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FISCAL IMPACT REPORT

ORIGINAL DATE 02/26/21

SPONSOR Ivey-Soto LAST UPDATED _____ HB _____

SHORT TITLE Cannabis Regulation Act SB 13

ANALYST Glenn/Torres/Iglesias

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY22	FY23	FY24		
\$15,878.7	\$32,529.3	\$46,534.1	Recurring	Cannabis Excise -State GF
\$8,550.1	\$17,515.8	\$25,056.8	Recurring	Cannabis Excise -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
\$6,203.7	\$20,929.3	\$32,634.1	Recurring	TOTAL GENERAL FUND
\$2,497.6	\$10,215.8	\$16,256.8	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
	\$322.0	497.5	497.5	\$1,317.0	Recurring	Cannabis Regulation Fund/General Fund (TRD)
	\$5,977.0	\$182.0	\$0	\$6,159.0	Nonrecurring	Cannabis Regulation Fund/General Fund (TRD)
	\$0	\$4,450.0	\$5,325.0	\$9,775.0	Recurring	Cannabis Regulation Fund/General Fund (DOH)

	\$0	\$1,632.0	\$1,282.0	\$2,914.0	Recurring	Cannabis Regulation Fund/General Fund (NMED)
	\$0	\$262.0	\$262.0	\$524.0	Recurring	Cannabis Regulation Fund/General Fund (NMDA)
	\$0	\$150.0	\$0	\$150.0	Nonrecurring	Cannabis Regulation Fund/General Fund (NMDA)
	\$0	\$1,257.9	\$1257.9	\$2,515.8	Recurring	Cannabis Regulation Fund/General Fund (DPS)

(Parenthesis () Indicate Expenditure Decreases)

Relates to
HB12, SB288, SB363

Duplicates
HB17

SOURCES OF INFORMATION

LFC Files

- Responses Received From
 Department of Taxation and Revenue (TRD)
 Department of Agriculture (NMDA)
 Environment Department (NMED)
 Department of Health (DOH) (analysis of HB17)
 Department of Public Safety (DPS)
 Department of Finance and Administration (DFA)
 Economic Development Department (EDD)
 Department of Transportation (NMDOT)
 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)
 Public Education Department (PED)

No Response Received
 Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of Bill

Senate Bill 13 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 Regulation Division (CRD) created in RLD is charged with regulating and administering a licensing program for commercial cannabis activities and the medical cannabis program provided in the Lynn and Erin Compassionate Use Act (LECU Act) and cannabis education and training programs.

As of the effective date of the act, CRD must convene the Cannabis Policy and Regulatory Advisory Committee (CPRAC) to advise on rules and best practices, including best practices that promote diversity in licensing and employment and protect public safety, and to publish an annual report detailing its activities. CRD is required to develop rules in consultation with CPRAC, NMED, and NMDA. NMED also must adopt rules establishing labeling and packaging requirements for cannabis products and proposed occupational health and safety rules for persons working in the cannabis industry. The bill requires rulemaking by CRD as necessary to carry out its duties under the CRA by July 1, 2022.

No later than July 1, 2021, CRD must begin issuing transitional licenses to persons licensed under LECU Act to allow those licensees to conduct medical and commercial cannabis activities. Each license will designate whether it is solely for medical cannabis activity or for both medical and commercial cannabis activity. CRD will accept and begin processing transitional and regular license applications no later than the act's effective date. CRD's licensing program encompasses a variety of commercial and medical cannabis activities, including licenses for manufacturers, testing and research laboratories, couriers, integrated businesses and microbusinesses, producers, and retailers. CRD also will issue cannabis occupational licenses, which allow a person to offer, sell, serve, dispense, cultivate, manufacture, test, or transport cannabis products. Licenses shall be valid for two years, unless suspended or revoked for cause. Violations of the CRA may result in license suspension or revocation, sanctions, correction plans, or penalties.

Under the CRA, adults age 21 and older are allowed to purchase, possess, and transport not more than 2 ounces of cannabis flowers and 16 grams of extract. Except as provided in the LECU Act, it is unlawful for an unlicensed person to produce cannabis, defined as any activity involving the cultivation of cannabis. This effectively precludes consumers of nonmedical cannabis products from possessing cannabis plants.

