cannabis impairment.

The balance of these receipts is distributed to the general fund.

The bill also amends existing law to provide a gross receipts tax deduction for medical cannabis, and the Controlled Substances Act and the LECUA in a manner consistent with CRA. It contains a temporary provision requiring certification by the governor no sooner than July 1, 2020, that NMDA and NMED are prepared to regulate and issue licenses for cannabis production and manufacturing. Until issuance of that certification, DOH shall continue to regulate and license cannabis production and manufacturing.

This bill has an effective date of July 1, 2019.

FISCAL IMPLICATIONS

Section 35 of CS/SB577 creates the cannabis regulation fund. Fees collected under CRA are credited to the fund, and any unexpended or unencumbered balance in the medical cannabis fund is transferred to this fund on this bill’s effective date. Money in the fund is appropriated to the Commission to support its duties under CRA. Any unexpended or unencumbered balance remaining at the end of any fiscal year reverts to the general fund. Similarly, Section 38 creates the cannabis research fund, appropriated to the board of regents of the University of New Mexico for its Health Sciences Center for the purposes specified, and Section 39 creates a road safety fund, a non-reverting fund appropriated to DPS to fund research, implementation of best practices regarding cannabis impairment, and training and purchase of roadside impairment tests.

Continuing Appropriations

Sections 35, 38, and 39 create new funds and provide for continuing appropriations. 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.

Two additional non-reverting funds, the community grants reinvestment fund and the cannabis health and safety fund, are created in Sections 36 and 37, but each requires appropriations by the legislature.

Revenues

TRD provides this explanation of the methodology it employed in developing the estimated revenue shown in the table above:

TRD assumed no revenue from retail (adult-use) sales before July 1, 2020, as Section 6 of the substitute does not allow producer or manufacturer licenses to be issued before then (but see Technical Issue on June 1, 2020 start of retail sales in state stores below) With Colorado having allowed recreational cannabis sales for several years, New Mexico would be in a similar situation that Oregon (*vis-à-vis* Washington) was in at the beginning of 2016. As in this bill, Oregon likewise allowed about a year of sales via medical cannabis dispensaries before issuing licenses to non-medical outlets. Utilizing published tax receipts from Oregon for the first three years of that state's program, TRD extrapolated a retail sales base for each of the years, adjusting for differences in population between Oregon and New Mexico. This base was multiplied by the state retail cannabis tax rate to produce the retail revenue estimate. The percentages specified in the bill for the various funds receiving distributions were then applied. As with other tax programs, any remaining money is distributed to the general fund.

The bill also provides for 4 percent county and (where applicable) municipal excise taxes. Based on estimates of the amount of overall retail sales that occur in municipal versus non-municipal areas, these revenues were estimated. Three percent of local excise taxes would flow to TRD to administer the tax program.

State and local gross receipts tax would also apply to retail cannabis purchases. However, the bill removes gross receipts tax from medical cannabis purchases by expanding the existing gross receipts tax deduction for prescription drugs to include medical cannabis. TRD used quarterly data from the New Mexico Department of Health on receipts by licensed medical marijuana non-profit producers over the last several years to estimate the future number of ounces distributed in the medical marijuana market. Although the medical marijuana industry initially grew rapidly in recent years, it appears that growth is now moderating. The addition of a retail market should further moderate growth. This loss of GRT base for medical cannabis was multiplied by the average state and local GRT percentages to determine effects. Assuming cannabis is not a replacement for other goods, the net effect is an increase in gross receipts tax, except for FY2020 because retail sales will not have started.

Importantly, the new cannabis excise taxes in sections 42 thru 47 (41 thru 46 in SPAC amended version) do not appear to exempt medical cannabis. This means that medical

sales will lead to revenue immediately upon the effective date of July 1, 2019, well before adult-use sales begin.

Opening and maintaining a series of retail outlets is something with which the state government has little experience. As with all retail businesses, management and vision will be important, even in the semi-monopoly environment that would exist after 2025. Versus licensing a set of privately run outlets, there are many more variables involved and there is a strong possibility of both much greater financial gain and even financial loss by the state. For this estimate, the assumption is made that the retail markup will only be sufficient to cover the costs of running the stores, and the revenue will come strictly from the tax imposed.

