LFC Requester:	

AGENCY BILL ANALYSIS
2017 REGULAR SESSION

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

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 X **Amendment** ____
Correction ___ **Substitute** ____

Date Jan. 23, 2017
Bill No: HB 89

Sponsor: Bill McCamley
Short Title: Cannabis Revenue and Freedom Act

Agency Code: 264
Person Writing Gary Cade
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		

(Parenthesis ( ) Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: HB 89, AKA Cannabis Revenue and Freedom Act ("CRFA"), is an omnibus bill to "…eliminate problems caused by the prohibition and uncontrolled manufacture, possession and delivery of marijuana within New Mexico…establish a comprehensive regulatory framework relating to marijuana...allow a person who is licensed by this state to legally manufacture and sell marijuana to a person who is twenty-one years of age or older…(and)…provide a licensing and permitting system for industrial hemp and agricultural hemp seed production."

HB 89 would establish an 11-person "Cannabis Control Board," to regulate and provide oversight of the medical cannabis program and marijuana program established by the CFRA. The board would be made up of: two CRFA licensees; two medical or public health professionals; one qualified patient under the medical cannabis program; one interested public citizen; one banking or finance professional; one representative from the state regulation and licensing department; one representative from the state department of agriculture; one representative of the department of health; and, one representative of the state department of environment. Among their assigned tasks would be establishment of qualifications for persons to be licensed to produce, possess, distribute or dispense cannabis.

The bill would also charge the state regulation and licensing department ("department") with regulation of the production, processing, sale, purchase, transportation and delivery of "marijuana items" (marijuana, marijuana products and marijuana extracts) in cooperation with the cannabis control board. The state department of agriculture would be charged with regulation of production, possession and commerce involving industrial hemp (all non-seed parts of a cannabis plant with a crop-wide average tetrahydrocannabinol [THC] concentration of no more than three-tenths of a percent on a dry weight basis, and seeds to grow agricultural hemp)

HB 89 would permit possession of usable marijuana (dried marijuana flowers and leaves) at a household by one or more persons, 21 or older, if the total amount did not exceed: two ounces of marijuana at the person's household or one ounce outside their household; and, up to seven grams of marijuana extract (product obtained by separating resins from marijuana by solvent extraction). They could also produce, process, keep or store homegrown marijuana (grown for non-commercial purposes): six marijuana plants per person and 12 plants per household; six immature marijuana plants; and, eight ounces of usable marijuana. They could also make, process, keep or store up to 16 ounces in solid form and 72 ounces in liquid form of homemade

(made for non-commercial purposes) marijuana products, i.e., containing marijuana or marijuana extracts and intended for human consumption. A person at least 21 years old could also deliver up to one ounce of homegrown marijuana or up to 16 ounces of homemade marijuana products in solid form or up to 72 ounces in liquid form to another person age 21 if the delivery was for non-commercial purposes. Use of marijuana in public places would be prohibited unless a licensed marijuana retailer had also obtained a separate "on-site consumption endorsement" allowing for the sale and consumption of marijuana items in an on-site area.

HB 89 would categorize commercial enterprises involving marijuana as: producers (who manufacture, plant, cultivate, grow or harvest marijuana); processors (who process, compound or convert marijuana into marijuana products or extracts); wholesalers (who purchase marijuana items in New Mexico for resale in the state to someone other than a consumer); and retailers (who sell marijuana items to a consumer in New Mexico). The bill states that persons, which could be individuals or a legal entity, would need a state license as a producer or processor or wholesaler or retailer for the premises where they were conducting their business activities. License applications could be denied if there are "sufficient licensed premises in the locality set out in the application." The number of "mature" cannabis plants (plants with no observable flowers or buds) a commercial producer could possess would be limited to 1,000 between July 1, 2017 and June 30, 2018, and limited to 2,000 from July 1, 2018 to June 30, 2019. Presumably there would be no commercial limits after that. Only a licensed producer and their representatives could possess or sell a mature plant for commercial purposes. Qualified medical cannabis patients could be permitted by the cannabis board to grow medical cannabis for personal use, and sell mature cannabis plants to licensed medical and commercial cannabis producers. Commercial licensees could not import or export marijuana into or from New Mexico.

Beginning on July 1, 2017 the department would have to accept license applications to be a producer, processor, wholesaler and retailer to "produce, process and sell marijuana" within the state, subject to the provision of the CRFA, from persons currently licensed under the New Mexico medical marijuana law. Beginning on July 1, 2019 commercial license applications could be accepted from other qualified persons; decisions on license applications would have to be made in a timely fashion. The bill provides that persons wanting a retail or wholesale license could be charged a non-refundable application fee of up to $500, and an annual license fee of up to $2,000, The annual license fees for producers would be $15,000 if the "…producer will possess up to one hundred fifty marijuana plants" and an additional $5,000 for each additional 50 marijuana plants the producer will possess, up to a maximum fee of $45,000. The bill defines marijuana producer as "…a person who produces marijuana in this state," and defines marijuana as "…all parts of the plant cannabis…but does not mean marijuana extracts, industrial hemp or industrial hemp commodities or products." Persons could hold multiple production, processing, wholesale and retail licenses. Producers would have to certify that would produce at least 500,000 grams of marijuana for qualified medical cannabis patients.

