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## FISCAL IMPACT REPORT

02/26/21      CS/CS/HB12/HHCS/  
 ORIGINAL DATE 03/18/21      HTRCS/aHF1#1/  
 SPONSOR HTRC      LAST UPDATED 03/19/21      **HB** aSTBTC/aSJC

SHORT TITLE Cannabis Regulation Act      **SB** \_\_\_\_\_

ANALYST Glenn/Torres/Iglesias

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY22	FY23	FY24		
\$6,449.2	\$20,018.1	\$28,636.4	Recurring	Cannabis Excise –State GF
\$3,224.6	\$10,009.0	\$14,318.2	Recurring	Cannabis Excise –Local
\$3,466.4	\$10,759.7	\$15,392.0	Recurring	GRT – State GF
\$2,168.5	\$6,731.1	\$9,629.0	Recurring	GRT – Local
(\$9,675.0)	(\$11,600.0)	(\$13,900.0)	Recurring	Medical Cannabis Deduction – State GF
(\$6,052.5)	(\$7,300.0)	(\$8,800.0)	Recurring	Medical Cannabis Deduction – Local
Positive, possibly \$5,000.0	Positive, possibly \$5,000.0	Positive, possibly \$5,000.0	Recurring	License fees- State General Fund
<b>\$5,240.6</b>	<b>\$24,177.8</b>	<b>\$35,128.4</b>	<b>Recurring</b>	<b>TOTAL GENERAL FUND</b>
<b>(\$659.4)</b>	<b>\$9,440.1</b>	<b>\$15,147.2</b>	<b>Recurring</b>	<b>TOTAL LOCAL</b>

(Parenthesis ( ) Indicate Revenue Decreases)

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

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	\$0	\$7,630.0	\$7,630.0	\$15,260.0	Recurring	Cannabis Regulation Fund/General Fund (RLD)
	\$322.0	\$997.0	\$997.0	\$2,316.0	Recurring	Cannabis Regulation Fund/General Fund (TRD)
	\$6,459.0	\$262.0	\$0	\$6,721.0	Nonrecurring	Cannabis Regulation

						Fund/General Fund (TRD)
	\$0	\$4,450.0	\$5,325.0	\$9,775.0	Recurring	Cannabis Regulation Fund/General Fund (DOH)
	\$0	\$1,347.0	\$1,347.0	\$2,694.0	Recurring	Cannabis Regulation Fund/General Fund (NMED)
	\$0	\$350.0	\$0	\$350.0	Nonrecurring	Cannabis Regulation Fund/General Fund (NMED)
	\$0	\$262.0	\$262.0	\$524.0	Recurring	Cannabis Regulation Fund/General Fund (NMDA)
	\$0	\$150.0	\$0	\$150.0	Nonrecurring	Cannabis Regulation Fund/General Fund (NMDA)
	\$0	\$1,257.9	\$1257.9	\$2,515.8	Recurring	Cannabis Regulation Fund/General Fund (DPS)
	\$0	\$100.0	\$100.0	\$200.0	Recurring	General Fund (AOC)

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to

HB17, SB13, SB288, SB363

**SOURCES OF INFORMATION**

LFC Files

Responses Received From

- Regulation and Licensing Department (RLD)
- Taxation and Revenue Department (TRD)
- Department of Finance and Administration (DFA)
- Department of Agriculture (NMDA)
- Environment Department (NMED)
- Department of Health (DOH)
- Department of Public Safety (DPS)
- Public Education Department (PED)
- Economic Development Department (EDD)
- Law Offices of the Public Defender (LOPD)
- Administrative Office of the District Attorneys (AODA)
- Administrative Hearings Office (AHO)
- Administrative Office of the Courts (AOC)
- New Mexico Attorney General (NMAG)

Human Services Department (HSD)

## SUMMARY

### Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to the House Taxation and Revenue Committee substitute for the House Health and Human Services Committee substitute for House Bill 12 as twice amended makes the following changes:

- Strikes several of the STBTC amendments.
- In the Cannabis Regulation Act:
  - Prohibits appointees to CRAC from holding an ownership interest in a licensed entity and provides that CRAC’s membership may include an individual with previous experience as a cannabis retailer, producer or manufacturer.
  - Allows only cannabis research laboratories to be issued cannabis testing laboratory licenses.
  - Requires CCD to issue a license to conduct commercial cannabis activities to a person licensed under the LECU Act as of October 1, 2021.
  - Requires CCD to accept and begin processing license applications for cannabis producers, cannabis producer microbusinesses, and any person licensed under the LECU Act “no later than” September 1, 2021, and accept and begin processing license applications all license types “no later than” January 1, 2022, with the proviso that retail sales of commercial cannabis may not begin until April 1, 2022.
  - Amends the provisions governing application and renewal fees, to provide specified fee amounts for each category of license and lower fees for cannabis microbusinesses.
  - Requires CCD annually, from January 1, 2022, through December 31, 2025, to limit the number of cannabis plants that licensees, except cannabis microbusinesses, may produce.
- In the Cannabis Tax Act:
  - Changes the rate of the cannabis excise tax from 8 percent to 12 percent.
  - Eliminates the municipal and county cannabis taxes and provisions related to distribution and replaces them with amendments to the Tax Administration Act that provide for distributions to each municipality or county in an amount equal to 33.03 percent of net receipts attributable to the cannabis excise tax from cannabis retailers within the municipality or the county area of the county.
- Amends the Criminal Record Expungement Act, including permitting petitions for

expungement to include multiple arrest records and removing a law enforcement agency from the parties entitled to notice of a filed petition and an opportunity to object to the petition.

- Adds a delayed repeal date of December 31, 2025, for section 46, which allows CCD to promulgate rules that limit the number of cannabis plants that a licensee may produce.