TRD has not estimated possible secondary positive or negative financial impacts that could occur as a result of New Mexico allowing recreational cannabis. Such impacts could relate to law enforcement agencies, hospitals, courts, correctional facilities, the tourism industry, and others as a result of increased usage of medical cannabis. Conclusions on these secondary effects of cannabis legalization vary,^{1 2} and the time periods analyzed are generally too small with effects difficult to discern from pre-existing trends.

Operating Budget Impact

NMED notes the bill requires it begin work immediately and would require \$144 thousand in FY19 for the hiring of staff; operational costs associated with hiring new staff; development of regulations, policies, and forms, training; IT database upgrades; and outreach. Costs are estimated to rise to \$1.1 million in FY20. Recurring cost are estimated to be approximately \$1.8 million per year for permitting, inspections, and training of industry and hiring, operating costs, and training of staff. Licensing fees are directed to the cannabis regulation fund to support the commission's duties under CRA, so they are not a funding source to offset NMED's continuing administrative obligations under CRA. In addition to those cost, which are reflected in the operating budget impact table, to the extent NMED is to promulgate rules, license or regulate cannabis manufacturers, testing laboratories and lounges, it advises that currently it does not have the knowledge or expertise to do so, which would necessitate significant resources to gain or recruit externally to develop such a knowledge base.

AHO anticipates an increase in the number of tax protests given the new excise tax, as well as additional hearings under the Implied Consent Act due to increased DWI arrests on the decriminalization of marijuana. The number appearing in the operating budget table above reflects AHO's estimated costs for the two additional full-time hearing officers it believes will be needed to handle this increased work load.

NMDA reports that, although long-term the program may be fee supported, department resources and personnel will be insufficient to cover initial implementation of program associated with licensing, applicant reviews, testing, and compliance inspections. Further, it anticipates a

¹ *Legalization of Marijuana, The Impact*, Rocky Mountain High Intensity Drug Trafficking Area, Office of National Drug Control Policy. September 2016.

² *So Far, So Good – What We Know About Marijuana Legalization in Colorado, Washington, Alaska, Oregon and Washington, D.C.* Drug Policy Alliance. October, 2016

substantial increase in scale numbers and scale inspections, which do not generate revenue. Other states that have adopted recreational cannabis have seen substantial increases in their scale inspection activity. For example, the state of Oregon had a 20 percent increase just in its cannabis scale inspection numbers. Currently NMDA inspects approximately 5,000 small capacity scales a year; a 20 percent increase would equate to approximately 1,250 more scales to inspect, and would require two additional FTE's for an estimated total cost of \$150.0 including salary, fringe benefits, travel and per diem.

TRD explains that enacting an entirely new tax program has a high impact on several divisions within TRD. The Revenue Processing Division will need to develop new forms, instructions, procedures, publications and educational materials. It would also need to add 10 FTE to record, process and correct statements, apply payments and manage correspondence. The Information Technology Division will incur contractual services costs of \$5.8 million and soft costs of \$583,000 to implement the bill. After implementation, 3 FTEs will be required for ongoing operations and support. This would be for taxation only and would not include any tracking for the new commission. The Audit and Compliance Division will also be impacted, needing new auditors and a new collector for the program.

SIGNIFICANT ISSUES

Conflict with Federal Law. NMAG advises, as do several other agencies, this bill conflicts with federal law. It explains:

The federal government regulates marijuana through the Controlled Substances Act, 21 U.S.C. § 811 *et seq.* Under current federal law, marijuana is treated like every other controlled substance, such as cocaine and heroin. The federal government places every controlled substance in a schedule, in principle according to the relative potential for abuse and medicinal value of that controlled substance. Under the Controlled Substances Act, marijuana is classified as a Schedule I drug, which means that the federal government views marijuana as highly addictive and having no medicinal value.

In addition, federal law criminalizes a number of activities that would be permitted under New Mexico law pursuant to SB 577. For example, federal law prohibits the distribution, possession with intent to distribute and manufacture of marijuana or its derivatives (21 U.S.C. §§ 841, 960, 962); simple possession of marijuana (21 U.S.C. § 844); and establishing manufacturing operations, i.e. opening, maintaining, financing or making available a place for unlawful manufacture, distribution or use of controlled substances (21 U.S.C. § 856).

