

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:

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SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment**
Correction **Substitute**

Date 25JAN2024

Bill No: SB 6 JUS

Sponsor: Katy M. Duhigg, Andrea Romero
Short Title: Cannibas Regulation Changes

Agency Name and Code Number: 790-Department of Public Safety
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		
NFI	NFI	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		
NFI	NFI	NFI	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI	NFI	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: 2024 HB-127 and HB-226
 Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Makes a number of changes relating to cannabis regulation including: prohibits co-location of cannabis activities and alcohol sales; allows for conversion from a medical cannabis legacy nonprofit corporation to a corporation, limited liability company, or partnership; provides for seizure of illegal, adulterated or misbranded products; authorizes training and education programs; creates new crimes for trafficking illegal cannabis products; and includes cannabis as contraband in jails and prisons.

CHANGES RELATING TO LICENSES.

- Prohibits the transfer or assignment of a license from a licensee to another person.
- A cannabis licensee shall not occupy any premises that also houses a licensed business under the Liquor Control Act that allows the sale of distribution of alcoholic beverages to the public or members of a private club or otherwise allows alcohol consumption on the premises.
- Licensees are allowed to conduct other licensed activities, including those pursuant to the Hemp Manufacturing Act and the Liquor Control Act (except for co-location as detailed above).
- A medical cannabis legacy nonprofit corporation that was required to organize in order to qualify for a medical cannabis license may be converted into a corporation, a limited liability company, a limited partnership, or a partnership. The procedure for doing so is detailed.
- The division may refuse to issue, suspend or revoke a license if qualifications are not met or if (1) there is a tax lien related to cannabis activity in any state; (2) a pending investigation or conviction of the applicant or licensee in any state or by the federal government involving fraud, deceit or embezzlement; (3) a pending investigation or a felony indictment or conviction of the applicant or licensee involving producing, manufacturing, distributing, selling, or giving away illegal cannabis products; (4) the denial, suspension, or revocation of a cannabis license in another state that would have the same result if occurring in New Mexico; (5) a pending investigation or felony indictment or conviction for hiring or otherwise using someone under 18 years old or a person who is a victim of trafficking, forced labor, or other exploitation to produce, manufacture, transport or sell cannabis or a controlled substance; (6) a licensee or controlling person refuses to follow division requirement, operational rules, public health and safety laws, or other provisions of state law pertaining to cannabis products; or (7) any other governmental action that makes the person unqualified to be licensed in a cannabis business in New Mexico.
- Production, manufacture, distribution, sale or possession of illegal cannabis product is grounds for denial, suspension, or revocation of a license or for taking any other allowed disciplinary action.

CRIMINAL HISTORY BACKGROUND CHECKS. Adds a new section to the Cannabis Regulation Act to detail requirements for a criminal history background check of an applicant for

a license. This section replaces the provisions currently in Sec. 26-2C-7J through M.

FEES. Removes the specification that the initial application fee and annual renewal fee for a vertically integrated license not exceed \$125,000 for a license for both medical and commercial cannabis activity.

TRAINING AND EDUCATION PROGRAMS. Authorizes a New Mexico public post-secondary educational institution to offer a curriculum designed to prepare students for participation in the cannabis industry. The institution must register the program with the division, which is to post information about the program on its website.

CRIMINAL PENALTIES.

- Clarifies that a minor who traffics cannabis products must attend a drug education and legal rights program and do four hours of community service, in addition to the penalties provided in the Delinquency Act.
- A person between 18 and 21 who traffics cannabis products is guilty of a misdemeanor.
- A person 21 or older who traffics cannabis products is guilty of a fourth degree felony for a first offense, a third degree felony for a second offense, and a second degree felony for a third and subsequent offense.
- A conveyance used for trafficking cannabis products is subject to forfeiture and the provisions of the Forfeiture Act apply to the seizure, forfeiture, and disposal.
- A person who removes, conceals, destroys, or disposes of a cannabis product subject to an administrative hold or embargo is guilty of a fourth degree felony.

ADULTERATED AND MISBRANDED CANNABIS PRODUCTS.

Specifies what makes a cannabis product adulterated, including mold, impure ingredients, unsanitary conditions, substitutions have been made, or damage has been concealed.

A misbranded product is one that has false or misleading advertising, is offered for sale under the name of another product, is an unlabeled imitation, or its label does not conform to the labeling rules.