#### Synopsis of STBTC Amendment

The Senate Tax, Business and Transportation Committee amendment to House Taxation and Revenue Committee substitute for House Health and Human Services Committee substitute for House Bill 12 as amended, makes the following changes:

- Strikes the HFI#1 Amendment in its entirety.
- In the Cannabis Regulation Act (CRA):
  - Changes the total number of mature cannabis plants a cannabis producer microbusiness and integrated cannabis microbusiness can possess at one time from 99 to 200.
  - Amends definition of “qualified patient” in the CRA to include a New Mexico residency requirement, which makes it consistent with the definition in the Lynn and Erin Compassionate Use Act (LECU Act), and adds a definition of “reciprocal participant,” which refers to an out-of-state resident eligible to participate in the medical cannabis program under the LECU Act based on the out-of-state resident’s eligibility for and enrollment in a medical cannabis program of another state or jurisdiction.
  - Requires the Cannabis Control Division (CCD) exercise its rulemaking authority pursuant to the State Rules Act.
  - Deletes provisions prohibiting the CCD director from limiting the number of plants a licensee may possess, cultivate, or manufacture and instead authorizes the director to impose limitations on the number of plants.
  - Deletes provisions prohibiting CCD from limiting the amount of tetrahydrocannabinol in a cannabis product and instead provides CCD with discretion to limit the amount of tetrahydrocannabinol.
  - Changes the provision prohibiting CCD from limiting the type or number of licenses a licensee may be issued to allow CCD to limit the type and number of licenses that may be issued to a licensee, unless the Cannabis Regulatory Advisory Committee (CRAC) finds that “the market equilibrium is deficient and threatens the economic viability of the industry or adequate supply of cannabis.” Under those circumstances, CCD may impose a temporary moratorium on new licenses and production limitations, issue new licenses, or allow greater production by existing licensees.
  - Provides that rules CCD is required to develop in consultation with NMDA and NMED must be promulgated no later than January 1, 2022, and adds “food and product safety” and “occupational health and safety” to the protocols the rules must establish.
  - Requires CCD to adopt rules in consultation with DOH to govern cannabis products

- reserved for sale to qualified patients, caregivers, and reciprocal participants under the medical cannabis program. The STBTC amendments also change the provisions governing CCD's authority to address a shortage of cannabis supply in the medical cannabis program by adding authority for CCD to require all cannabis establishment licensees to ensure at least 10 percent of the cannabis in stock is designated for sale to qualified patients, caregivers, and reciprocal participants, increasing from 5 percent to 10 percent of a licensee's cannabis plants the monthly amount that CCD may require a licensee to devote for use in the medical cannabis program; and authorizing CCD to require specific tracking of cannabis plants.
- Deletes the provision precluding members of CRAC from holding any ownership interest or investment in an entity licensed under the CRA and adds to the members of CRAC appointed by the CCD director a cannabis retailer, cannabis producer, and cannabis manufacturer.
  - Changes the date by which CCD must adopt procedures to encourage participation in the cannabis industry by persons from communities disproportionately harmed by enforcement of cannabis prohibitions and to encourage diversity among cannabis industry participants from within 60 days to within 180 days of the CRA's effective date.
  - Requires a cannabis retailer, as a condition to licensure, to agree to accept cannabis products on consignment for resale from any manufacturer or producer licensed under the CRA.
  - Deletes provisions allowing only certain licensees to operate cannabis consumption areas, provides CCD with discretion to designate cannabis consumption areas, and includes licenses for cannabis consumption areas in the licensing program administered by CCD.
  - Requires CCD to issue a license to conduct commercial cannabis activities to a cannabis producer licensed under the LECU Act as of October 1, 2021, and to any other person licensed under the LECU Act as of the effective date of the CRA.
  - Requires CCD to accept and begin processing license applications for cannabis producers "no later than" September 1, 2021; accept and begin processing license applications for integrated cannabis microbusinesses, cannabis producer microbusinesses, and eligible cannabis producers and other licensees under the LECU Act "no later than" January 1, 2022, with the proviso that retail sales of commercial cannabis may not begin until March 1, 2022; and issue licenses for all license types beginning on July 1, 2022.
  - Changes the date when retail sales of commercial cannabis are permitted for licensees whose licenses allow that activity from January 1, 2022, to March 1, 2022, and adds a proviso requiring at least 25 percent of monthly cannabis sales be to qualified patients, caregivers, and reciprocal participants until December 31, 2022.
  - In addition to the base annual fees collected by CCD, authorizes an annual per plant fee of up to \$50 and allows a licensee to increase the number of licensed plants twice a year in increments of 500 plants.
  - Requires CCD to promulgate rules for cannabis consumption area licenses in addition to courier permits by January 1, 2022.

- Amends the provisions governing cannabis product labels to require an expiration date and other information required by rules promulgated under the CRA.
- Requires CCD to adopt rules governing cannabis product testing in consultation with NMED; shifts responsibility for identifying a set of updated certified reference materials for laboratory testing from NMED to CCD, in consultation with NMED; and requires CCD to work with NMED to implement the inspection of cannabis establishments.
- Expands the prohibition against advertising and marketing of cannabis products so it applies to all media, not just broadcast media.
- Makes mandatory the provision authorizing the governor to enter into agreements with other jurisdictions for purposes of cross-jurisdictional delivery of cannabis products and expands the scope of the provision to allow agreements with jurisdictions outside and well as within the United States.
- Shifts responsibility for administering the community grants reinvestment program from the DOH to RLD and adds tuition and fees for higher education courses related licenses issued under the CRA as an eligible use of grant funding under the program.
- Removes the requirement DOH consult with CCD when promulgating rules governing eligibility for assistance under the medical cannabis subsidy program and requires the rules to be adopted by July 1, 2022.
- Amends the Gross Receipts and Compensating Tax Act to provide a deduction from gross receipts tax for receipts from the sale of medical cannabis products.
- Amends the Regulation and Licensing Department Act to clarify and update the powers and responsibilities of the superintendent.
- Amends the definition of “reciprocal participant” in the LECU Act to make it consistent with the definition in the CRA.
- Changes the expiration date for registry identification cards issued under the LECU Act from two years to three years after the date of issuance.
- Reinstates the exclusion from the enumeration in the Controlled Substances Act of marijuana and tetrahydrocannabinols as schedule I controlled substances for hemp, cultivation of hemp, and related activities under rules promulgated by NMDA or NMED. (This addresses concerns raised by NMDA. See “Other Substantive Issues.”)
- Corrects typos, grammatical errors, and inconsistencies in provisions throughout the bill.