NMAG warns that, in New Mexico, a person may cross many different jurisdictions when traveling throughout the state, including federal lands. While the possession of cannabis under CRA may be lawful within the state, the possession of the same cannabis would be unlawful on federal property, creating a patchwork of regulation (state and federal) with consequences that vary significantly.

TRD raises similar concerns with respect to New Mexico tribes. First, it notes there is no language in the bill to deal with the separate taxation that typically occurs on tribal lands, such as with cigarettes. It reports that although other states where recreational cannabis is legal have not yet had a problem with untaxed or unregulated tribal production and sales, such possibilities

should be considered in the bill. Secondly, because cannabis is still illegal under federal law, federal officers such as those with the Bureau of Indian Affairs, can charge those in possession with a crime, regardless of the possession and transport allowed in Section 22(A).

Further, Section 19 of the CRA provides that “state and local law enforcement agencies shall not cooperate with or provide assistance to the United States government, or any federal agency thereof, in enforcing the federal Controlled Substances Act solely for conduct that complies with the Cannabis Regulation Act or the Lynn and Erin Compassionate Use Act[,]” except by court order. NMAG advises this provision may have consequences with respect to the prosecution of crimes created in multiple jurisdictions. TRD suggested this provision may violate the distribution of powers provision in the New Mexico Constitution and the full faith and credit and privileges and immunities sections of the United States Constitution.

NMDOT notes it is the recipient of federal aid funds, and its secretary is required to sign Certifications and Assurances on behalf of federal aid fund grant applicants. One of the assurances is that the state and grant applicants will comply with all applicable federal laws, regulations and requirements in implementing grant awards. Since production, distribution, sale and consumption of cannabis are currently illegal under federal law pursuant to the Controlled Substances Act, there exists a possibility that federal aid funds could be revoked if federal authorities choose to enforce the Controlled Substances Act against the state should this bill become law.

Similarly, NMDA advises it cannot legally possess cannabis for testing purposes. As a Schedule I drug under the Controlled Substance Act, possession is unlawful. There is a DEA Chemical Analysis registration process that allows for analytical activities on scheduled drugs including cannabis, but this registration does not appear to be applicable to testing it for medicinal, or recreational purposes. Further, the Safe and Drug-Free Schools and Communities Act and the Drug Free Workplace Act require NMSU and NMDA to have policies that prohibit the unlawful possession of any controlled substance. Violation of these laws could result in the loss of federal funding, including both deferral student financial aid and federal research grants. In addition, NMDA cannot legally collect fees or other money from the cannabis industry. The Annunzio-Wylie Anti-Money Laundering Act prohibits knowingly participating in a financial transaction that involves the proceeds from the manufacture, sale, or distribution of a controlled substance; NMSU and NMDA could not accept fees to fund the testing and regulatory activities.

Revenue Adequacy. TRD reports that by developing a comprehensive system for regulating the production and sale of cannabis, the bill adheres to the tax policy principle of revenue adequacy. It does so by bringing an underground economy that exists in New Mexico into a legalized tax structure. In four and one-half years of retail operation, Colorado has realized over \$600 million in total revenue from retail cannabis. Growth has been moderating in recent years, and was most recently about 10 percent.

Implementation and Regulation. First, TRD warns that while implementing the tax program by July 1, 2020, the date specified in Section 6 for issuing first cannabis manufacturers (who are currently manufacturing medical cannabis products), is feasible, having the new cannabis taxation system in place by the July 1, 2019 effective date of the bill to impose and collect the new taxes on medical cannabis is not.

NMED reports the Environmental Improvement Board (EIB) currently has occupational health and safety rules in place that cover persons employed in the cannabis industry. The agency's Occupational Health and Safety Bureau (OHSB) enforces occupational health and safety within the industry under the New Mexico OHS Act and federal OSHA standards incorporated under 11.5.1 through 11.5.6 NMAC. As the state agency designated by the OHS Act for all purposes under federal legislation relating to occupational health and safety, NMED/OHSB must enforce rules that are at least as effective as federal OSHA rules. The bill's provisions for the development of occupational health and safety standards do not include language that will ensure rules developed by the commission will be at least as stringent as those currently enforced by OHSB. See Section 3(G)(9)(d). In addition, the bill does not contain language preserving the authority of NMED to enforce occupational health and safety rules for persons working in the cannabis industry.

