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FISCAL IMPACT REPORT

ORIGINAL DATE
SPONSOR McCamley **LAST UPDATED** 02/05/15 **HB** 160

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

ANALYST Daly

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		
		NFI*		

(Parenthesis () Indicate Revenue Decreases)

*See Fiscal Implications

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			\$3,858.7	\$3,858.7	Recurring	General Fund*

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications

Relates to SJR 2

SOURCES OF INFORMATION

LFC Files

Responses Received From

Regulation & Licensing Department (RLD)
 Department of Health (DOH)
 Children, Youth & Families Department (CYFD)
 Attorney General's Office (AGO)
 Department of Public Safety (DPS)
 Administrative Office of the District Attorneys (AODA)

No Response

Taxation & Revenue Department (TRD)
 Department of Agriculture (DOA)

SUMMARY

Synopsis of Bill

House Bill 160 enacts the Cannabis Revenue and Freedom Act, which establishes a comprehensive regulatory framework allowing for the legal production, processing and sale (to persons 21 years of age and older) of industrial hemp, marijuana and marijuana products. Applications for licenses to produce, process and sell marijuana would be accepted beginning July 1, 2017. The Act assigns duties and grants powers to the Departments of Regulation and Licensing (RLD), Taxation and Revenue (TRD), Agriculture (DOA) and Health (DOH). HB 160 declares an emergency.

RLD is charged with licensing production, processing and wholesale and retail sales. Licenses are issued for a period of one year, for an annual fee of up to \$2 thousand, and become void on the licensee's death. They could be transferred only as provided in the Act, related rules, and municipal ordinance or local regulation. Licenses could be disapproved if RLD reasonably believes that there are sufficient licensed premises in the locality or that issuing a license in that locality is not demanded by public interest or convenience. RLD is also responsible for investigating and pursuing violations of state law and promulgating rules that prohibit advertising, document the source of production, and require labeling of the THC concentration. Additionally, by January 1, 2016, RLD must study the influence of marijuana on a person's ability to drive a vehicle.

Producers, processors and wholesalers could deliver marijuana only to licensed premises. A retailer could sell marijuana items only on the licensed premise, but could make deliveries. The import and export of marijuana would be prohibited.

TRD is charged with implementation of the taxation provisions of the Act. Marijuana producers are taxed at rates of \$35 per ounce of flowers, \$10 per ounce of leaves and \$5 per immature marijuana plant. The tax is assessed on sale, which is deemed to occur when a producer takes any action that would require a processor wholesale or retail license. The tax rate is adjusted for the cost of living on July 1 of each year. In addition, TRD is to review the tax rates and provide recommendations to the legislature. The State has the exclusive right to tax marijuana.

DOA regulates the production and possession of and commerce in industrial hemp (THC concentration of not more than 0.3 percent) and agricultural hemp seed. Licenses are valid for three years and cannot be transferred.

DPS, DOH, RLD, TRD and DOA are all charged with joint enforcement of the provisions of the Act.

HB 160 creates two new funds. The cannabis administration fund consists of license fees, charges and fines collected by RLD and are appropriated to RLD, except any balance over \$250 thousand at the end of each fiscal year is credited to the cannabis revenue fund. The cannabis revenue fund consists of taxes and fines collected by TRD. TRD is directed to withhold sufficient money to carry out its duties and distribute the balance on a monthly basis: 40 percent to the general fund; 25 percent to DOH for alcohol and substance abuse prevention and treatment; 15 percent to the department of public safety for state police expenses; and 10 percent each to municipalities and counties in proportion to the number of licenses issued.

Marijuana use in public places, and possession in adult correctional and secure juvenile facilities is prohibited. While a limited amount of homegrown marijuana is exempted from the Act, it cannot be produced, processed or stored in public view. Homemade marijuana extracts (via solvents, etc.) are prohibited.

Municipalities and counties may enact regulations related to nuisance aspects of retail establishments. Further, municipalities with populations over 5,000 and all counties may hold local option elections to prohibit licensed premises.

The Act authorizes the Governor to suspend a license without notice in case of “invasion, disaster, insurrection, riot or imminent danger” for the duration of same.

