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FISCAL IMPACT REPORT

SPONSOR Candelaria ORIGINAL DATE 02/26/21
 LAST UPDATED 03/03/21 HB _____

SHORT TITLE Cannabis Regulation Act SB 363

ANALYST Glenn/Torres/Iglesias

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY22	FY23	FY24		
\$10,992.9	\$22,520.3	\$32,215.9	Recurring	Cannabis Excise – State GF
\$4,885.8	\$10,009.0	\$14,318.2	Recurring	Cannabis Excise -Local
\$5,252.2	\$10,759.7	\$15,392.0	Recurring	GRT – State GF
\$3,285.7	\$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
\$6,570.1	\$21,680.0	\$33,707.9	Recurring	TOTAL GENERAL FUND
\$2,118.9	\$9,440.1	\$15,147.2	Recurring	TOTAL LOCAL

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	\$0.0	\$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	\$0.0	\$6,721.0	Nonrecurring	Cannabis Regulation Fund/General Fund (TRD)
	\$0.0	\$1,347.0	\$1,347.0	\$2,694.0	Recurring	Cannabis Regulation Fund/General Fund (NMED)
	\$0.0	\$350.0	\$0.0	\$350.0	Nonrecurring	Cannabis Regulation Fund/General Fund (NMED)
	\$0.0	\$262.0	\$262.0	\$524.0	Recurring	Cannabis Regulation Fund/General Fund (NMDA)
	\$0.0	\$150.0	\$0.0	\$150	Nonrecurring	Cannabis Regulation Fund/General Fund (NMDA)
	\$0.0	\$1,257.9	\$1257.9	\$2,515.8	Recurring	Cannabis Regulation Fund/General Fund (DPS)
	\$0.0	\$100.0	\$100.0	\$200.0	Recurring	General Fund (AOC)

(Parenthesis () Indicate Expenditure Decreases)

Relates to

HB12, HB17, SB13, SB288

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Regulation and Licensing Department (RLD)
- Taxation and Revenue Department (TRD) (analysis of HB12)
- Department of Finance & 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 Bill

Senate Bill 363 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 and responsibilities under existing law related to commercial cannabis activity and the medical cannabis program are transferred to CCD.

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 and NMDA. 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.

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, retailers, and cannabis consumption areas. 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 Cannabis Regulation Act 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 small 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 reverting fund consists of appropriations, grants, gifts, donations, and fees collected by CCD under the CRA and the medical cannabis program. On July 1, 2021, any unexpended or unencumbered balance in the medical cannabis fund is transferred to the cannabis regulation fund.

The CRA provides municipalities and counties with some authority to regulate activities governed by the CRA, including reasonable time, place, and manner rules and rules that limit the density of licensed establishments and operating times. Local rules may not completely prohibit the operation of a licensee.

The CRA provides, if a person is charged with any criminal offenses under the CRA related to commercial cannabis products (Sections 26-30), all records held by a court or state or local jurisdiction that relate to arrest or conviction shall be expunged. 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 for offenses that are no longer a crime under the CRA to have their cases reopened to consider dismissal of their sentences. By January 1, 2022, DPS must identify past convictions eligible for recall or dismissal and notify prosecutors of eligible cases.

SB363 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 drug education programs to students in eighth through 12th grades.

SB363 also enacts the Cannabis Tax Act (CTA), which imposes a cannabis excise tax of 9 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 or to receipts of cannabis producers from selling cannabis wholesale. There is no definition of wholesale included in the bill, see *Significant Issues* for more information.

The CTA also allows municipalities and counties to adopt ordinances imposing an excise tax on cannabis retailers. The rate of a municipality's or county's tax may not exceed 3 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 Lynn and Erin Compassionate Use Act or to receipts of cannabis producers from selling cannabis wholesale.

SB363 amends the Gross Receipts and Compensating Tax Act to provide an exemption from gross receipts tax for receipts from selling cannabis products wholesale under the CRA and to provide a deduction from gross receipts tax and governmental gross receipts tax for medical cannabis products.

The effective date of SB363 is July 1, 2021.