DOH noted that "cannabis extract" is defined in Section 2 to exclude the weight of non-cannabis ingredients contained in topical or oral administrations containing cannabis. However, the labeling requirements of the bill do not require that the weight of cannabis ingredients be identified on the label of a cannabis product. The bill limits possession to not more than eight grams of cannabis extract, and imposes penalties for exceeding that threshold and other, greater thresholds. However, unless cannabis products are labeled to identify the quantity of cannabis that is contained in the product, it could be difficult for law enforcement and others to determine whether an individual is in compliance with or in violation of the law, and if in violation, to what extent.

DOH also questioned whether the provisions of Section 21 allowing zero tolerance policies by employers regarding the use of cannabis by employees is intended to apply to those enrolled under the medical cannabis program as well.

Further, TRD advised the bill adheres to the tax policy principle of revenue adequacy by developing a comprehensive system for regulating the production and sale of cannabis. It brings an underground economy that exists in New Mexico into a legalized tax structure. TRD reported in four and one half years of retail operation, Colorado has realized over \$600 million in total revenue from retail cannabis via licensed private companies. Growth has been moderating in recent years, and was most recently about 10 percent.

Medical Cannabis

DOH first commented generally that the bill appears to create a bifurcated system where there are producers that grow product and consign that product to state stores for sale and then entities producing for medical cannabis patient use. It reports that other states have attempted to create this type of system and it has ultimately led to shortages in product for medical use as producers may forfeit their medical cannabis licenses to seek out the more profitable recreational sale permits. This bifurcated system has created confusion in other states for patients enrolled in a medical cannabis program because patients are often unclear where they can purchase product to ensure they are charged appropriately for their purchases. When Colorado began commercial sales, there were times that medical patients did not have access to product due to the run on the system.

DOH then questions the interplay of the licensing and regulation system set up in SB577 and that currently in existence under LECUA. One question it raises is the continued existence of

“personal production licenses” (PPL) under this bill. Currently, DOH explains, these license holders are qualified patients enrolled in the medical cannabis program who are licensed to cultivate a limited number of plants to produce cannabis for their own consumption. “Cannabis producer” as defined in SB577 includes a person who, in part, sells or consigns cannabis. PPL holders cannot sell or consign. However, Section 30, which addresses unlicensed production of cannabis, does exempt production as allowed under LECUA. Further, Section 6(C) assigns the licensing of cannabis producers to NMDA, while subsection (H) provides that NMSU regents through NMDA license and regulate commercial and medical cannabis cultivation

Also DOH pointed to Section 6(C), that requires NMED begin issuing licenses for cannabis producers currently producing and maintaining a crop of no less than 450 cannabis plants exclusively for medical use no sooner than July 1, 2020 and licensing other producers no sooner than July 1, 2021. DOH reported that, of the 35 currently licensed producers in the medical cannabis program, six have elected to not have the maximum number of plants. This decision is based on their business operations and being aware of whether they can support a 450-plant grow. DOH questioned why only current producers with a minimum of 450 plants for the purposes described would be prioritized over current producers with fewer than 450 plants.

Road Safety. DPS comments it would like to be able to use the road safety fund for overtime and equipment for sobriety checkpoints. NMDOT also raises concerns about the cannabis health and safety fund, administered by DOH, a second fund whose purpose involved road safety and discouraging driving while impaired. It notes it is the lead public agency responsible for increasing awareness about and for promoting driver safety. It has an established DWI prevention program managed through its Traffic Safety Division (TSD). TSD and NMDOT’s Research Bureau are already funding and working on researching and implementing programs that promote road safety and discourage DWI. Certain sections of the Motor Vehicle Code require NMDOT and DOH to coordinate so certain programs will not be duplicated. The bill should either direct funds from the cannabis health and safety fund to be used for already existing road safety and DWI prevention programs, or it should require NMDOT and DOH to coordinate on programs that promote road safety and discourage DWI. The bill does not require coordination between DFA and NMDOT for drug recognition expert training via the local DWI Grant Fund. DOT also points out it uses federal funds for drug recognition expert training; NMDOT and DFA should also be required to coordinate so as not to duplicate programs.