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

DOH must establish a medical cannabis assistance program to make distributions to provide medical cannabis or financial assistance to qualified patients who are sick and low-income and higher use patients who need assistance in obtaining medical cannabis. DOH is charged with administering the nonreverting "low-income medical patient assistance fund," created for the purpose of assisting qualified patients participating in the medical assistance programs created under the LECU Act and the CRA. DOH also must prepare an annual report evaluating the affordability and accessibility of medical cannabis and the needs of qualified patients in rural areas.

SB13 enacts the Cannabis Tax Act (CTA), which imposes a cannabis sales tax of 20 percent on cannabis retailers and is applied to the price paid for a cannabis product. The 20 percent rate appears to be composed of a state rate of 13 percent and a local government (municipality or county) rate of 7 percent. The tax does not apply to retail sales of medical cannabis sold to qualified patients or caregivers pursuant to the LECU Act. Sales of recreational and medical cannabis are deductible from gross receipts and are therefore not subject to the gross receipts tax. The bill adds provisions to the Tax Administration Act requiring that 35 percent of county or municipal tax revenue from retail sales of cannabis products within a county or a municipality be distributed to that county or municipality. It is unclear how these distributions compound on the already designated state and local rates.

SB13 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 unlicensed trafficking, intentionally producing cannabis, 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.

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

Continuing Appropriations

Section 3(I)-(J) provides for the “cannabis regulation fund.” Money in the fund is subject to appropriation to fund the activities of CRD and other specified agencies required by the CRA. Balances in the fund do not revert but may be reappropriated to cannabis-related programs.

Section 25 provides for the “low-income medical patient assistance fund.” Money in the fund is subject to appropriation to DOH for the purpose of assisting qualified patients participating in medical cannabis programs. Balances in the fund do not revert to the general fund.

The funds created in Sections 3 and 25 provide for continuing appropriations. LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds because earmarking reduces the ability of the Legislature to establish spending priorities.

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.

Revenues generated from the cannabis sales tax are distributed by percentage, with 65 percent of the total reaching the general fund. The revenue tables reflect expected distributions to the state and localities based on LFC modeling.

LFC estimates assume widespread retail sales of recreational cannabis begin in 2022. Faster promulgations of rules and widespread transitional licensing could increase FY22 fiscal estimates.

The imposition and distribution of taxes are unclear and could imply distributions to localities from state cannabis sales rates, alterations to distributions of local cannabis sales taxes, or both because of vague language and differing definitions of what belongs to localities. The estimate included in this report is based on a 20 percent cannabis excise tax. Furthermore, the estimate includes a 35 percent distribution to localities of the 20 percent cannabis excise tax.

Operating Budget Impact

TRD states that the estimated personnel time to implement the new tax program in TRD's Administrative Services Division is 440 hours, at a cost of \$18,551. The impact on TRD's Information Technology Division is estimated to be \$6,280,571 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.

In its analysis of HB17, which is a duplicate of SB13, DOH states that 20 medical cannabis program FTE currently administer the medical cannabis patient services. The budget for those positions is approximately \$1.86 million currently. Contract services, facilities, supplies, vehicles, and other costs associated with the administration of the medical patient registry currently total approximately \$2 million. DOH projects administering the patient services section of the medical cannabis program with the current projected continued growth will require an additional 11 staff members to be added to the program staff in FY22 for a total of 31 staff and 10 additional staff, for a total of 41 staff in FY23 with a total salary and benefit cost of \$2.05 million and \$2.725 million, respectively. DOH also projects it will require an additional \$2.4 million in FY22 and \$2.6 million in FY23 to cover the costs of supplies, contracts, facilities, vehicles, and the registry database and to conduct and produce the annual assessment report on the affordability and accessibility of medical cannabis required in the LECU Act. DOH also notes if, as a result of the bill's enactment, the 8 FTE currently in the licensing and compliance section of DOH's medical cannabis program are transferred to CRD, it would represent a reduction in costs for DOH of \$540 thousand for FTE and \$900 thousand for operations.

NMED believes SB13 would necessitate 5 additional FTE to staff the cannabis program in the Environment Department, 6 additional dedicated technical FTE to develop, train, and implement occupational health and safety rules specific to the cannabis industry, and contract funding (for

technical experts and attorneys) in FY22 to aid in rule development prior to July 1, 2022. 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 that 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 \$915,312 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.