FISCAL IMPLICATIONS

Appropriations

Section 38 provides for the "cannabis regulation fund," and provides that balances in the fund remaining at the end of a fiscal year revert to the general fund. Section 38 does not subject money in the fund to continuing appropriation for CCD or any other purpose.

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.

Exempting medical sales of cannabis is expected to reduce state GRT revenues by \$9.7 million and local GRT revenues by \$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 2022. Faster promulgations of rules and widespread licensing before 2022 could increase FY22 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 SB363. 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. An organizational chart prepared by RLD showing the contemplated organizational structure of CCD is attached to this FIR.

Operating budget impacts for TRD are based on TRD's analysis of HB12. In that similar iteration of a Cannabis Tax Act, TRD anticipated the personnel time to implement the new tax program in TRD's Administrative Services Division is 560 hours, at a cost of \$23.611. 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 notes that SB363 removes all medical cannabis licensing (including producers, manufacturers, couriers, and laboratories), and medical cannabis patient services from DOH and assign its responsibilities and duties for regulating both commercial and medical cannabis to CCD. According to DOH, if the bill is enacted, 28 Medical Cannabis Program Division FTEs would need to transfer to CCD. This is important as these are positions which currently address and regulate patient services, producer licensure, manufacturing, and production. Twenty Medical Cannabis Program Division FTEs are in Santa Fe for patient services and eight Medical Cannabis Program Division FTEs are in Albuquerque for license and compliance. Alternatively, DOH states the positions would need to be transferred to other DOH programs or eliminated.

NMED believes SB363 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 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 SB363 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 31, which requires automatic expungement of records relating to arrests or convictions, and Section 32'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 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 SB363 may increase tax protest hearings. Although the significance of the increase is difficult to predict, AHO's prior experience demonstrates 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 any increase in tax protest volume can be absorbed by its current resources.

AHO also notes 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 SB363'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, in the longer term, SB363 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 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 SB363 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

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 17(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 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, based on the responsibilities assigned to it under SB363, 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 states the limits on possession for consumers and medical cannabis patients are contradictory. In some places, SB363 refers to permitting a person to purchase or possess "at least" the specified amounts of flowers and extract. See, e.g., Sections 3(C)(5), 60. The term "at least" suggests 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 5(K)(2) ("up to"), 24(A)(1) ("not more than"), 24(A)(6) ("up to"). LOPD also notes Section 29(C), which states 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 24(A)(2), which states 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 states Section 32's provisions for recalling or dismissing sentences do not address the situation of people who are serving time indirectly related to an earlier marijuana-related conviction. These would include people who received habitual offender enhancements on subsequent offenses because of earlier marijuana-related crimes, as well as people convicted of being felons in possession of a firearm, where the felony was related to marijuana. To address this issue, the statute might include a general statement the bill's changes to the criminal code are fully retroactive, and any person who wanted to petition for resentencing or to vacate a conviction could do so. People whose cases are not initially identified under the bill as potentially eligible for recall or dismissal should also be able to petition for review under Rules 5-802 or 5-803 NMRA.

Medical Cannabis Program

DOH notes SB363 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 5(H)). DOH is concerned, 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 SB363. 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 it conforms to the definition in the Lynn and Erin Compassionate Use Act.

New Job Creation

EDD estimates 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 SB363 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 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 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, while SB363 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 Section 63 of the bill deletes the definition of "drug paraphernalia" in the Controlled Substances Act (Section 30-31-2(W)) and Section 68 deletes "drug paraphernalia" from property subject to forfeiture under the Act (Section 30-31-34(G)). This is problematic because those provisions apply to drug paraphernalia used for all controlled substances, not just marijuana. If SB363 were enacted, the term "drug paraphernalia" would be undefined and subject to interpretation, and all drug paraphernalia used in connection with controlled substances would be exempt from forfeiture.

AODA also refers to the *Birchfield* decision, where the U.S. Supreme Court ruled implied consent laws requiring blood draws are unconstitutional and 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, as experienced in Colorado, black market sales may still be a problem even after legalization of cannabis.