Law Enforcement; Penalties. DPS continues to express concern that, under the bill, a person convicted of “possession, use, manufacture, distribution or dispensing” or the “possession with the intent to manufacture, distribute or dispense” any “controlled substance” who has completed his or her sentence, including probation or parole, may apply for a license and that prior conviction is not considered substantially related to the qualifications, functions or duties of a business seeking a license. Section 4(I)(2). Further, it shall not be the sole ground on which an application is denied (unless the offense involved the distribution of alcohol or a controlled substance to a minor). DPS believes limiting consideration of prior convictions of manufacture, distribution or dispensing, of, for example, fentanyl, heroin, and methamphetamine in deciding whether to license an individual poses a threat to public safety.

DPS comments on the absence of any per se limit for cannabis impairment. Such a limit is critical, it contends, in the enforcement of DWI laws. It reported that several states which have legalized marijuana have per se limits to address this public safety issue and recommends that limit be two nanograms per milliliter. However, Section 25(A)(1) allows a person to be under the

influence of not more than one ounce of cannabis or eight grams of cannabis extract.

DPS believes the penalties for trafficking are so low that they may undermine the legal market. (Fine only for less than half an ounce of cannabis or four grams of extract; fine only petty misdemeanor for half an ounce to one pound or four grams to 128 grams of extract; more than one pound or 128 grams of extract is a fourth degree felony). These minor penalties may encourage individuals that it is worth the risk to operate illegally and thereby avoid taxation. Similarly, in Section 25, distribution of cannabis in a school zone is only a misdemeanor; DPS believes this penalty is too low to discourage sales in this location and recommends this violation be made a felony. Further, unlicensed manufacture of extracts with butane is only punishable by a civil penalty of \$450. DPS notes states that have legalized marijuana report labs using butane are a major illicit market and constitute a public safety issue. DPS recommends the penalty for unlicensed manufacture of cannabis extracts should be the same as for illegal operation of a methamphetamine lab, given the danger to persons present and the surrounding neighborhood. Further, DPS reads SB577 as repealing the criminal statute for drug paraphernalia. While revisions may be necessary, it contends drug paraphernalia is involved with all manner of controlled substances and the criminal charge is necessary in the enforcement of the Controlled Substances Act.

Banking. RLD provides these concerns about the effect of the bill on the safety and soundness of New Mexico financial institutions:

1. So long as the possession, distribution and sale of marijuana remains illegal under federal law, any contact with money that can be traced back to marijuana operations will be considered by U.S. federal authorities to be proceeds of illegal activity. Any actions by a financial institution to accept the deposit of, hold or transfer the funds, or provide any other traditional banking services, could be considered money laundering and expose a bank or credit union to significant legal, operational and regulatory risk.
2. Under current New Mexico law, all state chartered banks are required to be insured by the Federal Deposit Insurance Corporation (FDIC) and state chartered credit unions are required to be insured by the National Credit Union Association (NCUA). In order to receive insurance coverage/services through the FDIC or NCUA, these institutions are subject to regular, in-depth examinations assuring compliance with federal and state law. Examination findings that a bank or credit union has violated federal or state law may result in revocation of the bank or credit union's insurance coverage by the FDIC or NCUA which would almost certainly result in an administrative action to revoke the charter of the bank or credit union and force the institution into receivership.
3. In addition to the growers and retailers who would be licensed under the proposed Cannabis Regulation Act, there would be vendors, suppliers, landlords, and employees indirectly tied to the cannabis industry, whose rent payments, invoices and paychecks would all be clearly tied to the proceeds of sales of substances that continue to be illegal under federal law. Thus, for any depository institution that may receive deposits from any of those businesses or individuals, the institutions will be placed at substantial legal risk including but not limited solely to

administrative actions but also include the potential for criminal prosecution at the federal level for money laundering, wire fraud and possibly other offenses.