HB160 also amends a number of existing state laws:

- Amends 7-2-2 (Income Tax Act) – excludes the amount of any deductions that would have been allowed but for section 280E of the Internal Revenue Code from the modified gross income starting with 2018 tax year. This allows the deduction of business expenses related to cannabis;
- Amends 24-15-9 [passengers of ski lifts] and 24-15-10 [skiers responsibilities];
- Amends 29-29-4 [concealed handgun] to exclude misdemeanor marijuana convictions within 10 years as a disqualifying factor for a concealed handgun permit;
- Amends 30-6-1 [abandonment or abuse of a child] – to exclude conduct pursuant to and in compliance with this act from evidence of abuse;
- Amends 30-31-2 [controlled substances act] to remove industrial hemp and marijuana from the definition of a controlled substance and adds industrial hemp to the exclusions in the definition of marijuana;
- Amends 30-31-6 [controlled substance schedules] provide an exemption from the listing of marijuana as a schedule I controlled substance with respect to the Act;
- Amends 30-31-12 [Registration] to exempt “a person who is licensed pursuant to the Cannabis Revenue and Freedom Act, and only with respect to conduct that is pursuant to and in compliance with that act” from registering with the Board of Pharmacy;
- Amends 30-31-21 [distribution to a minor] to add this act in parallel to Controlled Substances act in exception [in distribution to persons under 18]; adds penalties for selling marijuana to persons under 21 years and under 18 years.
- Amends other sections in Chapter 30 NMSA (Criminal Offenses) to clarify the interaction of this Act with the Controlled Substances Act; and
- Amends 47-8-3 [Uniform owner-resident relations] to exclude “conduct that complies with” this act from the definition of “substantial violation”.

FISCAL IMPLICATIONS

RLD does not report any fiscal impact in performing its obligation under the bill to study the influence of marijuana on a person’s ability to drive and make recommendations to the legislature regarding any amendments to the Motor Vehicle Code by January 1, 2016. It does, however, report that in order to fully perform its licensing, regulatory and other duties under this Act, it will need a minimum of approximately 42 additional FTE’s: 13 to perform licensing and compliance duties and 15 to perform investigative/financial auditors and enforcement duties,

along with approximately 14 additional FTE's to include managers, attorneys and support staff to design a comprehensive regulatory framework, draft rules and regulations as required and hold rule-making and administrative citation hearings. It notes that Colorado has approximately 55 individuals carrying out these duties, but Colorado's program also includes the medical marijuana program, so RLD has reduced its estimated staffing needs to 42 FTE's since DOH regulates the medical cannabis program.

In addition to FTE's and their benefits, RLD's estimated impact includes costs for both start-up and continuing activities such as conducting hearings for and promulgating rules, along with expenses related to land and buildings, computers, office furniture and supplies, and law enforcement training. RLD's estimated budget impact is set forth the table above. Although RLD has indicated these costs will occur beginning in FY 16, in light of the July 1, 2017 start date for accepting applications, LFC staff has shown that number beginning in FY 17, to provide funding one year before licensing begins to build staff and adopt rules, as well as obtain necessary office space, equipment, furniture and supplies.

RLD estimates that beginning in the first licensing year (FY 18), it will receive \$250 thousand a year from the Cannabis Administrative Fund from application and annual license fees, pursuant to the appropriation contained in the Act. RLD notes that its projected cost is consistent with the annual budget for its Alcohol and Gaming Division (AGD), which performs similar licensing and regulatory functions within RLD with a staff of 15 FTE's, plus the 26 certified peace officers in the Special Investigations Division (SID) of DPS who perform investigative and enforcement duties for that Division. RLD reports the combined budgets of these two divisions is approximately \$4 million.

DOA has not provided an agency analysis of the Act, nor any estimates concerning any budgetary impact or estimates of the number of industrial hemp licenses and agricultural hemp seed production permits. The Act does not provide for the assessment of any application or licensing or permitting fees by DOA.

Although not reflected in the Revenue Table set out above because LFC staff anticipates no revenue will be received until FY 18, RLD reports that it estimates approximately \$4.3 million to the Cannabis Administration Fund in the first year of licensing using the current number of Colorado licenses (1718 equivalent four license types and a one-time licensing fee of \$2500). Its estimate for the second year is substantially lower, at \$1.2 million, assuming renewal fees of \$500 each and minimal ten per cent increase in new licenses (based on the number of new licenses RLD's other licensing boards issue on a year to year basis). If, in fact, the Act authorizes a \$2500 annual fee (for application and license), then the estimated revenue for the second year, using RLD's ten per cent increase number, would be approximately \$4.7 million.

