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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 03/30/21  
**LAST UPDATED** 03/31/21    **HB** \_\_\_\_\_  
**SPONSOR** Pirtle  
**SHORT TITLE** Cannabis Regulation Act    **SB** 3/ec  
**ANALYST** Jorgensen/Torres

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected.
FY22	FY23	FY24		
\$2,247.4	\$4,604.2	\$6,586.4	Recurring	Cannabis Excise –State GF
\$4,885.8	\$10,009.0	\$14,318.2	Recurring	Cannabis Excise –Local
\$5,252.2	\$10,759.7	\$15,392.0	Recurring	GRT – State GF
\$3,285.7	\$6,731.1	\$9,629.0	Recurring	GRT – Local
\$146.6	\$300.3	\$429.5	Recurring	Local DWI Grant Fund
\$48.9	\$100.1	\$143.2	Recurring	Road Safety Fund
\$(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 GF
Positive, possibly \$5,000.0	Positive, possibly \$5,000.0	Positive, possibly \$5,000.0	Recurring	License fees- Cannabis Regulation Fund
<b>(\$2,175.4)</b>	<b>\$3,763.9</b>	<b>\$8,078.4</b>	<b>Recurring</b>	<b>TOTAL GENERAL FUND*</b>
<b>\$2,118.9</b>	<b>\$9,440.1</b>	<b>\$15,147.2</b>	<b>Recurring</b>	<b>TOTAL LOCAL*</b>

(Parenthesis ( ) Indicate Revenue Decreases) \*Assuming all localities allow and implement max tax. See fiscal implications.

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

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	\$200.0	\$4,429.29	\$6,112.0	\$10,741.29	Recurring	General Fund (NMED)
	\$4,002.0	\$772.9	\$950.6	\$5,725.5	Nonrecurring	Cannabis Regulation Fund/General Fund (TRD)

	\$0	\$4,450	\$5,325	\$9,775	Recurring	General Fund (DOH)
	\$300.0	\$1,306.0	\$1,306.0	\$2,912.0	Recurring	General Fund (NMDA)
	\$0	\$650.0	\$0	\$650.0	Nonrecurring	General Fund (NMDA)
	\$0	\$1,257.9	\$1,257.9	\$2,515.8	Recurring	General Fund (DPS)

(Parenthesis ( ) Indicate Expenditure Decreases)

**SOURCES OF INFORMATION**

LFC Files

Responses Received From\*

- Regulation and Licensing Department (RLD)
- Taxation and Revenue Department (TRD)
- Department of Agriculture (NMDA)
- Environment Department (NMED)
- Department of Health (DOH)
- Department of Public Safety (DPS)
- Public Education Department (PED)
- Economic Development Department (EDD)
- Law Offices of the Public Defender (LOPD)
- Administrative Office of the District Attorneys (AODA)
- Administrative Hearings Office (AHO)
- Administrative Office of the Courts (AOC)
- Department of Transportation (DOT)

**SUMMARY**

Synopsis of Bill

Senate Bill 3 (SB3) enacts the Cannabis Regulation Act (CRA), which decriminalizes the possession, use, production, transportation, and sale of commercial cannabis for nonmedical adult use and creates a regulatory and taxation structure.

The CRA allows adults age 21 and older to possess not more than 2 ounces of cannabis flowers or 16 grams of cannabis extracts purchased from a licensed dispensary or authorized under the medical cannabis program. Except as allowed for qualified patients under the Lynn and Erin Compassionate Use Act (LECU Act), production of cannabis products is prohibited without a license issued under the CRA.

The bill creates the Cannabis Control Division (CCD) within the Regulation and Licensing Department (RLD). CCD is charged with licensing and regulating dispensaries, at which cannabis items are stored or offered for retail sale to the public, and lounges, which sell cannabis

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\* Unless otherwise noted, agency responses are to Senate Bill 228, introduced in the 2021 regular Legislative session

items only for on-site consumption. Additionally, CCD shall assume all responsibilities for licensing and regulation under the LECU Act no later than July 1, 2021.