HB 89 states that the involved state agencies may not refuse to perform any duty required by the CFRA or refuse, suspend or cancel a hemp license on the basis that manufacturing, distributing, dispensing, possessing or using marijuana is prohibited by federal law. It further provides that a licensed marijuana producer, processor, wholesaler, or retailer, or a representative of those licensees, may produce, possesses and deliver marijuana items in accordance with provisions of the CFRA and doing so "…shall not constitute a criminal or civil offense pursuant to New Mexico law." The bill declares that the CFRA "…shall be

superior to and shall supersede all local laws or ordinances…that are inconsistent or in conflict with the Act." It would permit local governments to establish reasonable regulations dealing with nuisance aspects of marijuana sales. It would also permit any county, or a municipality with at least 5,000 population, to have a referendum election on whether to permit licensees under the CRFA if a petition with at least 5% of the registered voters was submitted seeking the election. A majority vote in the election would determine whether to permit CRFA licensees to do business there. If the election was conducted by the county, the bill requires that the votes be counted separately for any municipalities in the county of at least 5,000; if a majority in the municipality voted in favor of, or against, licensed marijuana production or sales that would be determinative for their community, regardless of what the majority vote in the county was. The referendum election could not be held at the same time as a primary, general or school election.

HB 89 would impose an excise tax of fifteen per cent (15%) on the, "price paid for the marijuana item" (marijuana, marijuana products and marijuana extracts). After administrative costs were deducted the cannabis tax would be distributed to multiple groups: 40% would go to the <u>public school fund</u> ("augment appropriations for the state equalization guarantee distribution"); 23% to a new <u>substance abuse prevention and behavioral health fund</u> ("establish, operate and maintain alcohol and substance prevention, early intervention and treatment and related behavioral health services"); 20% to a new <u>cannabis revenue economic development fund</u> ("training to support local entrepreneurs, local business development…business growth and marketing programs…and community reinvestment grant programs to support job training for and placement of formerly incarcerated persons"); 7.5% to a new <u>district attorney public safety fund</u> ("support evidence-based arrest and incarceration diversion programs for low-level nonviolent drug related offenses and support development of intoxicated driving programs"); 7.5% to a new <u>public defender safety fund</u> ("for operations"); and 2% to the <u>department of health</u> (support qualified patients for a new medical cannabis subsidy program). In addition, municipalities and counties could impose an additional excise tax of five per cent if approved by a majority of the voters in a special election. Local governments could use the revenue generated for general purposes. If imposition of the tax was not passed another referendum could not be proposed for at least a year.

HB 89 would substantially revise most of the criminal code statutes relating to marijuana. Marijuana and industrial hemp would be specifically removed from the list of Schedule 1 controlled substances "for the purpose of conduct that complies with the (CRFA)." Marijuana violations of the Controlled Substances Act would be as follows. Possession of up to one ounce would be punished by only a $50 fine for a first offense, and a $100 fine for a second offense. Possession of one ounce but less than eight ounces would be subject to a $100 fine, and possession of more than eight ounces (regardless of the quantity, or whether it was 1st or subsequent offense) would be designated a misdemeanor. Possession of up to one ounce of marijuana in a drug-free school zone would be subject to a $100 fine for a first offense and would be a misdemeanor for a second or subsequent offense. If more than one ounce was involved it would be a misdemeanor, regardless of the amount. Distribution of marijuana and possession with intent to distribute, would be designated as misdemeanors, regardless of the quantity or whether it was a 1st or repeat offense. Distribution of marijuana and synthetic cannabinoids in a drug-free school zone would also be a misdemeanor, as would distribution of a counterfeit substance that is marijuana. A minor in possession of synthetic cannabinoids would be fined $50 for a first or second offense, but could face a disposition hearing, and possible adult sentence, for a third or subsequent offense. Illegal possession of synthetic cannabinoids by an adult would be a petty misdemeanor.

Anyone taking or attempting to take marijuana into a correctional facility could be charged with bringing contraband into a place of imprisonment. If the facility is a prison, it is punishable as a third degree felony; taking contraband into a jail is punishable as a fourth degree felony. As drafted, it is unclear if the same statute would prohibit taking marijuana into a juvenile facility but if so, taking marijuana into a juvenile correctional facility is a third degree felony and bringing contraband into a juvenile detention facility is a fourth degree felony.