4. The great majority of banks and credit unions in other states that have adopted laws legalizing the recreational use of cannabis have declined to provide financial services to the cannabis industry. The result is the operation of very high-volume “cash only” businesses. Especially at the point-of-sale retail locations, the large quantities of cash being handled has led to very valid concerns about the risks of robbery and for the physical safety of the customers and staff at such locations, forcing installation of complex security systems and employment of armed security personnel. Additionally, there have been difficulties in obtaining security transport services to handle the transport and safe storage of the volume of cash being handled.

PERFORMANCE IMPLICATIONS

NMED noted that, without additional staffing, the duties assigned to the agency under the bill would prohibit NMED from maintaining conformance with federal requirements for current federal funding of current programs. This may significantly direct staff and NMED resources away from existing regulatory oversight areas such as food safety, liquid waste permitting and public swimming pool safety. Additionally, NMED might be required to withdraw from the Food and Drug Administration’s Manufactured Food Regulatory Program Standards and forego federal funding of \$33 thousand per year and conducting FDA contract work currently totaling \$40 thousand per year.

DOH reports that this bill relates to its strategic plan:

Result 1: Improved Health Status for New Mexicans

Result 2: An Engaged, Empowered, and High-performing Workforce that Supports Health Status Improvement

Result 3: Simple and Effective Administrative Processes that Support Health Status Improvement

DUPLICATION; CONFLICT

This bill substantially duplicates CS/SB577/SJCS (CS/SB577). There are several differences between the bills as to penalties for violation. This bill prohibits sale (trafficking) by a licensee to a person under 21, and authorizes suspension or revocation of the license and a fine not to exceed \$10 thousand or both. It also makes intentional trafficking to a minor a fourth degree felony. CS/SB577, on the other hand, prohibits trafficking by anyone over 18, and provides for graduated penalties ranging from a civil fine to 12 months imprisonment and a fine of not less than \$25 thousand nor more than \$75 thousand. Although both prohibit smoking cannabis or consuming cannabis items in a public place, and imposes a civil penalty of \$50 for a violation, CS/SB577 enhances the penalty for a second or subsequent offense to be a misdemeanor. CS/SB577 adds restorative justice mediation as one of the penalties for possession of cannabis by a person younger than 18 as well as a person 18 or older, while this bill does not.

It conflicts with HB581, providing regulation of hemp harvesters, breeders and manufacturers,

particularly as to cannabis that is greater than .3 percent and less than 0.5 percent THC.

TECHNICAL ISSUES

On page 18, line 3 and page 34, line 11, both NMED and the commission are charged with licensing testing laboratories.

On page 18-19, lines 25 and 1 and page 34, lines 4-10, both NMED and the commission are charged with licensing manufacturers.

On page 28, there are references to “cannabis retailer” and “cannabis microbusiness” similar to those struck by SPAC amendment # 17. These terms appear inconsistent with the concept of state-owned stores.

Section 37 creates a new fund - the cannabis health and safety fund - but on page 57, lines 2-3, money in the fund is declared to be subject to appropriation to DOH for the community grants reinvestment program, although Subsection (B), lines 10-24 sets out the purpose of the cannabis health and safety fund, which is different than that of the community grants reinvestment program.

Section 38 creates another new fund, the cannabis research fund, but does not specify if the fund reverts at the end of each fiscal year or if it is non-reverting.

On page 63, lines 12-13, the bill requires the excise tax be applied to the “reasonable value” of the cannabis item at time of purchase; however, line 15 directs the tax be applied to the price paid. “Reasonable value” is not defined; further administrative difficulties in determining and taxing “reasonable value” argue in favor of applying the tax to the price paid.

In light of the lead-time required by TRD to create a new cannabis taxation system, and since the bill as drafted imposes the excise tax on medical cannabis as of the effective date of July 1, 2019, the bill should contain a hold harmless provision protecting those taxpayers from fines or penalties for late payment, or delay the imposition of the tax until the new taxation system is in place.

HSD suggested inclusion of behavioral health treatment facilities to the list contained in Section 3(J) prohibiting state stores from being within 300 feet from the perimeter of schools and other public settings.