The CRA requires that, not later than July 1, 2021, the CCD, New Mexico Department of Agriculture (NMDA), and New Mexico Environment Department (NMED) shall promulgate rules including: procedures for issuance, renewal, suspension, or revocation of licenses; qualifications for licensure; security requirements for a cannabis establishment; requirements for inspection, recordkeeping, cannabis tracking and prevention of unauthorized sale of cannabis, and labeling requirements; rules for advertising and marketing; health safety standards; quality control and testing; standards for food and product safety; listing of additives and ingredients approved and prohibited from inclusion in cannabis items.

A dispensary license may be issued to a person who holds an adult-use cannabis manufacturer or producer license or a dual license (which authorizes the sale of both medical and adult-use cannabis). CCD must regulate and license dispensaries and lounges no sooner than October 1, 2021. However, CCD may issue licenses to those who possess dual licenses no later than July 1, 2021. CCD is required to begin licensing cannabis couriers no sooner than July 1, 2021.

A dispensary may not be located within 300 feet of a school, playground, childcare center, youth center, public park, or library. Otherwise, CCD may license dispensaries or lounges at any location within the state. However, the CRA allows a local jurisdiction to prohibit the operation of a cannabis establishment or to further limit permitted locations of a cannabis establishment. Local jurisdiction may not prevent transport of cannabis through it or prohibit personal production of cannabis.

CCD is prohibited from limiting the number of plants a commercial cannabis establishment may possess, cultivate, or manufacture, and may not limit the type or number of licenses a licensee may be issued under the CRA.

NMDA is charged with regulating and licensing cannabis producers no sooner than July 1, 2021, and is required to license holders of dual licenses for both medical and adult-use cannabis production no later than May 15, 2021, or 15 days after the effective date of this act, which ever is later.

NMED is charged with regulating and licensing cannabis manufacturers and cannabis testing laboratories. NMED may begin issuing licenses for cannabis manufacturers no sooner than October 1, 2021, except for manufacturers with dual licenses who will receive production licenses no later than July 1, 2021. NMED may issue a dual license for the manufacturing and sale of on-site and off-site of adult-use cannabis to holders of a medical cannabis manufacturer or producer license, provided they sell medical cannabis at a minimum percentage set by rule but not less than 20 percent nor more than 40 percent of total cannabis products sold.

CCD will establish application and licensing fees for dispensaries, lounges, and activities related to medical cannabis while NMDA will set and charge fees for licenses for cannabis cultivation, and the NMED will set and charge fees for cannabis manufactures and testing laboratories. The fees shall be scaled to reflect the amount of activity the licensee seeks to conduct or renew. A license for medical producers shall not exceed 50 percent of the fee charged to a licensee receiving both a commercial and medical cannabis license. Fees are to be deposited in the cannabis regulation fund.

The Department of Health (DOH) must monitor emerging scientific and medical information relevant to the health effects of cannabis use and monitor changes in cannabis use patterns for children and adults in the state. The secretary of DOH must appoint a public health and safety advisory committee to provide to the Legislature and DOH an annual report on the effects of legalizing adult-use cannabis, including child access, workplace, and road safety, and other factors. The CRA limits the DOH to administering personal production licenses and removes DOH authority to identify requirements for the licensure of cannabis production. The bill requires DOH to promulgate rules relating to medical cannabis program reciprocity by January 1, 2022.

SB3 transfers functions, personnel, money, appropriations, records, equipment, contractual obligations, statutory references, fund balances, and rules related to cannabis but unrelated to medical cannabis from the Department of Health to the Regulation and Licensing Department. The CRA also repeals the medical cannabis fund and exceptions related to possession, delivery or manufacture of drug paraphernalia.