TRD has not provided an agency analysis of this Act, nor any information concerning budgetary impact or anticipated revenue from the taxes imposed in the Act. The LFC Report referenced in the Significant Issues section contains some information concerning marijuana tax revenue collection and estimates in Colorado and Washington. See Attachment 1.

Continuing Appropriations language

This bill creates two new funds (the cannabis administration fund and the cannabis revenue fund) and provides for continuing appropriations. The LFC has concerns with including

continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the legislature to establish spending priorities.

SIGNIFICANT ISSUES

In response to HM 38, passed by the New Mexico House of Representatives during the 2014 legislative session, LFC studied the effects of marijuana legalization and issued its report December 16, 2014 addressing the areas requested in the memorial. That report is attached to the FIR as Attachment 1.

Federal laws classify marijuana as a controlled substance and provide criminal penalties for its manufacture, distribution, possession or use. These federal criminal laws are enforced by federal government agencies that act independently of state and local government law enforcement agencies. As such, federal marijuana laws could still be enforced in New Mexico. Federal enforcement efforts is an area addressed in the LFC report at pages 4-5, and the federal Department of Justice memorandum referred to therein is attached as Attachment 2.

RLD expresses concern that HB 160 requires RLD to enforce the cannabis program as a law enforcement entity, yet it does not specifically give RLD law enforcement authority. While RLD has separate and distinct statutory authority to investigate and prosecute securities and unlicensed construction activity, RLD is not a law enforcement agency and does not have general law enforcement authority.

To the extent the Act directs that fines collected by RLD or TRD be credited to the cannabis administration fund or the cannabis revenue fund, it may conflict with the directive contained in the New Mexico constitution requiring all fines collected under general laws be deposited in the current school fund of the state. See Art. XII, Sec. 4, N.M. Const.

Further, the Act does not provide the state the ability to regulate the time, place, manner or use of marijuana, instead giving that power to local governments, which could result in different regulations between counties, or even between a county and a municipality located within that county.

AODA comments that while HB 160 would make it illegal to provide marijuana to “a person who is visibly intoxicated,” there is no objective standard for intoxication prescribed and no guidance on how that can be ascertained. 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. The bill would establish a new crime: use of marijuana while driving if the person uses any marijuana while driving a motor vehicle on the highway. Violators would be guilty of a misdemeanor but it is not specified if that would be punished as a misdemeanor under the criminal code or the motor vehicle code. There are obvious challenges in detecting someone who is using of marijuana while driving.

Further, AODA points out the Act does not establish any standardized limit for driving a motor vehicle after consuming marijuana that would be presumptive for intoxication. 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. 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.

More generally, AGO raises these issues:

1. Anyone person who has a legitimate medical need for cannabis/marijuana may already obtain that through New Mexico's Lynn and Erin Compassionate Use Act. HB 160 only serves to create a market for recreational use of cannabis/marijuana.
2. New Mexico currently has a limited amount of substance abuse treatment centers available to address alcohol abuse (a legal and highly regulated substance) and other forms of substance abuse. Under these circumstances it would be fair to say that New Mexico is ill equipped to provide treatment to persons who become dependent on cannabis/marijuana, which would likely become a greater issue if the substance were legalized.
3. Should HB 160 become law, New Mexico would be the only southwest border state to legalize cannabis/marijuana. Unintended consequences might be an influx of transnational gang activity relating to the sale and distribution of cannabis/marijuana.
4. Although highly regulated under HB 160, legalized cannabis/marijuana, similar to alcohol, which is also highly regulated, will likely result in increased access of this substance to minors. Scientific evidence supports the detrimental impact of cannabis/marijuana to a child's brain development.
5. Currently the state of Colorado, who has legalized cannabis/marijuana, is being sued by the States of Nebraska and Oklahoma based on the alleged negative impact that Colorado's legalization has produced in having cannabis/marijuana then transported into the borders of these neighboring states. It is possible that legalization of cannabis/marijuana in New Mexico would result in litigation by other states against our own state.
6. Although there is an anticipated cost savings to law enforcement assumed in the bill, costs to law enforcement may actually increase due to added enforcement of the provisions of the proposed act.