DOH pointed out that, although Sections 45 and 46 change LECUA’s use of the term “licensed producer” to “licensed dispenser,” the term “producer” still appears in Section 26-2B-7(A(5)) of that act.

OTHER SUBSTANTIVE ISSUES

NMSU reports there are mixed signals coming from the Trump Administration regarding its position on enforcing federal laws prohibiting marijuana in states that have legalized medicinal, or recreational use of marijuana. In 2018, President Trump, in principal, supported legislation that would allow states to regulate medicinal, or recreational use of marijuana in their states. More recently, Attorney General William Barr stated in his confirmation hearing that he would

“not go after” marijuana companies where marijuana is legal under state law. Furthermore, on February 15, 2019, President Trump signed a spending bill that included the Rohrabacher-Blumenauer budget amendment, which prohibits the use of federal funds to enforce federal marijuana laws against state sanctioned medical marijuana licensees. On the other hand, NMSU notes that former Attorney General Jefferson B. Sessions, during the Trump Administration, rescinded the Cole Memorandum that offered guidance to U.S. Attorneys to exercise prosecutorial discretion in favor of not prosecuting marijuana operations that comply with state law. It should be noted that, since the rescission of the Cole Memorandum, the Trump Administration has taken no action to crackdown on Marijuana sales in states where Marijuana is legal under state law.

TRD suggested that having the state take the role of the retailer could be beneficial from a societal health viewpoint. Research³ into state control of liquor stores shows that “control” states show lower per-capita consumption, lower usage by under-age customers, lower excessive consumption, and better enforcement. However, the allowance for private lounges may mitigate these positive effects.

On the other hand, HSD advised the Colorado Retail Marijuana Public Health Advisory Committee has been tasked with studying and reporting on population health effects of marijuana use. The committee released a report in 2016 that indicated the following mixed results (Monitoring Health Concerns Related to Marijuana in Colorado, Retail Marijuana Public Health Advisory Committee, 2016):

- For adults and adolescents, past month marijuana use has not changed since legalization either in terms of the number of people using or the frequency of use among users.
- Marijuana use among Colorado adolescents is nearly identical to the national average.
- No new disparities in marijuana use by age, gender, race, ethnicity or sexual orientation have been identified since legalization; however, disparities that existed before legalization continue.
- More than 1-in-3 adolescents who use marijuana first use it by age 14, supporting prevention efforts aimed at children before they enter ninth grade.
- Weekly marijuana use by adolescents is associated with impaired learning, failure to graduate from high school. Adolescents and young adults who use marijuana are more likely to experience psychotic symptoms as adults.
- Evidence shows that marijuana users can become addicted to marijuana and that treatment for marijuana addiction can decrease use and dependence.
- Marijuana exposure calls to the poison center continue to be higher after medical marijuana commercialization than in previous years, including calls about children 0-8 with unintentional marijuana exposure, although calls have been decreasing since 2015.
- The risk of a motor vehicle crash increases among drivers with recent marijuana use, and alcohol and marijuana together increase impairment and the risk of crash more than using either substance alone.

Further, HSD provided this research concerning adolescent use, noting that adolescence is a period when many developmental changes are occurring. It is a time when a young person’s intellectual capacities expand and their friends and peers become increasingly influential.

³ *Preventing Excessive Alcohol Consumption: Privatization of Retail Alcohol Sales*. Community Preventive Services Task Force, appointed by the U.S. Centers for Disease Control, July 2014
<https://www.thecommunityguide.org/sites/default/files/assets/Alcohol-Privatization-of-Retail-Alcohol-Sales.pdf>

- Adolescent use of marijuana has been linked to a range of developmental and social problems. A 2012 study of over 1,000 individuals followed from birth through midlife found that persistent cannabis use was associated with neuropsychological decline across numerous domains, including cognitive and memory problems and declining IQ. Further, cessation of marijuana use did NOT fully restore neuropsychological functioning among adolescent-onset cannabis users (Meier et al, 2012⁴).
- In a study (McCaffrey DF et al, 2010⁵), using marijuana at an early age is independently associated with:
 - Poorer school performance,
 - Increased absences from school,
 - Increasing the risk of dropping out without graduating.
- Marijuana use has been linked to a range of mental health problems such as psychosis, depression or anxiety. Using marijuana from an early age places the person at risk of:
 - Impaired emotional development,
 - Increased risk of becoming more dissatisfied with life,
 - Increased likelihood to suffer from depression, anxiety, psychosis, or other mental illness.