SB3 amends the Controlled Substances Act to make it consistent with the CRA, including amending or repealing criminal laws governing cannabis offenses and removing cannabis and related products from the list of schedule I and schedule II substances. The bill adds new civil and criminal penalties related to regulated cannabis activities, including trafficking to underage persons, employing underage persons, and possessing or distributing a cannabis product within 300 feet of a school, playground, childcare center, youth center, public park, or library. DPS must annually collect and compile reports from every police and sheriff's department concerning arrests and citations for cannabis-related violations and motor vehicle accidents. DPS must compile the reports submitted by law enforcement agencies and issue a report of all cannabis law violations annually. Additionally, cannabis is excluded from forfeitures related to the Forfeiture Act.

The bill creates the reverting cannabis regulation fund consisting of appropriations, grants, gifts, donations, and fees collected by CCD, NMED, and NMDA. Money in the fund is appropriated to CCD to carry out its duties under the CRA. Additionally, the bill creates the non-reverting road safety fund consisting of money transferred from the cannabis excise tax, appropriations, and other money. DPS administers the fund, and money is subject to appropriation to DPS for research to determine whether a driver is impaired, implementing best practices in law enforcement agencies regarding cannabis impairment, and drug recognition expert field certification training for law enforcement officers.

The CRA enacts the Cannabis Tax Act (CTA), which imposes a cannabis excise tax of 2 percent on the sale of cannabis items and is applied to the price paid for a cannabis product. The tax does not apply to retail sales of medical cannabis sold to qualified patients or caregivers pursuant to the LECU Act or to receipts of cannabis producers from selling cannabis wholesale. The CTA also allows municipalities and counties to adopt ordinances imposing an excise tax of 2 percent on the sale of cannabis items, although it is unclear if the taxes imposed at the county level stack with taxes imposed at the municipal level. For the purpose of this analysis, local excise taxes are estimated to stack to four percent in municipalities.

The bill creates distributions of 6 percent of net receipts attributable to the state excise tax to the local DWI grant fund and 2 percent to the road safety fund. The Gross Receipts and Compensating Tax Act is also amended so that TRD must transfer an amount equal to the net

receipts attributable to the municipal or county cannabis tax to each municipality or county that imposes the tax.

Additionally, SB3 amends the Tax Administration Act, Corporate Income and Franchise Tax Act to include cannabis business activity in the administration of taxes and provides an exemption from governmental gross receipts tax for receipts of cannabis producers for the sale of cannabis wholesale. Finally, the bill creates a deduction from gross receipts tax for receipts from the sale of medical cannabis.

SB3 specifies that sections dealing with criminal code reform are effective 90 days after the signing of the bill while all other sections of the bill are subject to Section 72 which contains an emergency clause.

## **FISCAL IMPLICATIONS**

### **Continuing Appropriations**

SB3 creates the “cannabis regulation fund.” Money in the fund is appropriated CCD to support it in its duties under the CRA. Balances in the fund remaining at the end of a fiscal year revert to the general fund.

SB3 also creates the road safety fund. Money in the fund is subject to appropriation to DPS for specified purposes. Balances in the fund do not revert to the general fund.

The funds created 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 use by using survey data on use frequency and takes into account survey bias in self-reporting and underreporting.

SB3 exempts medical sales of cannabis from gross receipt taxes. Exempting medical cannabis sales from GRT revenue would have a negative impact of \$9.7 million to the general fund and a negative local GRT impact of \$6 million, in the first year.

The revenue tables reflect expected distributions to each benefitting fund based on LFC modeling. This estimate applies both GRT and excise tax rates to the assumed retail sales base. SB3 does not require county excise taxes imposed to apply only to unincorporated remainders of the county. Therefore, this analysis assumes the municipal and county rates are stacked to 4 percent for localities. Furthermore, local excise tax rates do not exclude medical cannabis unlike the state excise rate. This analysis estimates a negative impact to both state and local revenues

from the GRT deduction created for medical cannabis. Finally, this analysis estimates all localities allow cannabis sales and implement the maximum allowable rate.