AHO states the tax program added by SB13 may increase tax protest hearings. Although the significance of the increase is difficult to predict, AHO's prior experience demonstrates that new tax programs generally result in an initial increase in protests. Nevertheless, because the volume of tax protests over the last few years has stabilized, AHO is optimistic that 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 that 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 that 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.

LOPD believes that, in the longer term, SB13 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).

AOC states there will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, and appeals from convictions. To the extent, however, that SB13 reduces or eliminates penalties for cannabis-related offenses and activities, the demand for court time and resources may diminish. New laws, amendments to existing laws, and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

Implementation and Regulation Generally

NMDA reads the act, including language in Section 3(C)(10), as transferring pesticide review and registration authority, currently under NMDA (Pesticide Control Act (Sections 76-4-2 through 76-4-39 NMSA 1978)), to CRD for pesticide use in cannabis. This transfer of authority may result in conflicting pesticide registrations between cannabis, hemp, and medical marijuana.

NMED points out that certain duties assigned to it are not within its areas of expertise. Section 3(C)(10) requires its participation (along with CRD and NMDA) in establishing standards for pesticides and developing training and education related to their use, which it believes is better left to NMDA. Similarly, Section 3(C)(8) requires NMED participate in rulemaking related to establishing standards for testing cannabis products, while Section 16(C) requires the agency to provide on an annual basis certified reference materials for laboratory testing. Neither of these subject areas are within the agency's expertise. Instead, NMED suggests NMDA and DOH Scientific Laboratory Division (DOH/SLD) be assigned these tasks because both have direct expertise in laboratory research and testing. NMED also notes some of the bill's protocols are also regulated by the Environmental Improvement Board or Water Quality Control Commission. For example, anyone discharging effluent or leachate so that it may move directly or indirectly into groundwater must do so pursuant to discharge permit issued by NMED. Additional environmental requirements from CRD may cause regulatory confusion or conflict with existing environmental statutes and regulations.

NMAG notes the act refers to licenses to conduct a "commercial cannabis activity" (Section 8(B)) and occupational licenses (Section 10). Section 8(A) states there is "no vested property right" in a license, without differentiating between a commercial cannabis activity license and an occupational license. NMAG believes this may be problematic. Although such a provision may apply to a commercial cannabis activity license, which is similar to a liquor license (*see, e.g.*, NMSA 1978, § 60-6A-19 (holders of licenses issued under the Liquor Control Act have no vested property right in the licenses)), it does not apply to an occupational license. Courts have expressly held that an occupational license, or a state-issued license to practice one's profession, is a property right (*see, e.g., Varoz v. New Mexico Bd. of Podiatry*, 1986-NMSC-051, ¶ 12).

Medical Cannabis Program

In its analysis of HB17, DOH notes that the bill creates the low-income medical cannabis assistance fund and the medical cannabis assistance program for medical cannabis patients. Based on current self-reporting, 30 percent of the medical cannabis program’s patients state they earn less than 200 percent of the poverty level, which suggests that many people would qualify for and use money from the fund and leave many other eligible individuals without access to the funds.

DOH also notes the definition of “qualified patient in the CRA does not include a residency requirement. The definition conflicts 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. To avoid any confusion regarding the application of the CRA, DOH suggests changing the definition of “qualified patient” in the CRA so that it is the same as the definition in the LECU 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 SB13 contains a detailed account of the methodology EDD used to calculate its estimates and a breakdown of estimated job creation by county.

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

Conflict with Federal Law

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

In addition, NMAG advises that federal law criminalizes a number of activities that would be

permitted under New Mexico law. For example, it prohibits the distribution, possession with intent to distribute, and manufacture of marijuana or its derivatives (21 U.S.C. §§ 841, 960, 962); simple possession of marijuana (21 U.S.C. § 844); and the establishment of 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

LOPD states that, under current law, it is generally illegal to possess “marijuana,” with no distinction between cannabis flowers and extracts. SB13 would legalize possession of some amounts of marijuana products but would retain penalties for possession in excess of the allowed amounts. The bill also distinguishes between the allowable weight of cannabis flowers and the allowable weight of cannabis extracts. In some cases, this distinction would actually **increase** penalties relative to current law. A person who possesses 65 grams (or about 2.3 ounces) of cannabis extract is guilty of a misdemeanor under current law. Under this bill, possession of more than 64 grams of extract would become a fourth-degree felony.