The STBTC amendment does not correct language in HB12 suggesting possession of “at least” 2 ounces of cannabis flowers or 16 grams of extracts is permissible. See discussion under “Significant Issues, Implementation and Regulation Generally.”

Synopsis of HF1#1 Amendment

House floor #1 amendment to House Taxation and Revenue Committee substitute for House Health and Human Services Committee substitute for House Bill 12 amends the Gross Receipts and Compensating Tax Act to provide a deduction from gross receipts tax for receipts from the sale of medical cannabis products, effective January 1, 2022.

Synopsis of Original Bill

The House Taxation and Revenue Committee substitute for House Health and Human Services Committee substitute for House Bill 12 decriminalizes the possession, use, production, transportation, and sale of commercial cannabis for nonmedical adult use and creates a regulatory and taxation structure.

The bill enacts the Cannabis Regulation Act (CRA), a comprehensive plan for regulation and licensing of commercial cannabis production and distribution and sale and consumption of cannabis by people age 21 or older. A new Cannabis Control Division (CCD) created in RLD is charged with regulating, administering, and collecting fees in connection with commercial cannabis activity and licensing, the medical cannabis program, and cannabis education and training programs. DOH's authority under existing law related to commercial cannabis activity and the medical cannabis program is transferred to CCD, except for administration of the medical cannabis registry under the Lynn and Erin Compassionate Use Act.

By September 1, 2021, CCD must convene the Cannabis Regulatory Advisory Committee (CRAC) to advise it on rules and best practices, including practices that promote diversity in licensing and employment and protect public safety. CCD is required to develop rules in consultation with NMED, NMDA, and the State Fire Marshal's Office. NMED also must annually provide CCD a set of updated certified reference materials for cannabis testing laboratories. CCD must promulgate rules for licensing and regulating commercial cannabis activities and begin issuing licenses no later than January 1, 2022.

DOH is required to appoint a Public Health Safety Advisory Committee (PHSAC) composed of professionals with expertise related to cannabis products. PHSAC is required to publish an annual report on the health effects of legalizing cannabis products for adult use. DOH also must establish (1) the medical cannabis subsidy program to provide medical cannabis or subsidies to qualified patients who need assistance in obtaining medical cannabis and monitor emerging scientific and medical information relevant to the health effects of cannabis use; and (2) the community grants reinvestment program to provide grants to qualified community-based nonprofit organizations and governmental entities for specified purposes.

CCD's licensing program encompasses a variety of commercial and medical cannabis activities, including licenses for cannabis establishments, testing and research laboratories, couriers, producers, manufacturers, microbusinesses, training programs, and retailers. CCD also is responsible for issuing cannabis server permits. Licenses are valid for one year – subject to renewal – but may be denied, suspended, or revoked for cause. Medical cannabis licensees shall be issued commercial cannabis licenses to allow them to conduct both medical cannabis and commercial cannabis activities. Violations of the CRA may result in license suspension or revocation, sanctions, correction plans, or penalties.

The CRA allows adults age 21 and older to purchase at least 2 ounces of cannabis flowers and 16 grams of extract each day and imposes no limit on qualified patients' and caregivers' possession of flowers and extract obtained under the medical cannabis program. Consumers are limited in the amount of cannabis flowers and extract they may possess outside their private residences and may possess a limited number of mature cannabis plants. For commercial cannabis activity, there is no limit on the number of plants a licensee may possess, cultivate, or manufacture (with certain exceptions for cannabis microbusinesses). The CRA includes provisions for limiting some licensed production activities to address shortages of cannabis supply in the medical cannabis program.

The bill creates the cannabis regulation fund. The fund consists of appropriations, grants, gifts, donations, and fees collected by CCD under the CRA and the medical cannabis program. Money in the fund is subject to appropriation to fund CCD, DOH, NMED, NMDA, TRD, and DPS for the purposes of carrying out the CRA and the Lynn and Erin Compassionate Use Act (LECU Act).

The CRA provides municipalities and counties with some authority to regulate activities governed by the CRA, including reasonable time, place, and manner rules, such as rules that limit the density of licensed establishments and operating times. Local rules may not completely prohibit the operation of a licensee. RLD is authorized to enter into intergovernmental agreements with tribal governments to coordinate the cross-jurisdictional laws of the state and tribal governments related to the use of cannabis products.

The CRA provides that if a person is charged with any criminal offenses under the CRA related to commercial cannabis activities (Sections 27-31) and the amount of cannabis product is within the limits for legal possession, all records held by a court or state or local jurisdiction that relate to arrest or conviction shall be expunged two years after the arrest or conviction. Under the direction of the attorney general, the CRA also allows the expungement of arrest and conviction records for violations of current criminal laws related to trafficking, distribution, and possession of cannabis and allows those currently incarcerated or who have been incarcerated in the past for offenses that are no longer a crime under the CRA to have their cases reopened to consider recall or dismissal of their sentences or to have their cases expunged or vacated. By January 1, 2022, DPS must identify past convictions eligible for recall or dismissal and notify the Corrections Department, prosecutors and the Public Defender Department of eligible cases.

HB12 makes amendments to the LECU Act to make it consistent with the CRA and similarly amends the Controlled Substances Act, including amending or repealing criminal laws governing cannabis offenses. The bill adds new civil and criminal penalties related to regulated cannabis activities, including trafficking to underage persons, employing underage persons in commercial cannabis activities, and possessing or distributing a cannabis product at a school or daycare center. DPS is required to compile an annual report on the total number of arrests, citations, and penalty assessments for cannabis-related violations. PED is required to implement evidence-based drug education programs to students in 6th through 12th grades.