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

### **Operating Budget Impact**

DPS stated SB3 has the following anticipated fiscal impacts:

- The bill would require replacement of all of DPS' drug-sniffing dogs. According to DPS, it currently has nine narcotics detection canines that have been trained to detect the odors of several controlled substances, including cannabis. If marijuana is legalized and the odor of marijuana can no longer be used for probable cause, the dogs will have to be replaced because they cannot be retrained to not alert for the odor of marijuana. DPS estimates the price of nine new dogs to be \$162 thousand and the cost for training the new dogs, including instruction and per diem for those attending the trainings, to be \$30.6 thousand for FY22 into FY23.
- Based on the experience of other states, DPS anticipates arrests related to black market marijuana sales and production will increase in New Mexico, including illegal THC extraction labs and growing operations. This will require additional, as yet undetermined, resources for training, and additional investigators to handle an increase in illegal THC extraction and growing operations. DPS estimates it would require \$915.3 thousand for 10 agents throughout the state to investigate those illegal operations.
- DPS estimates it will require \$150 thousand for enforcement of the bill's prohibitions against underage access to marijuana, which would be similar to DPS's current compliance operations for underage access to tobacco and alcohol.
- DPS expects it will incur additional, undetermined costs for training related to anticipated increases in marijuana-related DWIs, including certification of drug recognition experts. DPS notes that the road safety fund established under SB3 may provide funding to DPS for this type of training.

DOH states 20 medical cannabis program FTE currently administer 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 registry database and to conduct and produce the annual assessment report on the affordability and accessibility of medical cannabis required in the LECU Act. Eight (8) Medical Cannabis Program full-time employment positions in the licensing and compliance section including their salary and benefit costs would transfer out of the New

Mexico Department of Health. This would represent a reduction to the Department of Health of \$540.0 thousand in FTE costs and \$900.0 thousand in operational costs.

### **Use of Prior Bill Analysis**

The estimated additional operating budget cost impact table reflects agency cost estimates submitted by NMED, TRD, and NMDA for Senate Bill 228 of the 2021 regular session. While the provisions of SB3 differ from those of SB228, the additional duties required of affected agencies are similar. The cost estimates provided are as follows:

NMED estimates a cost of \$200 thousand in FY21 for the development of rules it must promulgate by September 1, 2021, as well as for researching and identifying standards for testing laboratories it must provide by January 1, 2022; a cost of \$3.767 million in FY22 to fund 32 FTE to assume responsibility of the medical cannabis program, to regulate existing medical cannabis facilities, to develop rules to regulate new cannabis businesses and testing laboratories, and to provide representation on the commission; an ongoing annual cost of \$5.5 million in personnel, contract, and operational expenses – beginning in FY23 – for permitting, safety inspections, and compliance actions of manufacturers, dispensaries, and testing laboratories; a cost of \$662 thousand in FY22, for the development of occupational health and safety rules and 6 FTE to enforce existing rules, the Occupational Health and Safety Act, and rules promulgated by the Environmental Improvement Board (EIB) for cannabis businesses; and an annual cost of \$612 thousand in personnel, contract, and operational expenses – beginning in FY23 – for occupational health and safety inspections of cannabis businesses.

As explained in more detail in its analysis of the bill, TRD anticipates the personnel time to implement the new tax program in TRD's Administrative Services Division is 440 hours, at a cost of \$18,552. 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. TRD's Revenue Processing Division will incur costs related to payment processing, equipment, and postage totaling \$11 thousand. Business resources will be required to make changes to forms and promulgate rules at a cost of approximately 1,040 hours at \$169 thousand, and 2 FTE are required to conduct revenue processing functions. The estimated nonrecurring cost for equipment at each of TRD's five district offices is \$79.5 thousand and estimated recurring costs at each office are \$2,000 for ongoing maintenance of new systems and \$416 thousand for armed guard services. (TRD's cost estimates for its district offices are based, in part, on TRD's assumption that commercial cannabis producers and retailers, in comparison to medical cannabis producers and retailers, are more likely to make tax payments in cash.) The proposed tax program also would create the need for an additional FTE in the office of the secretary and a business operations specialist.