DEFINITIONS. Makes a number of clarifying and reconciling changes to definitions in the Cannabis Regulation Act and adds:

- “illegal cannabis product” means a cannabis product that is: (1) produced or manufactured outside New Mexico; (2) produced, manufactured, distributed or sold in New Mexico by a person not licensed to do so; or (3) produced, manufactured, distributed or sold by a person acting outside the limits of the person's license;
- provided that "illegal cannabis product" does not include homegrown or homemade cannabis products that comply with the provisions of the Cannabis Regulation Act
- “trafficking cannabis products” means to produce, manufacture, distribute, courier, or sell illegal cannabis products or possess with intent to manufacture, distribute, courier or sell illegal cannabis products.
- Expands definition of “licensed premises” to include all areas of a standalone cannabis consumption area, including retail and other areas, whether in enclosed or outside spaces, and including private or members-only clubs where cannabis products are available for sale or consumption. Also allows licensed premises to be decreased but not increased without

permission of the division.

- Clarifies that “advertising” does not mean (1) a permanently affixed sign or outdoor display relating to the sale of a cannabis product produced, manufactured, or sold on the premises; (2) a label affixed to a cannabis product or the covering, wrapper, or container of the product; or (3) an editorial or other material printed in a publication that is not paid for by a licensee and is not intended to promote the sale of particular cannabis products.

OTHER CHANGES:

- Exempts information obtained by the Cannabis Control Division during an enforcement investigation from inspection of public records.
- Prohibits packaging and labeling of cannabis products in such a manner as to appeal to children.
- Requires the Division to work with the Department of Environment to implement inspection of cannabis establishments to protect the health and safety of consumers.
- Includes the Cannabis Regulation Act in the Racketeering Act, the Delinquency Act, and the Uniform Licensing Act.

REPEALS 2021 law regarding production limits of cannabis by certain licensees. Repeals Laws 2021 (1st S.S., Chapter 4, Section 73) “DELAYED REPEAL.--Section 40 of this act is repealed effective December 31, 2025.” Section 40 reads: “PLANT LIMIT.--No later than September 1, 2021, and each September 1 thereafter, the division shall by rule limit, by plant count, canopy or square footage, the number of cannabis plants that a licensee that is not an integrated cannabis microbusiness or a cannabis producer microbusiness may produce. The rule shall set the number of allowed cannabis plants per licensee to meet an average national market demand for cannabis products in states where adult and medical cannabis are authorized during the preceding year using a consumer base of no less than twenty percent of the adult population of New Mexico.”

FISCAL IMPLICATIONS

None for DPS in its current form.

SIGNIFICANT ISSUES:

Section 6 of SB 6 would add a new section on Criminal History Background Checks – Processes and Procedures -

In 2021, the Federal Bureau of Investigation [“FBI”] Criminal Justice Information Law Unit [“CJILU”] refused to approve the issuance of an originating agency identifier [“ORI”] to the Regulation and Licensing Department [“RLD”] Cannabis Control Division [“CCD”]. An ORI is needed to run a criminal history background check. **The FBI refused the request because it found that language in NMSA 1978 § 26-2C-7 J. and K.** had definitions that were overly broad and vague. The CJILU requested that the language be clarified because as presented the verbiage failed to meet the requirements of Public Law Pub.L. 92-544. Pub. L. 92-544 sets forth the requirements for allowing state and local governments access to FBI criminal history record information [“CHRI”] for licensing or employment purposes. DPS is concerned that the revised language in SB 6 at Section 6 will meet a similar fate.

Subsection J. of § 26-2C-7 currently provides that:

J. The division shall adopt rules providing for submission of an applicant's fingerprints to the federal bureau of investigation to conduct a national criminal history

background check and to the department of public safety to conduct a state criminal history check for the following licensees:

- (1) cannabis manufacturer;
- (2) cannabis producer;
- (3) cannabis producer microbusiness;
- (4) cannabis research laboratory;
- (5) cannabis retailer;
- (6) cannabis testing laboratory;
- (7) integrated cannabis microbusiness; and
- (8) vertically integrated cannabis establishment.

SB 6 strikes this language and replaces it with a new subsection B. which would provide:

B. The division shall adopt rules providing the procedures to be followed for submission of an applicant's biometric scan to the [DPS] to conduct a state criminal history background check and for its submission of the **biometric scan to the federal bureau of investigation to conduct a national criminal history background check** for the following cannabis establishments:

- (1) cannabis courier;
- (2) cannabis manufacturer;
- (3) cannabis producer;
- (4) cannabis producer microbusiness;
- (5) cannabis research laboratory;
- (6) cannabis retailer;
- (7) cannabis testing laboratory;
- (8) integrated cannabis microbusiness;
- (9) vertically integrated cannabis establishment; and
- (10) cannabis consumption licensees if different from cannabis retailer

In 2021, the FBI CJILU¹ advised DPS that current Subsection J. was unacceptable because it provided that the CCD would “**adopt rules** providing for the submission of an applicant’s fingerprints”, unless the rules were “voted on by the full body of the New Mexico Legislature.” In New Mexico, rules are adopted by agencies, without legislative input let alone a vote. DPS is concerned that subsection B., which also proposes to delegate submission procedures to a state agency, will similarly fail to pass FBI muster.