HB12 also enacts the Cannabis Tax Act (CTA), which imposes a cannabis excise tax of 8 percent on cannabis retailers and is applied to the price paid for a cannabis product. The tax does not apply to retail sales of medical cannabis sold to qualified patients or caregivers pursuant to the LECU Act.



The CTA also allows municipalities and counties to adopt ordinances imposing an excise tax on cannabis retailers. The rate of a municipal or county tax may not exceed 4 percent. Like the cannabis excise tax, the municipal and county excise taxes do not apply to retail sales of medical cannabis products sold to qualified patients or caregivers pursuant to the LECU Act.

HB12 creates the Low-Income Medical Patient Subsidy Fund to support qualified patients who participate in the medical cannabis subsidy program and the Community Grants Reinvestment Fund to support the community grants reinvestment program. Both funds consist of appropriations and investment income but do not include earmarks or recurring revenue sources.

The effective date of HB12 is July 1, 2021.

## **FISCAL IMPLICATIONS**

### **Continuing Appropriations**

Section 43 provides for the cannabis regulation fund. Money in the fund is subject to appropriation by the Legislature to fund the activities of CCD and other specified agencies required by the CRA. Balances in the fund remaining at the end of a fiscal year revert to the general fund.

Section 44 provides for the community grants reinvestment fund. The fund consists of appropriations and other money deposited into the fund. Money in the fund is subject to appropriation by the Legislature for DOH to administer the community grants reinvestment program. Balances in the fund do not revert to the general fund. The community grants reinvestment program provides grants to qualified community-based nonprofit organizations and governmental entities for specified purposes, including public education aimed to reduce drug-related harms for persons under age 21, reinvesting in communities disproportionately affected by past government drug policies, and research.

Section 45 provides for the low-income medical patient subsidy fund. The fund consists of appropriations and other money deposited into the fund. Money in the fund is subject to appropriation by the Legislature to DOH for the purpose of supporting qualified patients participating in the medical cannabis program. Balances in the fund do not revert to the general fund.

### **Revenues**

The fiscal impact estimate uses confidential, proprietary industry data to determine the fiscal impact of this bill. LFC staff made independent adjustments to various assumptions to produce the estimate in this report. Assumptions affecting the revenue model include expected cross-border sales, tourism consumption, survey response underreporting, and industry growth. Different assumptions in these areas result in cannabis excise revenue estimates that are higher or lower than what is provided in this impact table. The model considers estimated consumer usage by using survey data on usage frequency and takes into account survey bias in self-reporting and underreporting.

HB12 exempts medical sales of cannabis from gross receipt taxes starting July 1, 2021. Exempting medical cannabis sales from GRT revenue has a negative impact of \$9.7 million to

the general fund and a negative local GRT impact of \$6 million in the first year. Estimates include the latest data on medical sales in New Mexico and modest growth rates; however, the cost of this exemption could increase significantly if sales grow more quickly than assumed.

The revenue tables reflect expected distributions to each benefitting fund based on LFC modeling. This estimate applies both GRT and excise tax rates to the assumed retail sales base; however, it is unclear if GRT would apply to the total of the retail sale plus the excise tax.

LFC estimates assume widespread retail sales of recreational cannabis begin in April 2022. Faster or slower growth of sales could significantly impact FY22 and FY23 fiscal estimates.

### **Operating Budget Impact**

RLD estimates setting up CCD will require at least \$7.63 million in recurring revenue for licensing, rulemaking, administrative support for CRAC, disciplinary actions, and program approval. Initial start-up costs will include essential staff, office space, workspace equipment (telephones, copiers, office furniture, etc.), information technology equipment and tools (computers, servers, software and licenses, etc.), and related infrastructure. A total of 51 new FTE will be necessary to fully implement and comply with the requirements of HB12. RLD must also have funding in FY22 to acquire sufficient technical and scientific human resources to implement the administrative rulemaking necessary to regulate laboratories, advertising, and marketing aspects connected to the legal sale and possession of cannabis. Attachment 2 to this FIR is an organizational chart prepared by RLD showing the contemplated organizational structure of CCD.

TRD states the estimated personnel time to implement the new tax program in TRD's Administrative Services Division is 560 hours, at a cost of \$23.6 thousand. The impact on TRD's Information Technology Division is estimated to be \$6,757,696 for contractual resources, 3 additional FTE, independent verification and validation services, and staff workload costs. Additional revenue charges will be incurred, including payment processing, equipment and postage totaling \$11 thousand. Business resources will be required to make changes to forms and promulgate rules at a cost of approximately 1,040 hours at \$169 thousand, and 2 FTE are required to conduct revenue processing functions. The estimated nonrecurring cost for equipment at each of TRD's five district offices is \$79 thousand and estimated recurring costs at each office are \$2,000 for ongoing maintenance of new systems and \$416 thousand for armed guard services. The proposed tax program also would create the need for an additional FTE in the office of the secretary and a business operations specialist.

DOH states 20 medical cannabis program FTE currently administer medical cannabis patient services. The budget for those positions is approximately \$1.86 million currently. Contract services, facilities, supplies, vehicles, and other costs associated with the administration of the medical patient registry currently total approximately \$2 million. DOH projects administering the patient services section of the medical cannabis program with the current projected continued growth will require an additional 11 staff members to be added to the program staff in FY22 for a total of 31 staff and 10 additional staff, for a total of 41 staff in FY23 with a total salary and benefit cost of \$2.05 and \$2.725 million, respectively. DOH also projects it will require an additional \$2.4 million in FY22 and \$2.6 million in FY23 to cover costs of supplies, contracts, facilities, vehicles, the registry database, and to conduct and produce the annual assessment report on the affordability and accessibility of medical cannabis required in the LECU Act. DOH

also notes if, as a result of the bill's enactment, the 8 FTE currently in the licensing and compliance section of DOH's medical cannabis program are transferred to CCD, it would represent a reduction in costs for DOH of \$540 thousand for FTE and \$900 thousand for operations.