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. These additional costs are reflected in the budget impact table. NMDA also states the addition of licensing and inspection responsibilities for persons cultivating

adult-use cannabis or cultivation by cannabis collectives would warrant a new division dedicated to cannabis within NMDA. Although the number of people who will apply for licenses is unknown, it is expected public interest, initially, will be significant. NMDA expects recurrent program costs at approximately \$1.1 million plus initial onetime startup costs at approximately \$500 thousand. These additional costs are reflected in the budget impact table.

AHO states the tax program added by SB288 may increase tax protest hearings. Although the significance of the increase is difficult to predict, AHO's prior experience demonstrates new tax programs generally result in an initial increase in protests. Nevertheless, because the volume of tax protests over the last few years has stabilized, AHO is optimistic any increase in tax protest volume can be absorbed by its current resources.

AHO also notes Implied Consent Act hearings may increase if DWI arrests go up once cannabis possession and use is decriminalized. If hearings increase, AHO may need funding for additional hearing officers, office space, and travel expenses. Based on the experience of other states, AHO anticipates requests for Implied Consent Act hearings will increase and estimates a range of 250-500 additional hearings. Based on the current historic lows in the number of implied consent hearings, AHO is cautiously optimistic any increase in case volume can be absorbed by its current resources, unless the increase in hearings reaches the high end of its projected range.

LOPD states SB288 would have marginal impact on public defender caseloads. Currently, adult possession of small amounts is already a minor offense. Cannabis cases typically involve unlicensed production and sale, which would carry reduced penalties, but would continue to be illegal and subject to criminal prosecution, necessitating continued public defender representation in such cases. Most cannabis possession cases involve other charges, often because a defendant's suspected possession of marijuana provided grounds for a detention, search, or arrest that leads to additional charges. Although it would make it legal for adults to possess cannabis, SB288 forces citizens to demonstrate the legitimate origin of that cannabis to law enforcement or have it serve as grounds for detention, search, and arrest, which would do little to reduce overall public defender caseloads.

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, SB288 reduces or eliminates penalties for cannabis-related offenses and activities, the demand for court time and resources will 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.

DOT notes that its Traffic Safety Division (TSD) administers federally funded drug recognition expert (DRE) and advanced roadside impaired driving enforcement (ARIDE) training and recertification programs. TSD's DRE training program enables TSD to identify areas of the state with limited or no DRE resources and to provide training to increase the number of law enforcement officers certified in DRE and ARIDE, particularly in areas where the trainings had not been previously available. Although



SB288 does not impose any additional duties or responsibilities on DOT, the bill likely would increase the demand for DRE and ARIDE trained officers throughout the state. The increased demand for officers might increase the burden on the current TSD training program, and DOT would not receive additional federal funding to meet the demand for more DRE officers. However, DOT states that it may be able to enter into an agreement with DPS to receive funds from the road safety fund to help cover the costs of expanding TSD's DRE and ARIDE training program.

## **SIGNIFICANT ISSUES**

### **Medical Cannabis Program**

DOH notes:

Senate bill 3 would remove all medical cannabis producer licensing and licensing of other medical cannabis establishments (manufacturers, couriers, and laboratories) from the Department of Health. NMDOH would continue to operate the Patient Registry portion of the NM Medical Cannabis Program. The bill does not specify how the operations of the Medical Cannabis Program within the Department of Health would continue to be funded. Currently, NMDOH administers all aspects of the NM Medical Cannabis Program (MCP), and does not receive any appropriation for those purposes, but instead funds the MCP operations entirely from licensing fees collected from licensed cannabis establishments, including primarily licensing fees assessed to licensed nonprofit producers (LNPPs).