PERFORMANCE IMPLICATIONS

DOH points out that Section 31 requires a 25 per cent distribution to DOH from the cannabis revenue fund "to establish, operate and maintain alcohol and substance abuse prevention, early intervention and treatment and related mental health services." Although DOH does provide in-patient substance abuse treatment through the Turquoise Lodge, Rehabilitation Hospital and Fort Bayard facilities, many of the State's alcohol and substance abuse prevention and intervention programs are provided through the Human Services Department (HSD), Behavioral Health Services Division, which division is not mentioned in HB 160.

ADMINISTRATIVE IMPLICATIONS

RLD reports that substantial staff and budget have been required in Colorado and Washington to adopt regulatory frameworks for recreational marijuana. Similarly, RLD anticipates it will require extensive increases to staff and funding to promulgate and implement an entirely new regulatory scheme. Additionally, RLD is concerned that implementing HB 160's directive that priority consideration in licensing be given to persons already licensed through DOH's medical

marijuana program could be very difficult given the influx of new applicants anticipated when the program first begins its licensing activities.

RLD also notes that all its boards and commissions follow the Uniform Licensing Act, while HB 160 contemplates compliance with the outdated Administrative Procedures Act.

RELATIONSHIP

SJR 2 proposes a constitutional amendment that requires voter approval of possession and personal use of marijuana by persons twenty-one years of age or older, and directs the legislature provide by law (much as HB 160 does) for the production, processing, transportation, sale, taxation and acceptable quantities and places of use of marijuana and hemp to protect public health and safety.

TECHNICAL ISSUES

The amendments to Section 24-1-9, NMSA 1978 (passengers of ski lifts) and Section 24-15-10, NMSA 1978 (skier responsibilities) appear to be only minor wording updates that are not germane to this bill.

A “youth correctional facility” referenced on line 8 on page 49 may more appropriately termed a “secure juvenile facility”.

The Act authorizes sale of marijuana, marijuana products and industrial hemp to persons 21 years of age and older. Thus, the amendment to the distribution to minors provision in the Controlled Substances Act to exempt intentional distribution of a controlled substance to a person under the age of 18 does not appear to be necessary or meaningful. See page 100-102.

Sections 6 and 27, concerning TRD administration and rule-making, appear at least somewhat duplicative.

OTHER SUBSTANTIVE ISSUES

AODA comments on these issues arising under the Act:

The Attorneys General for the states of Nebraska and Oklahoma are preparing a lawsuit against the state of Colorado. They are asserting that their states, as neighboring states to Colorado, are having to bear the costs associated with an increasing number of marijuana-related cases now occurring in their states while Colorado reaps the financial rewards, and that federal law must trump the Colorado state law permitting recreational use. No quantification in support of their claims of undue burden have been published yet, and one Oklahoma legislator is asking his AG to drop the case because of a concern that it may erode states’ rights reserved to them under Amendment X to the U.S. Constitution.

The federal-state law conflict is having a direct effect on financial transaction in the states that have legalized marijuana. The Department of Justice issued a memorandum on that subject: “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. Secs. 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 under these offenses based on transactions involving marijuana proceeds does not require an underlying marijuana-related conviction under federal or state law.” At least one Colorado marijuana business has been charged with money laundering and an additional charge accuses as individual of attempting an illegal financial transaction by trying to deposit proceeds from a medical marijuana dispensary into a bank account. See, U.S. v. Hector Diaz, et al., 13-CR-00493 REB (D-Colo).

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 trying to make their tax payments. 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. (Although that section is addressed in the Act for state taxation purposes, it still applies for federal taxation purposes.)

There are currently 23 states, including New Mexico, the District of Columbia and Guam that permit medical marijuana. See, e.g., Sec. 26-2B-1, et seq., NMSA. Reportedly, in the 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.

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 unknown what impact the bill might have on the criminal justice system. The

Bernalillo county district attorney’s office, which prosecutes cases in the most populous county in New Mexico, has reported the number of marijuana possession cases they prosecuted has been relatively small, and is declining.

	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>
District Court:	45	58	62	49	28
Metropolitan Court:	56	15	20	24	2
Children’s Court	181	166	159	138	87

That is apparently not unique to Bernalillo County. A federal report shows that in FY 2012 there were just 83 people in the entire country who were sentenced for marijuana possession under the federal drug guidelines. Most federal judges are reported to use the federal guidelines when they sentence their criminal cases.