NMED believes HB12 would necessitate 5 additional FTE to staff its cannabis program, 6 additional dedicated technical FTE to develop, train, and implement occupational health and safety rules specific to the cannabis industry, 1 additional Administrative Services Division FTE to support the requested 11 FTE technical and program needs, and contract funding (for technical experts and attorneys) in FY22 to aid in rule development prior to the effective date of the bill. These additional costs are reflected in the budget impact table.

NMDA expects a 20 percent increase in services required by the cannabis industry for compliance-based scale inspections and certifications. This would result in a need for 2 additional FTE to monitor scale compliance with state law, 1 FTE for the state metrology lab to address anticipated increased demand for metrology laboratory services, and a one-time cost for the purchase of additional equipment related to specialized weight kit calibrations. NMDA also anticipates the need for 1 additional FTE due to additional inspection time to address potential mixing of hemp and cannabis in existing hemp-licensed greenhouses. These additional costs are reflected in the budget impact table.

DPS states that the bill has the following anticipated fiscal impacts:

- The bill would require replacement of all of DPS' drug sniffing dogs. According to DPS, it currently has nine narcotics detection canines that have been trained to detect the odors of several controlled substances, including cannabis. If marijuana is legalized and the odor of marijuana can no longer be used for probable cause, the dogs will have to be replaced because they cannot be retrained to not alert for the odor of marijuana. DPS estimates the price of nine new dogs to be \$162 thousand and the cost for training the new dogs, including instruction and per diem for those attending the trainings, to be \$30.6 thousand for FY22 into FY23.
- Based on the experience of other states, DPS anticipates arrests related to black market marijuana sales and production will increase in New Mexico, including illegal THC extraction labs and growing operations. This will require additional, as yet undetermined, resources for training, and additional investigators to handle an increase in illegal THC extraction and growing operations. DPS estimates it would require \$915.3 thousand for 10 agents throughout the state to investigate those illegal operations.
- DPS estimates it will require \$150 thousand for enforcement of the bill's prohibitions against underage access to marijuana, which would be similar to DPS's current compliance operations for underage access to tobacco and alcohol.
- DPS expects it will incur additional, undetermined costs for training related to anticipated increases in marijuana-related DWIs, including certification of drug recognition experts.

PED states HB12 may require PED staff to oversee public school compliance and offer technical assistance with the selection and provision of evidence-based drug education programs. Additionally, schools would incur costs in developing a qualifying evidence-based drug education program and training staff to implement such program.

AOC reports Section 34's provisions regarding reopening of cases for people currently incarcerated for an offense no longer a crime under this bill or that would have resulted in a lesser sentence and Section 32, which requires automatic expungement of records relating to arrests or convictions, may create a significant burden on the courts, requiring additional personnel and resources. AOC did not provide estimates of the fiscal impact on the courts' operating budgets but has confirmed the estimates have not changed since AOC's analysis of a similar bill in the 2019 session (HB356, as originally introduced). LFC staff has used those figures in the budget impact table.

AHO states the tax program added by HB12 may increase tax protest hearings. Although the significance of the increase is difficult to predict, AHO's prior experience demonstrates that new tax programs generally result in an initial increase in protests. Nevertheless, because the volume of tax protests over the last few years has stabilized, AHO is optimistic increase in tax protest volume can be absorbed by its current resources.

AHO also notes that Implied Consent Act hearings may increase if DWI arrests go up once cannabis possession and use is decriminalized. If hearings increase, AHO may need funding for additional hearing officers, office space, and travel expenses. Based on the experience of other states, AHO anticipates requests for Implied Consent Act hearings will increase and estimates a range of 250-500 additional hearings. Based on the current historic lows in the number of implied consent hearings, AHO is cautiously optimistic any increase in case volume can be absorbed by its current resources, unless the increase in hearings reaches the high end of its projected range.

AODA states HB12's provisions for identifying and challenging cases eligible for recall or dismissal of a sentence will require more resources for district attorney offices to comply with the requirements for reviewing and determining whether to challenge eligible cases and pursuing challenged cases in court.

LOPD believes that, in the longer term, HB12 may slightly reduce LOPD's fiscal burden. The bill would eliminate several crimes, which would reduce the need for defending not only those offenses but also later prosecutions based on those crimes (for example, charges of felon in possession of a firearm or habitual offender enhancements that complicate later prosecutions). Also, by specifying that people on parole, probation, or pretrial release should not be penalized for conduct permitted under the bill, the bill could reduce the number of violation hearings and reduce the burden on public defenders, prosecutors, and the courts. In the short term, LOPD states that HB12 could increase its fiscal burden. LOPD would have to allocate staff to handle old cases reopened under Section 34, including in counties where the LOPD does not have full-time attorneys.

## SIGNIFICANT ISSUES

### Implementation and Regulation Generally

RLD notes the timelines for rulemaking proposed in the bill need to be extended to ensure that RLD's consultations with NMED on environmental standards and with NMDA on cultivation are effective. RLD points out standards for cannabis cultivation and environmental impacts are constantly evolving in the relatively new commercial cannabis industry and will require thorough, evidence-based research. In addition, RLD notes significant research and study will be required to draft and adopt the rules specified by the bill. Extending the time for rulemaking will ensure that the rules are carefully drafted.

RLD also points to Section 7(F), which states a person who is aggrieved by an adverse decision of CCD may obtain review of the decision in the Court of Appeals "notwithstanding the review procedures set out in the Uniform Licensing Act." RLD notes this appeal process differs from that generally applied to appeals of administrative actions, which are brought in district court. See Section 39-3-1.1 NMSA 1978. By moving appeals of CCD decisions to the Court of Appeals, the bill may increase not only the court's workload and expenses but also the per-hearing costs because the appellate court process may be more expensive for CCD and RLD than the usual process for review of administrative agency actions in district court.