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

DPS makes the following points related to enforcement:

- DPS notes Section 5 requires DPS, in conjunction with AOC, to compile an annual report on the total number of arrests, citations, and penalty assessments for cannabis-related violations broken down by category and penalty level, race, ethnicity, age, gender, and jurisdiction. According to DPS, it is able to compile fingerprint-based arrest data from its automated fingerprint identification system (AFIS). DPS is not the repository for citation data, so DPS will only be able to gather data on those issued by State Police officers and those issued through the TRACS system for a limited number of law enforcement agencies. DPS further notes neither AFIS nor the TRACS system currently track ethnicity.
- DPS also believes that, based on its broad perspective as the state’s largest statewide law enforcement agency, a representative of DPS’s State Police division should be specifically included in the membership of the cannabis policy and regulatory advisory committee created under Section 3(E).
- DPS raises concerns that Section 18(C)’s list of factors that may be considered “reasonable articulable suspicion” of a crime may conflict with judicial interpretation of

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

- Section 21 makes intentional distribution of marijuana by a person over eighteen only a misdemeanor (unless done from a storefront that would lead a reasonable person to believe it is a licensed establishment, in which case it is a fourth degree felony). DPS is concerned this is insufficient incentive to encourage licensed distribution as opposed to illicit market distribution. If there is only a minor penalty for illegal sales, individuals may decide it is worth the risk of operating illegally and thereby avoid taxation. DPS recommends making sales by either method, at a minimum, fourth degree felonies.
- Section 22 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.

NMDOT notes SB13 is silent as to whether employers may restrict or regulate the use of cannabis at work or during working hours. It is not clear if the intent of the bill is to treat cannabis like tobacco, which may be consumed in restricted areas at restricted times at work, or like alcohol, which employers may disallow during working hours and ban from the workplace. Currently, the Lynn and Erin Compassionate Use Act does not relieve the patient or primary care giver from criminal or civil penalties in the workplace, which state agencies, including NMDOT, have interpreted to restrict cannabis activity, including use and possession in state buildings and vehicles, and to prohibit being under the influence during working hours. Though a similar interpretation may apply to this bill, it is without specific guidance in the bill.

Imposition of Taxes and Related Issues

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

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

Finally, a **potency-based** tax could be imposed. These taxes are similar to alcohol taxes, except instead of taxing drinks with a higher percentage of alcohol at higher rates (i.e., liquor is taxed at a higher rate than beer), the tax is based on the THC level of the marijuana product. Illinois is currently the only state with a THC-based tax. It taxes products with a THC content of 35

percent or less at 10 percent of retail price and those with more than 35 percent at 25 percent of retail price. All marijuana-infused products (e.g., edibles) are taxed at 20 percent of retail price.

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

SB13 would impose an excise tax of 20 percent and no application of 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 SB13 would be 20 percent.

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

TRD notes that SB13 does not have an express effective date. TRD will need time to get set up to administer this tax program if the bill is enacted, and suggests an effective date of January 1, 2022 at the very earliest to allow TRD sufficient time to develop and administer the new tax.

TECHNICAL ISSUES

NMDA points to the definition of cannabis in Section 2(C), which refers to “delta-9 tetrahydrocannabinol” (THC) only. 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”

SB13 defines “division” in Section 3(U) as “the cannabis control division,” rather than the “cannabis regulation division.”

TRD raises the following issues:

Sections 2 and 30

Both the CRA and the CTA have definitions of a “cannabis retailer.” The definitions differ based on describing the consumer. In Section 2 of the CRA, the “consumer” is described in a separate definition and in the CTA, the word consumer is not used but rather a “person.” In

addition, Section 2 describing selling to a “consumer in this state.” It is unclear if this means a resident of New Mexico or that the product is intended to be consumed in the state by residents or non-residents.

Section 2

Section 2, subsection N. Defines “cannabis sales tax” as a tax on price paid at the “final point of sale.” Other portions of the bill refer to a tax on retailers, and do not refer to “final point of sale.” TRD suggests substituting the phrase “from a cannabis retailer” for “at the final point of sale” for consistency and clarity.

Section 2(N) defines “cannabis sales tax” as a tax on price paid at the “final point of sale.” Other portions of the bill refer to a tax on retailers, and do not refer to “final point of sale.” TRD suggests substituting the phrase “from a cannabis retailer” for “at the final point of sale” for consistency and clarity.