As to the provisions of the CRA, HSD pointed out it contains elements to deter youths from cannabis use: packaging guidance to avoid packaging that appeals to kids, a prohibition on hiring persons under age 21 by cannabis licensees, and penalties, community service, restorative justice mediation, and drug education for youth violations. HSD notes, however, the bill lacks an education prevention effort targeted at youths.

NMED advised food containing cannabis material cannot be distributed in interstate commerce under section 301(II) of the federal Food, Drug and Cosmetics Act.

AMENDMENTS

TRD makes two observations that suggest the bill may need to be amended:

1. The bill may require an exception to Section 7-1-8, NMSA 1978, with respect to confidentiality, if TRD is to share information with other agencies.
2. Section 7-1-14, NMSA 1978, should be updated to include reporting for sales by counties and municipalities for cannabis sales by non-state run licensees.

MD/sb

⁴ Meier MH, Caspi A, Ambler A, et al. Persistent cannabis users show neuropsychological decline from childhood to midlife. *Proc Natl Acad Sci USA* 2012;109:E2657-64

⁵ •McCaffrey DF, Pacula RL, et al. Marijuana use and high school dropout: The influence of observables. *Health Econ* 2010; 19(11): 1281-1299.

ATTACHMENT 1

CS/CS/HB 356/SJCS/HFIS/aSPAC TIMELINE

July 1, 2019	Effective date of bill
	Persons properly licensed under Lynn and Erin Compassionate Use Act (LECUA) issued licenses under Cannabis Regulation Act (CRA) to continue conducting medical cannabis activity (operate under current DOH rules until commission and NMED issue new ones)
	Money in medical cannabis fund transfers to cannabis regulation fund
	Medical cannabis no longer subject to gross receipts tax
	State, county and municipal excise taxes on medical cannabis begins
Sept. 1, 2019	Secy of DOH appoints Public Health and Safety Advisory Committee (PHSAC)
December 31, 2019	NMSU/NMDA issues rules and begins licensing for collective medical cannabis cultivation
	Earliest date for commission to begin licensing cannabis couriers
January 1, 2020	DOH establish medical cannabis subsidy program
	NMED identifies/designates to commission standards for testing laboratories
?	No date for NMED to begin licensing testing laboratories (page 18, line 3)
	OR
?	No date for Commission to begin licensing cannabis testing laboratories (per page 34, line 11)
March 1, 2020	Commission must promulgate rules
June 1, 2020	Deadline to begin retail sales of cannabis items
July 1, 2020	Governor certifies to legislative council and compilation commission that:

- (1) NMDA prepared to issue licenses and regulate cannabis production; and
- (2) NMED prepared to issue licenses and regulate cannabis manufacturing

NMDA to begin licensing current medical cannabis producers operating under LECUA

NMED deadline to begin licensing currently operating medical cannabis manufacturers

Commission begins licensing dispensers (currently licensed under LECUA) for on-site consumption lounges

November 1, 2020

DPS begins providing annual report of all cannabis violations

UNM/HSC begins triannual report to legislative health and human services committee describing research and findings, reports or publications resulting from research funded by cannabis research fund

December 1, 2020

PHSAC begins providing annual report on health effects of legalizing adult use cannabis

July 1, 2021

NMED begins issuing licenses cannabis manufacturing licenses to other persons (pages 18-19, lines 25 and 1)

OR

?

No date for commission to begin licensing manufacturers (levels 1 and 2) (page 34, lines 4-10)

NMDA begins licensing cannabis producers to others

Commission begins licensing on-site consumption lounges to other persons

?

Commission to license dual medical and adult use cannabis sale license to licensee holding both adult use cannabis manufacturer to producer license and valid medical cannabis manufacturer or producer license (licenses expire July 1, 2025)