NMED points out certain duties assigned to it are not within its areas of expertise. Section 3(C)(12) requires its participation (along with CCD and NMDA) in establishing standards for testing cannabis products for potency and contaminants, while Section 18(C) requires the agency to provide on an annual basis certified reference materials for laboratory testing. NMED suggests NMDA and DOH Scientific Laboratory Division be assigned these tasks because both have direct expertise in laboratory research and testing. NMED also notes some of the bill's protocols are also regulated by the Environmental Improvement Board or Water Quality Control Commission. For example, anyone discharging effluent or leachate so that it may move directly or indirectly into groundwater must do so pursuant to discharge permit issued by NMED. Additional environmental requirements from CCD may cause regulatory confusion or conflict with existing environmental statutes and regulations.

DPS believes that, based on the responsibilities assigned to it under HB12, and because it is a statewide law enforcement agency, a representative from DPS should be added to the membership of the Cannabis Regulatory Advisory Committee created under Section 3(F).

DOH notes the bill's limits on possession for consumers and medical cannabis patients are contradictory. In some places, HB12 refers to permitting a person to purchase or possess "at least" the specified amounts of flowers and extract. See Sections 3(C)(5), 68. The term "at least" suggests that the specified amounts are the minimum amounts a person may purchase or possess, rather than the maximum. If the specified amounts are intended to be the maximum, the term "at least" should be changed to "up to." This would make the provisions consistent with the limits on possession specified in other sections of the bill. See, e.g., Sections 6(N) ("up to"), 25(A)(1) ("not more than"), 25(A)(7) ("up to"), 30(B) (penalizing possession of more than "up to" the specified amounts of flowers and extract). LOPD also notes that Section 30(B), which states that an adult over the age of 21 "shall not possess" more than 2 ounces of cannabis flowers or 16 grams of extracts directly contradicts Section 25(A)(2), which states that it is "lawful" for an adult over 21 to possess "in excess of two ounces of cannabis flowers or sixteen grams of cannabis extract" if such excess is stored in the person's residence.

### **Expungement of Arrest and Conviction Records**

LOPD also notes the HHHC substitute for HB12 removes a subsection from Section 33 that was in the original bill, which specified that if a person was incarcerated, “the two-year record retention period shall begin upon the person’s release from incarceration.” With that subsection removed, the bill mandates records “not be kept beyond two years from the date of the person’s conviction.” This raises a possibility the bill would result in the destruction of records that might be important to an incarcerated person’s appeals or petition for habeas corpus.

### **Medical Cannabis Program**

DOH notes HB12 prohibits CCD from requiring licensees to request information from consumers, except to verify age, or to impose any residency requirement on commercial cannabis consumers and medical cannabis patients (Section 6(I)). DOH is concerned that, absent any residency requirement, medical cannabis enrollment cards might be used by individuals who are not enrolled in the medical cannabis program, allowing them the ability to purchase medical cannabis and avoid paying the taxes outlined in HB12. Additionally, the prohibition appears to conflict with the definition of “qualified patient” in the LECU Act, which refers to a “resident of New Mexico” who has received a registry identification card. See Section 26-2B-3 NMSA 1978. DOH suggests removing the bill’s prohibition against imposing a residency requirement on medical cannabis patients and changing the definition of “qualified patient” in the CRA so that it conforms to the definition in the Lynn and Erin Compassionate Use Act.

### **New Job Creation**

EDD estimates that an additional 1,593 jobs could be created through additional employment in dispensaries to meet the new demand for commercial cannabis products. The dispensary jobs estimate was determined by taking the adult population (21+) for each county and multiplying the number by 25 percent (estimate of adults who would participate) and then subtracting the medical users from that total to arrive at an estimated number of new consumers. That number was then used to estimate the number of new dispensaries and number of full-time employees needed to run the dispensaries. EDD’s analysis of HB12 contains a detailed account of the methodology EDD used to calculate its estimates and a breakdown of estimated job creation by county.

Previous studies by private economists on the industry have estimated recreational legalization could create over 11,400 new jobs - 6,600 jobs in cannabis production and cannabis product manufacturing and 4,780 jobs in ancillary businesses including professional services, construction, cultivation supplies, and equipment for the production and consumption of cannabis.

### **Conflict with Federal Law**

NMAG and AODA advise that cannabis is still a federally controlled substance. 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 federal Controlled Substances Act, marijuana is classified as a schedule I

drug, which means the federal government views marijuana as highly addictive and having no medical value.

In addition, NMAG advises that federal law criminalizes a number of activities that would be permitted under New Mexico law. For example, it 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). In New Mexico, a person may cross many different jurisdictions when traveling throughout the state, including federal lands. While the possession of cannabis under state law 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.

### **Enforcement**

RLD notes that, while HB12 provides CCD broad authority to regulate and administratively sanction cannabis activity licensees, language granting explicit enforcement authority would be useful in ensuring compliance. In particular, RLD recommends the addition of enforcement authority for inspections tracking the cannabis supply and obtaining sales information via automatic monthly reports submitted to the CCD by the licensed producers, manufacturers, and retailers or on request of a compliance officer. With statutorily provided enforcement authority, CCD can adopt rules for further compliance. RLD further suggests the CCD director have subpoena power similar to the subpoena powers delegated to the director of the Alcoholic Beverage Control Division under the Liquor Control Act. These subpoena powers are useful tools in ensuring compliance.

RLD also suggests adding similar language found in other states' cannabis control laws that would designate as "contraband" cannabis products produced by unattended or unlicensed grow operations, along with statutory language allowing CCD to implement mechanisms to destroy such contraband in an efficient and safe manner – typically by incineration.

AODA notes that Section 78 deletes "drug paraphernalia" from property subject to forfeiture under the Act (Section 30-31-34(G)). This is problematic because the provisions apply to drug paraphernalia used for all controlled substances, not just marijuana. If HB12 were enacted, all drug paraphernalia used in connection with controlled substances would be exempt from forfeiture.

AODA refers to the *Birchfield* decision, where the U.S. Supreme Court ruled that implied consent laws requiring blood draws are unconstitutional and that a search warrant is necessary to get a blood sample. In New Mexico, there is a statutory limitation preventing law enforcement from seeking a warrant for blood on misdemeanor cases. (See Section 66-8-111(A).) Because a breath test detects only alcohol, not drug usage, AODA suggests existing law be amended to allow for a search warrant for a blood draw in misdemeanor DWI investigations. AODA also reports that, as experienced in Colorado, black market sales may still be a problem even after legalization of cannabis.