Section 30

The bill does not clearly indicate if cannabis wholesalers or cannabis producers are taxable under the Cannabis Tax Act or are subject to GRT or GGRT. In Section 30, only “cannabis retailers” are defined while under the Cannabis Regulation Act, there is a definition of a “cannabis producer.” For purposes of clarity, TRD recommends including language excluding wholesalers from the application of the act.

Section 31

In Section 31(C), it states that the cannabis sales tax does not apply to retail sales of “medical cannabis products”. “Medical cannabis products” are not defined under Section 30 of the CTA. In Section 2 of the CRA, the definition is for “medical cannabis.” TRD suggests substituting the latter term for purposes of consistency and clarity.

Section 31(A) refers to a “sales tax”. New Mexico does not impose sales taxes, and the use of the term here could be confusing or misleading. TRD suggests substituting the term “excise tax”.

Unless sales must occur only in person, it is not clear what constitutes “selling” in New Mexico and where the sale occurs. Buyer location or seller location could be the location, and thought should be given to whether cannabis may be mailed or delivered, for example.

Section 31(B) states that the rate is applied to the “price paid.” Consider whether using “price paid” or “price received” is more appropriate, as the difference may have implications on whether the incidence of the tax is on the buyer or the seller.

The use of the terms “state rate” and “local government rate” is inconsistent with subsequent references to the tax. Altogether, read with the provisions of Sections 33, 35,36, and 37, it is unclear what the tax rate is, and how much revenue is to be distributed to municipalities and counties. Section 31(B) states that the cannabis sales tax is 20 percent of the price paid, and that the “state rate” is 13 percent, while the “local government rate” is 7 percent. TRD understands this to mean that 13/20ths of the tax revenue goes to the state, and 7/20ths goes to local governments. But in Section 33, TRD is permitted to deduct an amount not to exceed one (1) percent of the “state, *municipal and county* cannabis sales taxes...” TRD assumes that “municipal and county cannabis sales taxes” means the taxes designated as the “local government rate” in Section 31(B), above, and suggests conforming the language of

these two paragraphs for consistency.

In Sections 35 and 36, TRD is directed to distribute “thirty-five percent of the tax revenue from the retail sales of commercial cannabis” to municipalities and counties, respectively. (Presumably the intent is for TRD to distribute 7/20th, 35 percent, of the 20 percent tax to local governments). This language is inconsistent with the language of Section 31(B). It is unclear whether the bill intends that the revenues derived from the 7 percent local government rate should be equally distributed between municipalities and counties; this language, read literally, would not achieve that, in particular because the 20 percent rate authorized by Section 31(B) does not distinguish between sales made within the municipal boundaries of a municipality and those made in the unincorporated areas of a county – it does not allocate sales according to geographical location.

The provisions of Sections 35 and 36 appear to further to conflict with those of Section 37, which requires TRD to transfer “seven percent” to municipalities and counties respectively, in such local governments where TRD is collecting the cannabis tax. TRD also notes that Section 37 does not say what the base for calculating that seven percent is – in other words, seven percent of what? TRD assumes that the meaning is seven percent of the gross receipts, calculated on the basis of the price paid for the cannabis or cannabis products, as in Section 31(B), but the language use does not clearly express this. As written, Section 37 is ambiguous and could be taken to mean, for example, seven percent of the revenues raised, rather than seven percent of the gross receipts. TRD suggests that Sections 31, 33, 35, 36, and 37 be redrafted for consistency and clarity.

Section 32

TRD suggests that rather than using the term “taxable event”, this section should state “the month in which the retail sale occurred” for consistency and clarity.

Sections 35 and 36

These two sections apply the local taxes to “revenue from retail sales.” The state tax, above, applied to the “price paid.” This is probably intended to be the same concept, but different terminology could lead to disputes. TRD recommends consistent use of “revenue from retail sales”

Section 37

Section 37(A), relating to municipalities, does not indicate the tax is subject to Section 7-1-6.15 NMSA 1978 for corrections and adjustments as a result of errors, amended returns, or other reasons. Section 37(B), relating to counties, does include this language. Both sections should include this language to accommodate adjustments to distributions.

Section 39

This section states that it is a sales tax on a “percentage of retail sales” using different language than the tax statute itself. TRD recommends using consistent language.