In 2021, the FBI CJILU also advised DPS that current Subsection K. of § 26-2C-7 was unacceptable because the terms “member” and “partner” were “overly broad” and “undefined by statute”. According to the FBI CJILU, in order for the state statute to be approved by the United States Attorney General, as meeting the legal requirements necessary to authorize the FBI to share its criminal history record information (CHRI) with state and local officials for purposes of employment and licensing:

- a. The statute must exist as a result of a legislative enactment;
- b. The statute **must require the fingerprinting of applicants** who are to be subjected to a national criminal history background check;

¹ The FBI provided its guidance in a Letter of November 12, 2021, to New Mexico’s then designated Criminal Justice Information Services [“CJIS”] Systems Officer [“CSO”] the former Bureau Chief of the New Mexico DPS Law Enforcement Records Bureau.

- c. The statute *must expressly (or by implication) authorize the use of FBI records for the screening of applicants*;
- d. The statute must *identify the specific category of applicants/licensees falling within its purview, thereby avoiding overbreadth*;
- e. The statute must not be against public policy; and
- f. The statute must not authorize receipt of the CHRI by a private entity.

The current provision which was rejected by the FBI provides:

- K. The division shall conduct national criminal history background checks and state criminal history checks on the following:
- (1) if an applicant is a limited partnership, each partner of the limited partnership;
 - (2) if the applicant is a limited liability company, each member of the limited liability company;
 - (3) if the applicant is a corporation, each director and officer of the corporation; and
 - (4) any controlling person of the applicant.

SB 6 would strike current subsection K. of § 26-2C-7 in its entirety, add definitions of “director”, “member and manager”, “officer” and “partner” and add a new section requiring “state and national criminal history background checks” on named “persons”/”applicants.”

DPS remains concerned that the new provisions may still lack sufficient specificity to meet the requirements of the FBI. For example, the added definitions, “director”, “member and manager”, “officer” and “partner” assume licensure (each is defined as director, member and manager, officer or partner of either a corporation, limited liability company, or business “licensed by the division.”) By definition, an applicant for licensure will not already be “licensed” by the division. In addition, nowhere in the current Cannabis Regulation Act or SB 6 are the terms “applicants” or “licenses” clearly defined. Nor is there a specific requirement in simple language for the CCD to fingerprint certain individuals and submit the fingerprints to the FBI for a criminal history records check of the FBI’s records on the individuals.

DPS suggests revising SB 6 to define both “applicant” and “license” and to specify who among the natural persons related to non-natural person applicants for licensure, may be fingerprinted by the division and subjected to a background search of FBI criminal history records.

DPS suggests adding the following definitions to §26-2C-1, Definitions:

“applicant” means a natural person, a partnership, a limited partnership, a corporation (for profit or not for profit) or other business association, including but not limited to a cooperative association or limited liability company, organized under the laws of this state, who or which applies for one or more of the licenses issued by the division [CCD];

* * *

“license” means formal permission from the division [“CCD”] to conduct one or more of the following activities under the Act:

- (1) cannabis courier;
- (2) cannabis manufacturer;
- (3) cannabis producer;
- (4) cannabis producer microbusiness;

- (5) cannabis research laboratory;
- (6) cannabis retailer;
- (7) cannabis testing laboratory;
- (8) integrated cannabis microbusiness;
- (9) vertically integrated cannabis establishment; and
- (10) cannabis consumption

Then DPS advises revising Subsection C. on p. 33 of SB 6 as follows:

C. The division may fingerprint an applicant who is a natural person and may also fingerprint the following natural persons who have the following relationship with the following applicants:

- (1) if the applicant is a partnership, every natural person who is identified in the partnership agreement as, or who, with the consent of all the partners is identified as or who, as the result of a conversion or merger is identified as a general or limited partner;
- (2) if the applicant is a corporation, every natural person who is a director on the corporation's board or an officer of the corporation;
- (3) if the applicant is a limited liability company, every natural person who is admitted to membership in the company and who has not dissociated from the company and the manager so designated in accordance with the articles of organization or an operating agreement;

D. The division shall submit the fingerprints of the applicants and natural persons identified in C. to the New Mexico Department of Public Safety for a check of state criminal history records. Only after the fingerprints have been submitted to the DPS for a state criminal history background check on each of the individuals will the division then submit the fingerprints to the Federal Bureau of Investigation for a national criminal history background check of the natural person utilizing the records the FBI.