DPS makes the following points related to enforcement:

- The bill should bar personal production of cannabis products. According to DPS, the existence of any type of legal home production greatly complicates enforcement against criminal operations and is likely to have a significant negative impact on the generation of tax revenue related to commercial cannabis production and sales. Additionally, personal production of cannabis products has been shown to be a common means for organized crime to infiltrate the industry in states where recreational cannabis use is legal.
- Section 7(G) 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). DPS notes that 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.

- Section 28 makes possession and intentional distribution of marijuana on the premises of a school or daycare center a misdemeanor offense. DPS believes this does not sufficiently disincentivize such behavior and protect public safety, and that the offense should be penalized at least as a fourth-degree felony.
- Section 29(C) makes possession of more than two ounces of cannabis flowers or more than sixteen grams of cannabis extract a misdemeanor, regardless of the total amount possessed. DPS believes this is not an adequate deterrent for criminal activity and points to similar bills that have been introduced, such as HB12, which increase the penalty to a fourth-degree felony for possession of more than eight ounces of cannabis flowers or more than sixty-four grams of cannabis extracts. According to DPS, stronger penalties provide a more significant incentive for individuals to take the time and effort necessary to enter the legal industry, which reduces the necessity for black market enforcement operations and increases tax revenues.

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. SB363 would include gross receipts taxes.

SB363 would impose a state excise tax of 9 percent and a local excise rate 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 SB363 would be 22.437 percent.

While the combined maximum tax rate under this bill would be less than some 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.

TRD noted in its analysis of similar provisions of HB12 that the bill exempts receipts from selling cannabis products wholesale from the cannabis excise tax and gross receipts tax (Sections 43-45, 54). TRD states this differs from treatment of other wholesale transactions under Section 7-9-47 of the Gross Receipts and Compensating Tax Act, which allows the receipts of a seller from the sale of a product to be deducted if the product is sold to a buyer who resells the product at retail. TRD is concerned wholesalers whose income stems entirely from sales exempt from taxation may not be required to register with TRD. Also, TRD states, without a deduction or a separately stated deduction on either the cannabis tax or gross receipts tax, there is no traceability between the movement of the product from wholesale to retail or the extent of the cannabis industry's activity. To address these issues, TRD recommends, instead of an exemption, receipts from selling cannabis products wholesale be covered by the sale for resale deduction from gross receipts under Section 7-9-47 and a similar sale-for-resale deduction be added for the cannabis excise tax.

TRD also states in its analysis of HB12 an implementation date as early as October 2021 will be difficult, and suggests the date be pushed back to January 1, 2022 to accommodate the new administrative challenges posed by the bill. Considerations of IT development, external stakeholder communication, public outreach, form design, partner agency readiness, cash handling readiness, rule development and promulgation, and logistics will need to be considered.

The CTA provides that an ordinance imposing a county or municipal cannabis tax must have an effective date of July 1 or January 1. This may create a conflict if actual sales under the CRA begin before a county or municipality enacts a local tax.

TECHNICAL ISSUES

Section 5(A)(2) states CCD may collect fees in connection with the medical cannabis program, "except for the medical cannabis registry." The reference to the "medical cannabis registry" should be omitted because, under Section 4, all powers and responsibilities of DOH related to commercial cannabis activity and the LECU Act, including the registry, are transferred to CCD.

Section 31 provides, if a person is charged with any criminal offenses under the CRA related to commercial cannabis products (Sections 26-30), all records held by a court or state or local jurisdiction that relate to arrest or conviction shall be expunged. This provision is confusing because it appears to allow for expungement as soon as a person is arrested or convicted, which undercuts the purposes of having criminal penalties for the listed offenses. This issue might be

addressed by adding language in bills similar to SB363 introduced this session, which provides for automatic expungement two years after the date of the person’s conviction or arrest. See, e.g., HB12, § 32.

DOH notes SB363’s title states it creates the “public health and safety advisory committee,” but the bill does not include provisions for the creation of the committee or otherwise mention the committee.