Here the state tax is entitled a “sales tax” and the local taxes are entitled a “cannabis tax.” TRD recommends conforming terminology to that used in Section 31(B).

“County area” is not a term found in the Tax Administration Act, or the cannabis sales tax. TRD suggests conforming the language to that used to describe the county jurisdiction in

Section 36.

Section 40

This section decouples from Section 280E of the Internal Revenue Code (I.R.C) for purposes of determining taxable income for CIT. A parallel section needs to be included for PIT for those who file a PIT return and includes those filing as a partnership or limited liability company.

Section 42

There is a conflict in the language of the deduction under Section 42 with the definition of cannabis in Section 30. The definition of “cannabis” under Section 30 excludes cannabis products purchased under the Lynn and Erin Compassionate Use Act. The deduction applies to “cannabis that is purchased in accordance with the Lynn and Erin Compassionate Use Act and the Cannabis Regulation Act.” In addition, TRD would suggest additional clarity between the terms “cannabis” and “cannabis product.”

NMAG points out the bill contains the following contradictory provisions:

- Section 3 states RLD has until July 1, 2022, to develop rules necessary to carry out its duties, but Section 6 states licensing must begin no later than July 1, 2021, which would be impossible without the rules to govern it.
- Section 3 requires CPRAC to be formed on the date the legislation becomes effective but also to consist of both current medical and recreational cannabis licensees. It is unclear whether any recreational licensees would exist at the time of the bill’s effective date.

LOPD notes the bill would impose low-level penalties for juveniles who sold cannabis and for people under 21 who possessed cannabis. Section 21, at p. 40; Section 23, at p. 42. The bill does not, however, say whether these are considered special petty misdemeanors, penalty assessments, or civil penalties.

OTHER SUBSTANTIVE ISSUES

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

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.

NMAG points out that, while SB13 combines medical and commercial cannabis activities and adds new requirements for medical cannabis dispensaries and licensees, it does not amend the current statutes applicable to medical cannabis (NMSA 1978, § 26-2B-1 *et seq.*). Consequently, the bill's provisions purporting to regulate cannabis for medical use may conflict with current law.

LOPD notes the bill does not appear to repeal language in other criminal laws relating to marijuana, including the penalties in Sections 30-31-23 (penalizing possession), 30-31-22 (penalizing distribution), and 30-31-21 (penalizing distribution to a minor). It is not clear whether these laws would continue to have any effect because some of the provisions of the bill directly contradict and would seem to supersede these sections, and the bill would remove marijuana from Schedules I and II and therefore from the definition of "controlled substances." However, for the sake of clarity, it would be useful for the bill to remove all references to marijuana from the criminal code.

LOPD also observes the bill legalizes the possession of "cannabis paraphernalia" and removes the definition of "drug paraphernalia" from the Controlled Substances Act. However, the bill does not repeal the paraphernalia crimes associated with other drugs, nor the crimes for delivery and manufacture of cannabis paraphernalia. *See* NMSA 1978, § 30-31-25.1 (2019). It is not clear how Section 30-31-25.1 would function without a definition of drug paraphernalia.

DPS notes Section 18 provides that personal use of marijuana by a person 21 years or older may not constitute grounds for "detention, search or arrest ... or for a violation of probation or parole." According to DPS, the practical result of this provision may be that judges setting conditions of release following an arrest will be able to prohibit the use of alcohol, but not marijuana. DPS suggests marijuana and alcohol should be on an equal footing in this regard.

DOH notes in its analysis of HB17, that the bill would authorize CRD to deny a license application if the applicant or a controlling person in the applicant's entity has had a license issued pursuant to the CRA or the Lynn and Erin Compassionate Use Act revoked in the three years immediately preceding the date on which the application was filed. DOH believes this is an arbitrary standard and would allow entities whose licenses had been revoked to reapply for licensure regardless of the seriousness of the conduct that led to the revocation.

Additionally, DOH notes states like Colorado and Washington with commercial cannabis programs have monitored the number of emergency department visits by children who accidentally consumed THC products. Colorado also monitors cannabis-related exposures reported to the Poison Control Center for children age 8 and under (<https://www.colorado.gov/pacific/marijuana-health-info/poison-center-data>). DOH suggests these issues be monitored in New Mexico. DOH also suggests the bill include provisions requiring consultation with the State Fire Marshal's Office with regard to health and safety.