Senate Bill 3 would immediately divest the Department of Health of licensing authority over commercial cannabis establishments. The bill would require the Department of Agriculture to regulate and license cannabis producers, and begin issuing licenses no sooner than July 15, 2021. The Environment Department would assume licensing authority over manufacturers and cannabis testing laboratories and begin issuing licenses no sooner than October 1, 2021. By immediately removing the Department of Health's authority to regulate commercial cannabis establishments, the bill may create a gap in regulation whereby 1) commercial licenses previously issued by the Department of Health cease to be valid, thereby preventing those previously licensed entities from continuing to operate until licenses are issued by the new regulating agencies, and/or 2) commercial businesses that were previously licensed by the Department of Health are not regulated for the period of time between enactment of the bill and the deadline for the new regulating agencies to issue licenses.

Eight (8) MCP full-time employment positions are in Albuquerque for the current licensing and compliance section and they would transfer to the Cannabis Control Division if the emergency clause is enacted, creating potential confusion due to a lack of a transition period for the monitoring of licensees as these responsibilities will be divided among the Cannabis Control Division, New Mexico Department of Environment, and the New Mexico Department of Agriculture; this is important as these are positions which currently address and regulate producer licensure, manufacturing and production. Twenty (20) Medical Cannabis Program fulltime equivalent positions are in Santa Fe for patient services and would remain with the Department of Health.

The division should create provisions requiring cannabis dispensaries maintain an

adequate supply of medical cannabis products suitable and sufficient to meet the reasonably foreseeable needs of qualified patients as determined by the Department of Health; this is especially important as the demand for adult use cannabis may quickly outstrip current production and create a shortage for current medical patients.

The bill at Section 54 proposes to delete the definition of “personal production license” from the Lynn and Erin Compassionate Use Act, although in Section 57, the bill would amend the LECUA to require the Cannabis Control Division to administer personal production licenses.

The following significant issues are based on agency cost analysis for implementation of the provisions of SB228 of the 2021 regular session. Many of the additional regulatory duties assigned to agencies under SB228 are similar to those in SB3.

### **Implementation and Regulation Generally**

NMDA interprets SB288 to assign post-harvest regulatory authority for specific cannabis operations and for oversight of occupational health and safety standards to NMDA. NMDA’s experience is primarily in pre-harvest or harvest (cultivation) elements. NMDA suggests assigning post-harvest regulatory functions to NMED.

NMAG notes Section 3(G)’s deadline of September 1, 2021, for CCC to promulgate rules is unrealistic, given the State Rules Act’s requirements for notice, which must include the proposed rules, comment period, hearing, and meaningful public participation.

NMED also states it does not have the resources or staff to meet the September 1, 2021, deadline to assume responsibility for the medical cannabis program, to provide representation on CCC, and to offer CCC consultation in promulgating regulations. Additionally, NMED must engage stakeholders through the required rulemaking public comment and hearing process. NMED will require immediate funding to assume medical cannabis program responsibilities and to meet rulemaking, licensing, and inspection requirements. RLD adds the administrative rulemaking processes alone that will be necessary to accomplish the transfer and licensing and regulation of the medical cannabis program from the DOH to NMED should be expected to take not less than a year.

NMED refers to Section 3(G)(7)(d) of SB288, which requires CCC to develop rules in consultation with NMED and proposed for adoption by NMDA to establish occupational health and safety standards for persons working in the cannabis industry. NMED states that this provision conflicts with the provisions of Section 50-9-4 of the Occupational Health and Safety Act (OHS Act), which provides:

The department [of environment] is the state occupational health and safety agency for all purposes under federal legislation relating to occupational health and safety and may take all action necessary to secure to this state the benefits of that legislation.

According to NMED, the Environmental Improvement Board (EIB) currently has occupational health and safety rules in place that cover persons employed in the cannabis industry. NMED enforces occupational health and safety within the industry under the OHS Act and federal OSHA standards incorporated under 11.5.1 through 11.5.6 NMAC.