In its analysis of similar provisions of HB12, TRD raises the following issues:

- 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 “cannabis producer” might be added to the CTA. TRD notes that, in Section 54, cannabis producers selling at wholesale are exempt from gross receipts tax and a definition would provide clarity regarding sellers who qualify for the exemption.
- A definition of “courier” might be added to the CTA. TRD notes that “courier” is defined in the LECU Act.
- “Price paid” or “price” is referenced in Sections 43-45. In these paragraphs there is a caveat stating that if the price paid does not reflect the value of the cannabis product, the tax is applied to the “reasonable value” of the product at the time it was purchased. It is recommended that the caveat be clarified, as there is no methodology to establish “value” or “reasonable value” of cannabis products. In addition, while language similar to the caveat is used in the Gross Receipts and Compensating Tax Act for purposes of determining the value of property for purposes of the compensating tax (e.g., Section 7-9-8), it does not appear suitable in this context. TRD states the requirement will make these provisions difficult for TRD to enforce, and suggests the language be clarified to make it clear that the tax is applied to the price charged by the retailer on sales of cannabis products and to remove the language regarding the value of the products.
- Section 46 refers the “taxable event” but it is not clear what the taxable event is in the context of the cannabis excise tax.
- TRD suggests that the provisions for the effective date of cannabis tax ordinances be the same as those for gross receipts tax local option ordinances under current law (Section 7-20E-3 and 7-19D-3 NMSA 1978). The current law provides an additional three months before the ordinances are effective, which allows TRD to make certain the correct rates are programmed, conduct proper testing of distributions, and release the rate table to the public. TRD suggests this could be accomplished by changing Sections 44(D) and 45(D) to read “An ordinance enacted pursuant to this section shall include an effective date of July 1 or January 1, whichever date occurs first after the expiration of at least three months from the date the adopted ordinance is mailed or delivered to the department. The ordinance shall include that effective date.”

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, 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:

- Although the bill de-schedules marijuana, making it no longer a “controlled substance” for purposes of the Controlled Substances Act, it does not repeal Section 30-31-21(A), which currently makes it a third- or second-degree felony to distribute marijuana to a minor. LOPD recommends removing all existing references to marijuana in the NMSA to align with the bill.
- In Section 23(B), the following language is confusing: “An applicant for a professional or occupational license shall not be denied a license based on previous employment related to cannabis establishments may not refuse to employ or discipline an employee . . .”
- Section 24(A)(9) authorizes a person over the age of 21 to possess up to six mature cannabis plants per person and a maximum of 12 per household, and “six immature plants per household.” But Section 26(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 2(A)(9), a person, rather than a household, can possess up to 12 mature plants and that person (or household) can possess more than six immature plants.

OTHER SUBSTANTIVE ISSUES

RLD recommends amending Section 8’s application process so the 90-day turnaround time for CCD to approve or deny a license begins to run on receipt of a “complete” application rather than from the day the application was submitted. Otherwise, if an applicant submits an incomplete application and fails to timely submit any deficient information or documentation, CCD would have to deny the applicant based solely on an incomplete application, resulting in the applicant being required to reapply.

RLD also notes SB363 does not allow CCD to limit the number of licensed premises a licensee may occupy or operate under a license. This allows a licensee to have one license with several (even hundreds) of licensed premises operating under one license. The bill also allows multiple licensees to occupy a single licensed premise, unless otherwise provide in the CRA. According to RLD, this would create enforcement issues when a violation occurred at the licensed premise, if the premises were occupied by numerous licensees.

In prior analysis, TRD observed Section 7(D) does not require retailers to be compliant with the gross receipts tax and cannabis excise tax to renew their licenses with RLD. The Tax Administration Act imposes this requirement for licensees under the Liquor Control Act, Section 7-1-82 NMSA 1978, and TRD suggest it may also be prudent for licensees under the CRA.

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, 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 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 21, 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.

HSD notes SB363 tasks PED with providing evidence-based drug education programs for students in grades 8-12. HSD's 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 SB363 pass, collaboration between the Behavioral Health Services Division and PED would help provide continuity in drug education programming.

PED notes, 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." PED states schools may need guidance and assistance with selecting and implementing evidence-based drug education programs that meet the requirements of SB363 and notes the bill does not provide parameters regarding the enforcement or oversight of the programs.