DOH provides this analysis, including some information from Colorado and Washington based on their experience with recreational marijuana:

Marijuana is not a benign substance. A number of negative consequences of marijuana use are known despite the Federal restrictions on marijuana that have limited research into the effects (either positive or negative). Among them:

- **Addiction/Dependence:** The lifetime risk of dependence is about 9% of marijuana users. While this is lower than the risks for nicotine, heroin, cocaine, and alcohol, it is not negligible (Bostwick, 2012). Addiction/Dependence also entails a withdrawal syndrome (Greydanus, et al, 2013, Bostwick, 2012).
- Research studies have noted that cannabis users “demonstrate important deficits in prospective memory and executive functioning that exist beyond acute cannabis intoxication” (Greydanus, et al, 2013). This appears to be a relatively subtle effect.
- Chronic use of cannabis is associated with increased rates of psychosis. Frequent cannabis use doubles the risk for schizophrenia and psychotic symptoms (Greydanus, et al, 2013). The question of whether cannabis causes psychosis remains unresolved, but there is some evidence that it worsens the course of psychotic illness (Bostwick, 2012).
- The risk of motor vehicle crashes involving death or injury is about two times as high for drivers under the influence of marijuana than for sober drivers. Tests used in the field for the detection of impaired drivers may not be precise enough to detect marijuana (Greydanus, et al, 2013).

While dependence seems quite rare in users who began after age 25, increased availability of marijuana for people over 21 is very likely to translate into increased availability for those under 21 where there are even larger risks. Many of the ill effects of marijuana are magnified for adolescent users. The average age for beginning marijuana use is around 18 years of age. Dependence and psychosis are much more common among users who begin in their teens, especially the early teens (Bostwick, 2012). Research has shown permanent changes in the brains of persistent users who began use in their early teens (Greydanus, et al, 2013, Bostwick, 2012).

Most teens who enter substance abuse treatment programs in Washington State report that marijuana is the main or only drug they use (Washington State Tobacco, Alcohol and Other Drug Trends Report, 2012). Colorado and Washington have seen increases in emergency

department visits from children accidentally consuming THC-laced products since their laws legalizing marijuana went into effect.

(http://www.oregonlive.com/opinion/index.ssf/2014/11/legal_pot_will_boost_traffic_a.html)

In Colorado marijuana-related exposures for children five and under have increased 268 percent from 2006-2009 to 2010-2013, triple the national rate, according to HIDTA. In Colorado, 12- to 17-year-old marijuana use rate is 39 percent higher, and the 18- to 25-year-old marijuana use rate is 42 percent higher than the national rate.

(<http://www.rmhidta.org/html/2014%20Legalization%20of%20Marijuana.pdf>)

Marijuana legalization would likely increase use among teens who already use marijuana, according to data from a survey of U.S. high school students. Nearly two-thirds (65 percent) of teens who reported using marijuana at least once in their lifetime said that legalizing the drug would make them more likely to use it. In addition, more than three-fourths (78 percent) of heavy marijuana users reported that legalizing the drug would make them more likely to use it.

Only sixteen percent of teens who reported that they had never used marijuana agreed that they would be more likely to use marijuana if it were legal. (*Adapted by CESAR from The Partnership for a Drug-Free America and the MetLife Foundation, The Partnership Attitude Tracking Study (PATS): Teens and Parents, 2013.* <http://www.ibhinc.org/pdfs/CESARFAX2226TeensReportedUseofMarijuanaIfLegal.pdf>)

POSSIBLE QUESTIONS

Should the medical marijuana program be moved from DOH to RLD?

AMENDMENTS

MD/je/bb

Attachment 1

Attachment 2

Representative Luciano "Lucky" Varela
Chairman

State of New Mexico

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December 16, 2014

MEMORANDUM

TO: Representative Bill McCamley
THROUGH: David Abbey, Director, LFC
FROM: Peter van Moorsel, Ruby Ann Esquibel, LFC Staff
SUBJECT: House Memorial 38 – Study Effects of Marijuana Legalization

Passed by the New Mexico House of Representatives during the 2014 legislative session, House Memorial 38 notes Colorado and Washington are the first states to legalize marijuana production, sale, possession and use; and the effects of marijuana-legalization measures in Colorado¹ and Washington² can inform New Mexico policymakers and residents who are considering whether to similarly legalize marijuana in New Mexico. House Memorial 38 (Attachment 1) requests the Legislative Finance Committee to study the effects in Colorado and Washington of marijuana legalization on: (1) state revenue and agricultural production levels; (2) illegal drug-addiction rates, (3) state and local law enforcement resource levels, (4) federal law enforcement efforts; and (5) testing for high-danger jobs, such as those in heavy-equipment operation and public safety. This report attempts to address the areas of study requested in the memorial and summarizes information from Colorado and Washington and from other resources. However, as both initiatives are relatively new, the information available is limited and constantly changing. As such, this memo is subject to revision.