DPS is concerned that Section 25(C)'s list of factors that may be considered "reasonable articulable suspicion" of a crime may conflict with judicial interpretation of the Fourth

Amendment and the New Mexico constitutional provision against unreasonable searches and seizures. See, e.g., *The Effect of Legislation on Fourth Amendment Protection*, 115 Michigan L. Rev. 1117 (2017).

### **Imposition of Taxes and Related Issues**

There are three main ways state and local governments tax marijuana. First is by a **percentage-of-price**. This is the tax set in this bill and are similar to a general sales tax in that the consumer pays a tax on the purchase price and the retailer remits it to the state. However, like other excise taxes, the tax rate is typically higher than the state's general sales tax rate. A few states (including Colorado) levy their percentage of price tax on the wholesale transaction, not the retail transaction, but it is assumed this cost is then passed on to the consumer in the final purchase price.

Second, a **weight-based** tax could be imposed. These taxes are similar to cigarette taxes, except instead of taxing per pack of cigarettes the tax is based on the weight of the marijuana product. This tax is levied on the wholesale transaction. States with this type of tax also typically set different rates for different marijuana products. For example, California levies a \$9.65 per ounce tax on marijuana flowers, a \$2.87 per ounce tax on marijuana leaves, and a \$1.35 per ounce tax on fresh plant material. As with other wholesale taxes, it is assumed most of this cost is passed on to the consumer in the final purchase price.

Finally, a **potency-based** tax could be imposed. These taxes are similar to alcohol taxes, except instead of taxing drinks with a higher percentage of alcohol at higher rates (i.e., liquor is taxed at a higher rate than beer), the tax is based on the THC level of the marijuana product. Illinois is currently the only state with a THC-based tax. It taxes products with a THC content of 35 percent or less at 10 percent of retail price and those with more than 35 percent at 25 percent of retail price. All marijuana-infused products (e.g., edibles) are taxed at 20 percent of retail price.

Some states use more than one of these taxes. Additionally, some states and localities levy their general sales tax on the purchase of marijuana in addition to their excise taxes. HB12 would include gross receipts taxes.

HB12 would impose a state excise tax of 8 percent and a local excise tax of up to 4 percent, in addition to GRT. Both Colorado and Arizona impose an excise tax of 15 percent and 16 percent, respectively, in addition to sales taxes. In Arizona, the combined rate is 21.6 percent while the combined Colorado rate could be as high as 26.2 percent. New Mexico's combined maximum rate under HB12 would be 21.437 percent.

While the combined maximum tax rate under this bill would be less than surrounding states, tax rates could significantly impact the ability to convert illicit market activities to the regulated market. The ability to entice illicit activity into the regulated market depends on the relative prices of the state's recreational cannabis, including the tax rate. However, with industry maturation and efficiency, significant declines in prices could eventually crowd out illicit activity even with higher tax rates.

HB12, as amended, adds a deduction from gross receipts tax for receipts from the sale of medical cannabis products to the existing deduction in Section 7-9-73.2 of the Gross Receipts and Compensating Tax Act for receipts from the sale of prescription drugs. In 2020, the N.M. Court



of Appeals held that the deduction for prescription drug sales applied to sales of medical cannabis as well. See *Sacred Garden v. N.M. Taxation & Revenue Department*, No. A-1-CA-37142 (slip. op. Jan. 28, 2020), petition for writ of certiorari filed March 9, 2020.

## TECHNICAL ISSUES

Section 8(D) states: “The department has ninety days from the date an application is deemed complete to process a license application.” The reference to “department” should probably be changed to “division.”

TRD raises the following issues:

- Section 47 provides RLD with authority to enter into inter-governmental agreements between the state and tribal governments to coordinate the cross-jurisdictional administration of state laws and those of tribal governments, including tax laws. TRD suggests that tax laws be removed from this authority and Section 9-11-12.1 NMSA 1978, which grants authority to TRD to enter into tribal cooperative agreements for gross receipts tax, be modified to include the new CTA.
- Several of the CRA’s definitions and the CTA’s definitions of “cannabis retailer” and “licensee” refer to a “person” engaging in various authorized commercial cannabis activities. TRD suggests adding a definition of “person” in both acts to clarify that it includes individuals and business entities.
- A definition of “courier” might be added to the CTA. TRD notes that “courier” is defined in the LECU Act.

AOC observes Section 14(A) provides it is a violation of the CRA for a person, including a licensee, to knowingly and intentionally provide cannabis products to a person under 21, buy cannabis products for or procure the sale or service of cannabis products to a person under 21, deliver cannabis products to a person under 21, or aid or assist a person under 21 to buy, procure or be served cannabis products, but provides no penalties for the violations.

NMDA points out the definition of cannabis in Section 2(C), which refers to “delta-tetrahydrocannabinol” should refer to “*delta-9* tetrahydrocannabinol.” NMDA goes on to explain that, absent the use of the qualifier “measured post-decarboxylation,” the definition may lead to some confusion by law enforcement and the industry as to what is measured (i.e., delta measured pre- or post-decarboxylation). The 2018 federal Farm Bill added post-decarboxylation as a qualifier to clarify what was being measured. Post-decarboxylation was also included in the Hemp Manufacturing Act to clarify the basis for measurement. Including the phrase “measured post-decarboxylation” in the CRA’s definition of cannabis would harmonize it with the definition in the Hemp Manufacturing Act, as well as federal definitions related to hemp and cannabis. NMDA suggests this might be accomplished by amending the first part of CRA’s definition of “cannabis” to state: “All parts of the plant genus *Cannabis* containing a delta-9 tetrahydrocannabinol concentration of more than three-tenths percent measured using a post-decarboxylation method and on a dry weight basis....”

