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## FISCAL IMPACT REPORT

**ORIGINAL DATE**  
**LAST UPDATED** 02/07/15    **HB** \_\_\_\_\_

**SPONSOR**    Ortiz y Pino

**SHORT TITLE**    Use, Regulation, Sale & Tax of Marijuana, CA    **SB** SJR 2

**ANALYST**    Daly

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

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>			>\$15.2	>\$15.2	Nonrecurring	Election Fund
			See Narrative	See Narrative	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

Relates to HB 160

#### Responses Received From

Attorney General’s Office (AGO)  
 Administrative Office of the District Attorneys (AODA)  
 Public Defender Department (PDD)  
 Department of Public Safety (DPS)  
 Secretary of State (SOS)

### SUMMARY

#### Synopsis of Bill

Senate Joint Resolution 2 proposes to amend the state constitution by adding a new section to allow for possession and personal use of marijuana for persons 21 years of age and older. Regulation of the production, processing, transportation, sale, acceptable quantities, and places of use and its taxation is to be determined by the legislature. The resolution is to be submitted for approval by the people of the state in the next general election (November 2016).

### FISCAL IMPLICATIONS

Under Section 1-16-13 NMSA 1978 and the New Mexico constitution, SOS is required to print samples of the text of each constitutional amendment, in both Spanish and English, in an amount equal to ten percent of the registered voters in the state. SOS is also required to publish them

## **Senate Joint Resolution 2 – Page 2**

once a week for four weeks preceding the election in newspapers in every county in the state. In 2014, SOS estimated the cost per constitutional amendment to be \$15,217. However, if the ballot size is greater than one page, front and back, it would increase the cost of conducting the general election. In addition to the cost of the ballot, there will be added time for processing voters to vote and would mean additional ballot printing systems would be required to avoid having lines at voting convenience centers.

DPS reports there are indeterminate fiscal implications to its budget assuming passage of the proposed constitutional amendment. If this language is approved by voters, then the production, sale and taxation of marijuana in New Mexico would be legal. It is presumed that there would be reasonable time, place and manner restrictions on these activities, and it is assumed that various entities within DPS, notably the New Mexico State Police Division, the Motor Transportation Police Division and the Crime Laboratory, would all be required to enforce various aspects of the new legal process. Based on these assumptions, it is unknown what cost increases may be incurred by the Department.

However, PDD suggests that SJR 2, if enacted and enabling legislation implemented, could result in a small decrease in the cost of public defenders, district attorneys, courts, law enforcement and corrections/county caseloads, resulting in future session re-evaluation of a wide swath of budget requests.

Because the proposed amendment contains no parameters outlining the implementing legislation, including tax rates, no revenue projections are available.

### **SIGNIFICANT ISSUES**

Production, sale, use and taxation of marijuana are still contrary to federal law. As AGO advises:

The federal government currently regulates marijuana under the Controlled Substances Act (CSA) and criminalizes the possession, cultivation, and distribution of marijuana. Marijuana is currently classified as a Schedule I drug, meaning that it is a drug with the “highest abuse potential . . . [with] no accepted medicinal value.” The Drug Enforcement Administration (DEA) is charged with enforcing federal drug laws and may arrest individuals for possessing, cultivating, and distributing marijuana. Nevertheless, the Department of Justice (DOJ), which is the entity responsible for prosecuting federal marijuana laws, has broad discretion in deciding whether to prosecute marijuana violations.

Although federal law provides for criminal penalties for marijuana use, possession, and cultivation, a state’s ability to enact marijuana laws is considered a valid exercise of its police powers. Currently, under the Lynn and Erin Compassionate Use Act, Sections 26-2B-1 through -7, NMSA 1978, New Mexico authorizes the medical use of marijuana “in a regulated system for [the purpose of] alleviating symptoms caused by debilitating medical conditions and their medical treatments.”