I - State revenue and agricultural production levels

¹ Colorado's Amendment 64 sets the parameters of the policy: a legalized, regulated system for the cultivation and purchase of marijuana products, in controlled quantities, for individuals 21 and older. It also provides guidance on taxation, revenue allocation, and local control.

² Washington's Initiative 502 would license and regulate marijuana production, distribution, and possession for persons over 21; remove state-law criminal and civil penalties for activities that it authorizes. It would tax marijuana sales and earmark marijuana-related revenues. The new tightly regulated and licensed system would be similar to those used to control alcohol.

other resources. However, as both initiatives are relatively new, the information available is limited and constantly changing. As such, this memo is subject to revision.

I - State revenue and agricultural production levels

State Revenue:

In an August 2014 memo, the Tax Foundation discusses the challenges of creating a legal structure for the retail sale of marijuana. In both Colorado and Washington, sales are permitted to adults age 21 or over. Public use, driving under the influence, and taking marijuana outside the state are illegal. In Washington, adults can purchase up to one ounce of the flowering part of the plant, 16 ounces of edible solids, 72 ounces of edible liquids, or 7 grams of concentrates or lotions. In Colorado, residents can purchase up to one ounce of any kind of marijuana product and non-residents can purchase up to a quarter of an ounce. Sellers must be licensed and must meet health and safety requirements, employers can still ban use by employees, and Washington capped the number of retail locations.

The challenges of taxing marijuana stem from the fact that marijuana is available in many forms. The tax foundation states excise taxes on other products are historically imposed at a specific amount regardless of the retail price, such as the federal gasoline tax of 18.4 cents per gallon and the federal cigarette tax of \$1.0066 per pack. Because marijuana can be purchased as a cigarette, an edible, a liquid, or vapor, all with a wide variety of concentrations, the Tax Foundation notes a specific excise tax is untenable.

Colorado. Depending on whether Colorado marijuana is classified as medical or retail, its sale is taxed differently. All sales of medical marijuana, medical marijuana products, retail marijuana, and retail marijuana products are subject to the state's 2.9 percent sales tax and any local sales taxes. Retail marijuana is also subject to a 15 percent excise tax on the average market price of retail marijuana. The excise tax is imposed on the first sale or transfer from a retail marijuana cultivation facility to a retail marijuana store, retail marijuana product manufacturing facility or to another retail marijuana cultivation facility. The price of retail marijuana at the store will include the excise tax, similar to liquor or tobacco. Retail marijuana is also subject to the 2.9 percent state sales tax, any local sales taxes and an additional 10 percent state sales tax. If a city or county imposes a specific tax on retail marijuana, that tax is reported and remitted directly to that city or county.

The marijuana sales tax is deposited in the marijuana cash fund. Fifteen percent of the sales tax will be distributed to local governments on a pro rata basis. The first \$40 million in retail marijuana excise tax revenue collected annually will go to public school construction. Any revenue above that will assist the state in regulating and enforcing the marijuana industry.

The Colorado Office of Research Analysis cites data from the Colorado Department of Revenue in reporting a total of \$34.8 million in marijuana tax, license, and fee revenue during FY14. Of this amount, \$30.5 million was transferred to the marijuana cash fund, \$3 million to the public school capital construction assistance fund, and \$1.4 million to local governments. In the first two months of FY15, a total of \$13.9 million had been collected, and \$10.7 million transferred to the marijuana cash fund.

Washington. In the state of Washington, marijuana retailers must collect and remit retail sales tax on sales of useable marijuana, and marijuana-infused products, and marijuana concentrates to consumers. Washington's Initiative 502 applies a 25 percent excise tax on each level of the system selling retail marijuana: producer to a processor, processor to a retailer, and retailer to the customer. In addition, the state sales tax, business and occupation taxes on the production, and local retail sales taxes apply.