NMED must enforce rules at least as effective as federal OSHA rules. SB288's provisions for the development of occupational health and safety standards do not include language that will ensure rules developed by CCC will be at least as stringent as those currently enforced under the OHS Act. In addition, SB288 does not contain language preserving the authority of NMED to enforce occupational health and safety rules for persons working in the cannabis industry. EIB needs to promulgate rules, in addition to those already in existence, specific to certain processes at cannabis businesses, such as extraction during manufacturing.

LOPD notes SB288 represents a soft legalization approach that places cannabis in a legal gray area. Although the bill purports to legalize the possession of cannabis by adults, it continues to allow government intrusion into citizens' private lives by allowing possession to serve as grounds for detention, search, and arrest. LOPD believes a more robust approach to legalization could have a greater positive effect on the workload of the LOPD, rendering the agency better able to address its constitutionally mandated duty of defending New Mexicans accused of more serious crimes.

### **Conflict with Federal Law**

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

### **Enforcement**

AODA notes Section 59 deletes “drug paraphernalia” from property subject to forfeiture under the Controlled Substances Act (Section 30-31-34(G)). This is problematic because the provision applies to drug paraphernalia used for all controlled substances, not just marijuana. If SB288 were enacted, all drug paraphernalia used in connection with controlled substances would be exempt from forfeiture.

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

DPS notes that Section 6(K)(2) provides that a conviction for which the sentence is completed for the possession, use, manufacture, distribution, or dispensing of a controlled substance is not considered “substantially related” to the qualifications, functions or duties of a business seeking a license for purposes of denying an application under Section 6(J), unless the offense involved a distribution of a controlled substance or

alcohol to a minor. DPS observes, because prior possession, use, manufacture, distribution, or dispensing convictions are not limited to marijuana, the bill would allow a person with a conviction for possession, use, manufacture, distribution or dispensing of heroin, other opioids, or methamphetamine to obtain a license to engage in commercial cannabis activity. DPS believes ignoring these serious convictions in determining who may obtain a license is a threat to public safety.

### **Imposition of Taxes and Related Issues**

TRD notes that SB288 exempts receipts of cannabis producers from selling cannabis “wholesale” from the cannabis excise tax and gross receipts tax (Sections 38, 49). This differs from treatment of other wholesale transactions under Section 7-9-47 NMSA 1978 of the Gross Receipts and Compensating Tax Act, which allows the receipts of a seller from the sale of a product to be deducted if the product is sold to a buyer who resells the product at retail. TRD is concerned that wholesalers whose income stems entirely from sales that are exempt from taxation may not be required to register with TRD. Also, TRD states that without a deduction or a separately stated deduction on either the cannabis tax or gross receipts tax, there is no traceability for the movement of the product from wholesale to retail or the extent of the cannabis industry’s activity. To address these issues, TRD recommends that, instead of an exemption, receipts from selling cannabis products wholesale be covered by the sale for resale deduction from gross receipts under Section 7-9-47 NMSA 1978 or a similar sale-for-resale deduction be added for the cannabis excise tax.

SB288, as amended, adds a deduction from gross receipts tax for receipts from the sale of medical cannabis products to the existing deduction in Section 7-9-73.2 of the Gross Receipts and Compensating Tax Act for receipts from the sale of prescription drugs. In 2020, the N.M. Court of Appeals held that the deduction for prescription drug sales applied to sales of medical cannabis as well. See *Sacred Garden v. N.M. Taxation & Revenue Department*, No. A-1-CA-37142 (slip. op. Jan. 28, 2020), petition for writ of certiorari filed March 9, 2020.

### **TECHNICAL ISSUES**

Section 3H prohibits a dispensary from operating within 300 feet of designated establishments but includes no prohibition on lounges within 300 feet of these establishments.

Section 6H defines “dual licenses” and includes a requirement that “the person shall sell a minimum quantity of medical cannabis as provided in Subsection B of this section”. Subsection B does not include a requirement for sale of medical cannabis.