With respect to the federal government’s authority over state marijuana laws, the United States Supreme Court has stated that the federal government may not “commandeer” state legislatures into enacting legislation that would require states to prohibit marijuana

or repeal existing exemptions for medical marijuana; Congress’s authority to do so is limited by the Tenth Amendment. Furthermore, Congress may not direct state police officers to enforce the marijuana provisions of the CSA.

AGO also points out there is a possibility of state official liability since the CSA makes anyone who conspires, aids, abets, or assists in crimes related to marijuana subject to federal penalties. For example, it notes that as to medical marijuana legislation, the U.S. Attorneys for the Eastern and Western Districts of Washington State have stated that officials could be subject to prosecution under federal law for carrying out aspects of a state medical marijuana law that violate the CSA. See Letter from Jenny A. Durkan, U.S. Attorney for the Western District of Washington and Michael C. Ormsby, U.S. Attorney for the Eastern District of Washington, to the Honorable Christine Gregoire, Washington State Governor, April 14, 2011.

Additionally, AODA warns:

President Obama and Attorney General Holder have—so far—declined to prosecute persons using medical marijuana, or persons using marijuana for recreational purposes in the four states that have legalized it under their states’ laws. Last February, Deputy U.S. Attorney General James Cole issued guidelines for federal prosecution of marijuana crimes: preventing distribution to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession and use on federal property. However a different administration could take a different view. A new President will be elected in 2016, at the same time this proposed amendment is on the ballot.

AODA also notes other impacts. It reports that the United States District Court for New Mexico has determined that it could not force an insurance company to pay for medical marijuana prescribed for treatment of injuries sustained in an accident because it was contrary to federal law and federal policy. See, *Hemphill v. Liberty Mutual Ins. Co.* (2013). Additionally, the federal-state conflict is having a direct effect on financial transactions in states that have legalized marijuana:

A DOJ memorandum on this subject states: “The provisions of the money laundering statutes, the unlicensed money remitter statute and the Bank Secrecy Act (BSA) remain in effect with respect to marijuana-related conduct. Financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under the money laundering statutes (18 U.S.C. Sacs. 1956 and 1957), the unlicensed money transmitter statute (18 U.S.C. Sec. 1960) and the BSA. Sections 1956 and 1957 of Title 18 make it a criminal offense to engage in certain financial and monetary transactions with the proceeds of a “specified unlawful activity,” including proceeds from marijuana-related violations of the Controlled Substances Act (CSA). Transactions by or through a money transmitting business involving funds “derived from” marijuana-related conduct can also serve as predicate for prosecution under 18 U.S.C. Sec. 1960.

Additionally, financial institutions that conduct transactions with money generated by marijuana-related conduct could face criminal liability for, among other things, failing to identify or report financial transactions that involved the proceeds of marijuana-related violations of the CSA. See, e.g., 31 U.S.C. Sec. 5318(g). Notably for these purposes, prosecution for these offenses based on transactions involving marijuana proceeds does not require an underlying marijuana-related conviction under federal or state law.” At least one Colorado marijuana business has been charged with money laundering and an additional charge accuses an individual of attempting an illegal financial transaction by trying to deposit proceeds from a medical marijuana dispensary into a bank account. See, U.S. v. Hector Diaz, et al., 13-CR-00493 REB (D-Colo).

Banks and other financial institutions are wary of providing financial services to marijuana businesses so it has remained largely a cash only business, including employment payroll. That raises security and safety issues for the businesses and their employees. It is unclear how the businesses can pay the IRS required payments for Social Security, Medicare and income taxes. A similar problem may exist for employees who are paid in cash in paying their taxes. The Internal Revenue Code provides that no deduction or credit may be allowed for any amount or credit on any trade or business if such trade or business consists of trafficking in a controlled substance (within the meaning of Schedules I and II of the Controlled Substances Act) which is prohibited by any federal law or any state law where the trade or business is done. See, Section 280E.