LOPD notes the following inconsistencies or ambiguities in provisions of the bill:

- In Section 25(A)(5) and (9), the bill contains a list of verbs and then the phrase “manufacturing cannabis extracts using nonvolatile solvents, alcohol or carbon

dioxide or no solvents.” This is confusing and makes the statutory language hard to parse. It appears that the bill might be trying to authorize adults over 21 to manufacture extracts using nonvolatile solvents, alcohol, carbon dioxide, or no solvents. If that is the bill’s intent, it would be less confusing to create a stand-alone section authorizing this kind of manufacture. In any event, this language appears to conflict with Section 31, which prohibits the unlicensed manufacture of cannabis extracts.

- Section 25(A)(10) authorizes a person over the age of 21 to possess up to six mature and six immature cannabis plants, and a maximum of 12 mature plants per household. But Section 27(B)(1) imposes a penalty assessment for producing “more than six and up to twelve mature or immature cannabis plants.” This language is confusing because it suggests, contrary to Section 25(A)(10), that a person, rather than a household, can possess up to 12 mature plants, and that a household is limited to possessing no more than 12 *immature* plants. LOPD suggests this issue might resolve by changing the language in Section 27(B)(1) to “up to twelve mature plants.”

## OTHER SUBSTANTIVE ISSUES

NMDA believes the bill’s proposed revisions to the Controlled Substance Act strike language that affords segments of the hemp industry to be licensed as hemp-related businesses, even though they may possess plants or hemp extracts with THC concentrations above 0.3 percent and less than 5 percent (plant breeders, hemp extractors, manufacturers, couriers, transporters) or concentrations in excess of 5 percent THC (businesses removing THC from hemp extracts). NMDA believes that, without further clarification in the CRA, the revisions might allow classification of hemp-based businesses that handle product greater than 0.3 percent total THC as cannabis-based businesses subject to regulation under the CRA. NMDA also is concerned that some hemp-based businesses, such as plant breeders, may end up being licensed as both a hemp-based and a cannabis-based business, subject to regulation by CCD, as well as by NMDA or NMED.

NMAG calls attention to Section 22, which bars disciplinary actions against state-licensed professionals when providing professional services or assistance in connection with any activity deemed legal under the act. In New Mexico, attorneys are regulated exclusively by the state Supreme Court. If the prohibition in Section 22 is read to apply to attorneys, it may violate the separation of powers clause of the state constitution. See N.M. Const. art. III, § 1.

NMED points out it will need to inspect cannabis establishments to assure the health and safety of employees in accordance with the Occupational Health and Safety Act, and to determine compliance with rules promulgated by the Environmental Improvement Board. According to NMED, the cannabis manufacturing industry has a history of serious accidents causing multiple employee hospitalizations.

DPS notes Section 24 prohibits a person under parole or probation from being penalized based on conduct permitted by the CRA. According to DPS, the practical result of this provision may be that judges setting conditions of release following an arrest will be able to prohibit the use of alcohol, but not marijuana. DPS suggests that marijuana and alcohol should be on an equal footing in this regard.

DPS also refers to Section 11(G), which provides cannabis servers who sell cannabis to a person under 21 years of age may have their permit suspended or revoked for a second or third offense.

DPS notes there is no criminal penalty imposed for serving an underage minor, which conflicts with existing law governing the sale of alcohol. See Liquor Control Act, Section 60-7B-1 (providing that the sale of alcohol to a minor by a certified server is a misdemeanor for a first offense and a fourth degree felony for a second or subsequent offense). DPS believes these provisions and other provisions of HB12 addressing cannabis sales to minors should be revised so that the penalties for sale of marijuana to someone under age 21 are consistent with those applicable under the Liquor Control Act.

Also of concern to DPS is Section 8(G), which provides that a conviction for the possession, use, manufacture, distribution, or dispensing of a controlled substance is not considered “substantially related” to the qualifications, functions or duties of a business seeking a license for purposes of denying an application under Section 8(D)(2). Because prior possession, use, manufacture, distribution, or dispensing convictions are not limited to marijuana, the bill would allow a person with a conviction for possession, use, manufacture, distribution or dispensing of heroin, other opioids, or methamphetamine to obtain a license to engage in commercial cannabis activity. DPS believes that ignoring these serious convictions in determining who may obtain a license is a threat to public safety.

DFA states the community grants reinvestment fund will complement DWI prevention programming that currently exists in all of New Mexico’s counties. Research into poly-substance use and its effect on communities will lay a foundation for future preventive and ameliorative actions. The substance abuse education component is an excellent opportunity to build on existing relationships that local DWI Coordinators have built with schools and other community organizations. The community grants reinvestment fund also will fund public education on responsible cannabis use (including abstinence for persons under 21) and reinvestment in communities that were disproportionately affected by past federal and state drug policies, helping to chart the path for a responsible recreational cannabis future while addressing the inequities of the past.

HSD states that, because initiatives funded through the proposed community grants reinvestment program could significantly overlap with existing programs funded through the Behavioral Health Services Division of HSD, it will be important for the Behavioral Health Services Division and DOH to coordinate their activities to strengthen and diversify community efforts rather than duplicate them. HSD also notes HB12 tasks PED with providing evidence-based drug education programs for students in grades 6-12. The Behavioral Health Services Division funds the Pax Good Behavior Game in public elementary schools, an evidence-based practice with a proven record of improving retention and reducing risky behavior downstream. Should HB12 pass, collaboration between the Behavioral Health Services Division and PED would help provide continuity in drug education programming.

PED notes that, according to a study conducted by the Drug Policy Research Center, school-based drug prevention programs may be a “cost-effective tool for improving public health and for making incremental progress in the effort to manage mature drug epidemics.” Further, the Harm Reduction Journal (2017) states, “Youth perspectives in the development of harm reduction programming are needed to ensure that approaches are relatable and meaningful to young people, and effective for promoting the minimization of substance-related harms.”

Attachments

1. Proposed CCD Organization Chart

BG/IT/DI/rl/al

Attachment 1:

# NEW MEXICO REGULATION AND LICENSING DEPARTMENT CANNABIS CONTROL DIVISION PROPOSED ORG CHART