All marijuana excise taxes, license fees, penalties, forfeitures, and all other moneys, income, or revenue received by the state liquor control board from marijuana-related activities, are deposited in the dedicated marijuana fund. Initiative 502 further requires the Liquor Control Board to regularly review the tax rate and recommend any adjustments to the legislature that would discourage use and undercut illegal market prices. This feature would facilitate fine tuning the tax rate, an important issue given that the excise tax is applied to every transaction level, which could contribute to high consumer prices.

The initiative requires a portion of the marijuana excise tax revenue to go to the Department of Social and Health Services for a biennial Washington state healthy youth survey and a cost-benefit evaluation, as well as to the Liquor Control Board to administer the initiative. The remaining revenue is transferred as follows:

- 50 percent to the state public health plan trust account;
- 15 percent to substance abuse programs;
- 10 percent for a marijuana education and public health program;
- 5 percent to fund community health centers;
- 1 percent to state universities to research effects of marijuana use;
- 0.3 percent to public schools to fund grants; and
- the remainder to the general fund.

The Washington Liquor Control Board notes estimates for marijuana excise tax revenue range anywhere between \$0 and \$2 billion dollars during the first five years. The board cautions, however, that without knowing what the market will look like or what the federal reaction will be, it is not possible to estimate the revenue with any certainty. Washington's legal retail sales began later than those in Colorado. In an August report on the legalization efforts of both states, the Tax Foundation reported the first month of legalization resulted in \$3.8 million in sales and about \$1 million in tax revenue. The Washington State Liquor Control Board, in charge of the program, estimates two-year marijuana tax revenue for the will be around \$122.5 million in the 2015-2017 biennium; and \$336.9 million in the 2017-2019 biennium.

Agricultural Production Levels

At this time, LFC staff have not gathered sufficient information to discuss the effect of marijuana legalization on agricultural production levels.

Colorado has provided guidance concerning marijuana growers. Adult residents can grow up to 6 marijuana plants per person. No more than 12 total plants are allowed per residence regardless of the number of adults living there. Marijuana plants must be kept in an enclosed, locked area. Marijuana must be grown in a fully enclosed and locked space, whether indoors or outdoors, and home grown marijuana, no matter the form, may not be sold to others.

In Denver, only existing medical marijuana centers, manufacturers and cultivators that are eligible can apply for a retail license before January 1, 2016. They can convert to a retail license or add a retail license to their existing medical marijuana license.

II - Illegal drug-addiction rates and public health issues

The U.S. Centers for Disease Prevention and Control (CDC) indicates the teenage marijuana use rate in Colorado decreased by 3 percent from 2009 to 2011. The CDC has not compiled more recent data.

Colorado's health department proposed a ban on the sales of nearly all forms of edible marijuana at recreational marijuana shops but backed away from the plan amid an industry outcry and questions over legality. However, the proposal highlights the concerns about preventing people, especially children, from accidentally eating marijuana-infused products. Such accidental ingestions have sent children to the hospital, caused an increase in calls to poison-control hotlines, and become one of the key measures lawmakers use in discussing whether legal marijuana sales can fit harmoniously in society. Sales of infused edibles make up about 45 percent of the legal marijuana marketplace in Colorado, according to the Colorado Cannabis Chamber of Commerce. It should be noted in June 2014, the Colorado Department of Revenue, Marijuana Enforcement Division, in partnership with the Denver Police Department, reported 100 percent compliance within the regulated marijuana businesses in underage compliance checks. The Marijuana Enforcement Division investigators and the Denver Police Department conducted 16 underage operations to prevent minors from obtaining marijuana or marijuana products.

Legalization of marijuana has raised concerns about potential public health problems associated with increased marijuana use, including the following:

- **Marijuana use affects the developing brain.** A recent study in *Brain* reveals impairment of the development of structures in some regions of the brain following prolonged marijuana use that began in adolescence or young adulthood.² Marijuana use is associated with cognitive impairment, including lower IQ among adult chronic users who began using marijuana at an early age.³
- **Substance use in school age children has a detrimental effect on their academic achievement.** Students who received earned D's or F's were more likely to be current users of marijuana than those who earned A's (45 percent versus 10 percent).⁴
- **Marijuana is addictive.** Estimates from research suggest that about 9 percent of users become addicted to marijuana. This number increases to about 17 percent among those who start young and to 25 to 50 percent among people who use marijuana daily.⁵
- **Drugged driving is a threat to our roadways.** Marijuana significantly impairs coordination and reaction time and is the illicit drug most frequently found to be involved in automobile accidents, including fatal ones.⁶

Additional public health issues that Colorado is examining and monitoring as a result of legalization include patterns and prevalence of use, acute health effects from contaminated marijuana products, the safety of edible marijuana products, accidental poisonings of young children from edible products, use among pregnant and breast-feeding women, secondhand smoke, proper marijuana disposal, laboratory testing, substance abuse, potential impaired driving, and occupational health and safety.