AODA also advises that in states that have legalized marijuana, many marijuana users are pursuing medical marijuana cards because it is cheaper to buy, especially where recreational marijuana is heavily taxed.

## **PERFORMANCE IMPLICATIONS**

PDD reports that in FY 13, it handled 221 cases state-wide in which the primary focus was charges brought under existing law criminalizing possession of, distribution of and trafficking in marijuana.

## **ADMINISTRATIVE IMPLICATIONS**

TRD predicts a moderate to high administrative and compliance impact, assuming SJR 2 receives voter approval and implementing legislation is enacted that contains a taxing component. Assuming this tax would be administered through GenTax, configuration and reports would require FDB testing. A new fund may need to be created in the state treasury for the collection of associated tax revenues, and its distribution would need to be established in that legislation. If TRD receives an administrative fee for that collection, an appropriation to TRD would be required, along with a determination if these revenues are reverting or non-reverting. New revenue and distribution accounts will need to be created in SHARE. Estimate of 100-120 hours would be required of FDB staff. Additionally, TRD reports that such a cash-based business will be very difficult to audit since the current federally chartered banks are prohibited under federal law from opening accounts with such businesses. Further, tax administration will require methods for reporting, collecting, and auditing taxes due.

## RELATIONSHIP

This resolution is related to HB 160, which establishes a comprehensive regulatory framework allowing for the legal production, processing, sale (to persons 21 years of age and older) and taxation of marijuana and marijuana products, and industrial hemp.

## OTHER SUBSTANTIVE ISSUES

AODA provides this additional information and analysis:

A 2013 national survey on drug use and health found 19.8 million people had used marijuana in the past month. The study also found that daily, or almost daily, use of marijuana (used on 20 or more days in the past month) had increased to 8.1 million persons from 5.1 million in 2005. SJR 2 provides that only persons 21 years old or older may lawfully possess and use marijuana. However if marijuana possession and use are made more accessible in New Mexico it is likely that it will become more available to persons under 21, including children under age 18. It is also likely that if marijuana usage increases, the number of persons driving a vehicle after ingesting marijuana, or even while using it, will also increase. There is currently no plain or specific limit for driving while under the influence of any drug. Instead, the current statute says, “it is unlawful for persons who are under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within the state.” See, Sec. 66-8-102(B), NMSA 1978. The prosecution of those cases is challenging, especially when the driver is suspected, or proven, to being under the influence of poly-drug combination, or alcohol and drugs. Expert testimony requirements will increase and trials will probably be longer, more complicated and more expensive.

PDD reports that according to the Wall Street Journal, a similar measure in Colorado resulted in a tax windfall of \$58.7 million, somewhat less than the \$67 million that had been forecast. Dan Frisch, *In Colorado, Legal Pot Fails to Meet Predictions of Supporters, Critics*, and Wall. St. J., Jan. 9, 2015, [ available at <http://www.wsj.com/articles/in-colorado-pot-legalization-fails-to-match-predictions-of-backers-critics-1420830972> (last updated Jan. 9, 2015, 7:38 p.m. ET)]. TRD cites another study concerning revenue generated by legalizing marijuana: a study conducted by Divya Raghavan on September 2014 on “How Much Money Could Your State Make From Marijuana Legalization?” concluded that New Mexico could potentially generate between \$20 and \$30 million in new revenues from the industry based on a 15% excise tax and 7.27% combined state and local sales tax rate.

TRD also comments that the proposed resolution could have both positive and negative impacts to the state. Since it is not legal under the current law, TRD suggests New Mexico can learn from other states that have legalized marijuana like Colorado. The Taxation and Revenue Department (TRD) referenced a published report “The Legalization of Marijuana in Colorado: The Impact” Vol. 2/August 2014. The impact study was targeted on the following areas: Impaired driving, Youth marijuana use, Adult marijuana use, Emergency room admissions, Marijuana-related exposure cases, and Diversion of Colorado marijuana outside the state. The following observations were the results of the study prior to and during the creation of the marijuana industry in Colorado:

**Section 1 – Impaired Driving:**

- The majority of driving-under-the-influence-of-drugs arrests involve marijuana and 25 to 40 percent were marijuana alone.
- Toxicology reports with positive marijuana results for driving under the influence have increased 16 percent from 2011 to 2013.
- Traffic fatalities involving operators testing positive for marijuana have increased 100 percent from 2007 to 2012.