What is now Subsections D. and E., would now be E and F.

Section 15 of SB 6 would add a new Enforcement – Embargo and Recall, Seizure and Condemnation – Procedures – Penalties:

At present, the DPS/NMSP cannot take on such a task for embargoing and seizing ...illegal, adulterated or dangerously or fraudulently misbranded (cannabis products) and is glad the substitute removed that section and proposed it all in a new bill.

PERFORMANCE IMPLICATIONS

This bill adds broader enforcement actions for DPS. Including the likelihood of additional investigative hours for these cases and the collection of evidence necessary for prosecution. Overall, DPS believes this will be beneficial in dealing with the illicit cannabis market because the current CRA has some areas that are either unclear or lacking enforcement mechanisms. These “gray areas” have been taken advantage of by unscrupulous actors and have been very difficult to address on either the regulatory or criminal side. This bill will give both regulatory and criminal enforcement more tools to deal with these situations. This should assist with reducing the illicit market and incentivizing individuals to comply with the CRA. It will also hopefully assist with reducing the influence of organized crime on the cannabis market.

ADMINISTRATIVE IMPLICATIONS

None for DPS.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

2024 HB-226 Cannabis Background Checks

2024 HB-128 Cannabis Regulation Changes

2024 SB-274 RLD Compliance Bureau for Cannabis Regulation

TECHNICAL ISSUES

The Federal Bureau of Investigations (FBI) provides the authority to collect and exchange criminal history information (CHRI) and is generally predicated upon 28 U.S.C. 534. The FBI with the assistance of the United States Department of Justice, has determined the criteria to include: a) The statute must exist as a result of a legislative enactment; b) it must require the fingerprinting of applicants who are to be subjected to a national criminal history background check; c) it must, expressly ("submit to the FBI") or by implication ("submit for a national check"), authorize the use of FBI records for the screening of applicants; d) it must identify the specific category(ies) of licensees/employees falling within its purview, thereby avoiding overbreadth; e) it must not be against public policy; and f) it may not authorize receipt of the CHRI by a private entity. Additionally, FBI policy requires that fingerprints be initially submitted to the state identification bureau (for a check of state records) and thereafter forwarded to the FBI for a national criminal history check.

Regulation and Licensing Division (RLD) will need to apply for their own Originating Agency Identifier (ORI) through the Criminal Justice Information Law Unit (CJILU). The CJILU makes the final determination if the language suffices under Public Law 92-544 to grant the agency an ORI.

In 2021, an ORI request was denied. The CJILU determined requirements were not met of Public Law 92-544 for access to CHRI. Specifically, NMSA § 26-2C-7(K) states criminal history record checks shall be conducted on the following: if an applicant is a limited partnership, each partner of the limited partnership; if an applicant is a limited liability company, each member of the limited liability company; if the applicant is a corporation, each director and officer of the Corporation; and any controlling person of the applicant. The categories of "partner" and "member" are overly broad and undefined by statute. An ORI cannot be issued for the Cannabis Control Division until NMSA § 26-2C-1 through 26.2C.42 meet the requirements of Pub. L. 92-544.

OTHER SUBSTANTIVE ISSUES

None identified.

ALTERNATIVES

DPS advises revising Subsection C. on p. 33 of SB 6 as follows:

C. The division may fingerprint an applicant who is a natural person and may also fingerprint the following natural persons who have the following relationship with the following applicants:

- (4) if the applicant is a partnership, every natural person who is identified in the partnership agreement as, or who, with the consent of all the partners is

identified as or who, as the result of a conversion or merger is identified as a general or limited partner;

- (5) if the applicant is a corporation, every natural person who is a director on the corporation's board or an officer of the corporation;
- (6) if the applicant is a limited liability company, every natural person who is admitted to membership in the company and who has not dissociated from the company and the manager so designated in accordance with the articles of organization or an operating agreement;

D. The division shall submit the fingerprints of the applicants and natural persons identified in C. to the New Mexico Department of Public Safety for a check of state criminal history records. Only after the fingerprints have been submitted to the DPS for a state criminal history background check on each of the individuals will the division then submit the fingerprints to the Federal Bureau of Investigation for a national criminal history background check of the natural person utilizing the records the FBI.

What is now Subsections D. and E., would now be E and F.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo which includes current inability of RLD CCD to run national criminal history background checks on natural persons applying for licensure under the Cannabis Regulation Act.

AMENDMENTS

DPS does believe the allowance of home grows will continue to be an area susceptible to significant abuse by the illicit market and would recommend a prohibition on home grows.