III - State and local law enforcement resource levels

The Department of Justice notes that, outside of its enforcement priorities identified in the following section of this memo, the federal government will rely on state and local authorities to address marijuana activity through enforcement of their own narcotics laws. The DOJ expects states such as Colorado and Washington that have enacted laws to authorize the production, distribution and possession of marijuana, to establish strict regulatory schemes that protect the federal interests identified below. The DOJ emphasized the schemes must be tough in practice, not just on paper, and include strong, state-based enforcement efforts, backed by adequate funding. However, at this point LFC staff have not collected sufficient information to discuss the impact on state and local law enforcement resources of the respective states' legalization efforts.

IV - Federal law enforcement efforts

The Brookings Institution noted in a July 2014 report⁷ that legalized marijuana presented unique issues highlighting the importance of proper implementation of its legal marijuana policy. Importantly, Brookings points out the state's policy raises unusual federalism issues, adding that although marijuana cultivation, distribution, possession, and use are legal in Colorado, they remain against numerous federal laws and regulations. To address these issues, in August 2013 the U.S. Department of Justice announced an update to its federal marijuana enforcement policy in light of recent state ballot initiatives that legalize, under state law, the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale.

In a memorandum outlining the policy (Attachment 2), the DOJ clarified that marijuana remains an illegal drug under the Controlled Substances Act and that federal prosecutors will continue to aggressively enforce this statute. To this end, the DOJ identified eight enforcement areas that federal prosecutors should prioritize. According to the guidance, DOJ will still prosecute individuals or entities to prevent:

- the distribution of marijuana to minors;
- revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- the diversion of marijuana from states where it is legal under state law in some form to other states;
- state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- violence and the use of firearms in the cultivation and distribution of marijuana
- drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands;
- preventing marijuana possession or use on federal property.

Based on assurances that states that legalized marijuana will impose an appropriately strict regulatory system, the Department has informed the governors of Washington and Colorado that it is deferring its right to challenge their legalization laws at this time. The DOJ stated that “if any of the stated harms do materialize—either despite a strict regulatory scheme or because of the lack of one—federal prosecutors will act aggressively to bring individual prosecutions focused on federal enforcement priorities and the Department may challenge the regulatory scheme themselves in these states.”

V – Screening for marijuana use at high-danger jobs

Employers and business groups indicate drug screenings identify drug-abusing workers, create a safer workplace, lower their insurance costs and, in some cases, are required by law. But marijuana advocates say the prohibitions amount to discrimination, either against people using marijuana to treat a medical condition or against people who smoke it because they have the legal right to do so off the clock and away from their jobsites.

However, a Colorado Court of Appeals upheld the firing of a man for off-the-job medical marijuana use, concluding that, because marijuana is illegal under federal law, employees have no protection to use it anytime.

VI – Policy lessons learned

Although the Brookings Institution states it is too early to judge the success of Colorado's policy, its report does note Colorado's initial implementation of legal retail marijuana has been largely successful. Brookings notes Colorado met challenging statutory and constitutional deadlines for the construction and

launch of a legal, regulatory, and tax apparatus for its new policy. The report adds Colorado has made intelligent decisions about regulatory needs, the structure of distribution, prevention of illegal diversion, and other vital aspects of its new market. The report notes six policy features have contributed to an effective regulatory scheme: seed-to-sale tracking, vertical integration, temporary barriers to entry and a preference for existing producers, purchase limits, video surveillance, and a revenue-distribution scheme. However, the Brookings institution notes challenges remain, including inconsistent potency of edibles, lack of oversight of homegrown marijuana, tax rate differentials between medical and retail marijuana, and problems associated with marijuana tourism.

The Brookings Institution also published a report on the experience in Washington.⁸ Although Washington began retail sales more recently than Colorado and information on sales and revenue is limited, the report points out that the state is being proactive in studying the effects of the legalization experiment, including a cost-benefit analysis, using some of the tax revenue generated by retail sales.

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U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole 
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana 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 drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- 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 or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.¹

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

¹ These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
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