**Section 2 – Youth Marijuana use:**

- In 2012, 10.47 percent of youth ages 12 to 17 were considered current marijuana users compared to 7.55 percent nationally. Colorado, ranked 4th in the nation, was 39 percent higher than the national average.
- Drug-related suspensions/expulsions increased 32 percent from school years 2008/2009 through 2012/2013. The vast majority were for marijuana violations.

**Section 3-Adult Marijuana Use:**

- In 2012, 26.81 percent of college age students (ages 18 – 25 years) were considered current marijuana users compared to 18.89 percent nationally. Colorado, ranked third in the nation, was 42 percent higher than the national average.
- In 2012, 7.63 percent of adults ages 26 and over were considered current marijuana users compared to 5.05 percent nationally. Colorado, ranked seventh in the nation, was 51 percent higher than the national average.
- In 2013, 48.4 percent of Denver adult arrestees tested positive for marijuana, a 16 percent increase from 2008.

**Section 4 – Emergency Room Marijuana Admission:**

- From 2011 through 2013, there was a 57 percent increase in marijuana-related emergency room visits.
- Hospitalizations related to marijuana have increased 82 percent from 2008 to 2013.
- In 2012, the City of Denver rate for marijuana-related emergency visits was 45 percent higher than the rate in the state of Colorado.

**Section 5-Marijuana-Related Exposure:**

- Marijuana-related exposures for children ages 0 to 5 on average have increased 268 percent from 2006–2009 to 2010-2013.
- Colorado’s rate of marijuana-related exposures is triple the national average.

**Section 6- Treatment:**

- Over the last nine years, the top three drugs involved in treatment admissions have been alcohol, marijuana and amphetamines.

**Section 7 – Diversion of Colorado Marijuana:**

- Highway interdiction seizures of Colorado marijuana destined to 40 other states increased 397 percent from 2008 to 2013.
- The average pounds of Colorado marijuana seized, destined for other states, increased 33.5 percent from 2005 to 2008 compared to 2009 to 2013.

**Section 8 – Diversion by Parcel:**

- U.S. Mail parcel interceptions, with Colorado marijuana destined for 33 other states, increased 1,280 percent from 2010 to 2013.
- U.S. Mail pounds of Colorado marijuana seized, destined for 33 other states, increased 762 percent from 2010 to 2013.

**Section 9 – THC Extraction Labs:**

- In 2013, there were 12 THC extraction lab explosions and in the first half of 2014 the amount more than doubled.
- In 2013, there were 18 injuries from THC extraction labs and in the first half of 2014 there were 27 injuries.

**Section 10 – Related Data:**

- Overall, crime in Denver increased 6.7 percent from the first six months of 2013 to the first six months of 2014.
- The number of pets poisoned from ingesting marijuana has increased four-fold in the past six years.
- Colorado estimates for annual revenue from the sale of recreational marijuana varies from \$65 million (.6 percent of all expected general fund revenue) to \$118 million (1.2 percent of all expected general fund revenue).
- The majority of counties and cities in Colorado have banned recreational marijuana businesses.
- THC, or (tetrahydrocannabinol) potency has risen from an average of 3.96 percent in 1995 to an average of 12.33 percent in 2013.

**ALTERNATIVES**

DPS suggests as an alternative to inclusion of this amendment on the ballot that an interim committee or study group consider the larger structural questions that arise relative to legalized recreational marijuana.

MD/bb