HB 89 would create some new crimes. Anyone who possesses, produces, processes, keeps, stores or delivers more marijuana or marijuana plants than is permitted by the CRFA would be guilty of a misdemeanor. Import or export of marijuana would be a misdemeanor if done for financial consideration; if it was not for financial consideration it would be a petty misdemeanor. Sale or delivery of marijuana to a person under 21 years old would be punishable as distribution to a minor, the first offense of which is a third degree felony and second and subsequent offenses are second degree felonies. Anyone under age 21 who buys or attempts to buy marijuana or enters or attempts to enter the premises of a marked marijuana licensee would be guilty of a misdemeanor. The bill states that in addition to other penalties their driver's license shall be suspended for up to a year. If they were between the ages of 13 and 18 and failed to appear in court on the charges their driver's license shall be suspended. Using marijuana in a public place, which is not a designated public consumption area, would be a misdemeanor. Anyone who "uses marijuana while driving a motor vehicle upon a highway" would be committing the offense of driving while under the influence of intoxicating liquor or drugs. Allowing marijuana or homemade marijuana products to be visible from a public place by normal vision would be a misdemeanor. A variety of other conduct is also prohibited by the CRFA. The bill states that if a sanction is not expressly provided, then the statutory violations would be designated as misdemeanors, and violation of any rules promulgated to implement the CRFA would be designated as petty misdemeanors.

HB 89 would also set up a regulatory system for production and sale of industrial hemp that would be administered by the department of agriculture. Industrial hemp is defined as, "all non-seed parts and varieties of the cannabis plant, whether growing or not, that contains a crop-wide average tetrahydrocannabinol concentration that does not exceed three-tenths per cent on a dry weight basis," and "any Cannabis sativa seed that is part of a growing crop, is retained by a grower for future planting or…processing into or use as agricultural hemp seed."

FISCAL IMPLICATIONS

Unknown. Before the vote to legalize marijuana in Oregon in 2014, a Portland economics firm, ECONorthwest, estimated that marijuana sales could generate $38.5-million in the first year based on Colorado's experience but with a lower tax rate in Oregon. The firm estimated that about 20% of the illegal marijuana sales would switch to legal sales when making their projection. A variety of state agencies in New Mexico would be involved in administrative activities under HB 89.

SIGNIFICANT ISSUES

A 2013 national survey on drug use and health found 19.8 million people had used marijuana in the past month. The study also found that daily, or almost daily, use of marijuana (used on 20 or more days in the past month) had increased to 8.1 million persons from 5.1 million in 2005. HB 89 provides that only persons 21 years old or older may lawfully possess and use marijuana or be

involved in its production, distribution and sales. However, if marijuana possession and use are made more accessible in New Mexico it is likely that it will become more available to persons under 21, including children under age 18. Reportedly, in the states that have legalized marijuana, many marijuana users are pursuing medical marijuana cards because it is cheaper to buy, especially where recreational marijuana is heavily taxed.

HB 89 is in direct conflict with federal law which classifies marijuana as a Schedule I controlled substance and makes it a crime to manufacture, distribute or possess marijuana. See, 21 U.S.C. Sec. 812(c) and 21 U.S.C. Sect. 812(a) and 21 U.S.C. Sect. 844(a). The supremacy clause, in Article VI of the United States Constitution, would override any contrary decision by the state. Distributing, possessing and using marijuana, even for medical purposes under California's medical marijuana act, was held to be illegal under federal law, with the sole exception of federally approved research. *Gonzales v. Raich*, 545 U.S. 2195 (2005). Congress' commerce clause authority includes the power to prohibit local cultivation and use of marijuana even if it was in compliance with California's law. Id.

The United States District Court for New Mexico has held that it could not force an insurance company to pay for medical marijuana prescribed for treatment of injuries sustained in an accident because it was contrary to federal law and federal policy. See, *Hemphill v. Liberty Mutual Ins. Co.* (2013). The court determined that payment of those expenses would violate clearly expressed federal law and New Mexico state law that prevents enforcement of an illegal contract. However, appellate courts in New Mexico have upheld the employer's duty to pay for medical marijuana prescribed for their injured workers. See, *Vialpando v. Ben's Automotive Services*, 2014-NMCA-084, cert. den. (2014); Accord, *Maez v. Riley Industrial*, 2015-NMCA-049 and *Lewis v. American General Media*, 2015-NMCA-090. The NM Court of Appeals determined that requiring the employers, and their workers compensation insurers, to pay for medical marijuana did not violate federal law and federal policy—which they found to be ambiguous, but instead was required by the clear state policy as expressed by the Compassionate Use Act (Sect. 26-2B-1, *et seq*., NMSA 1978). They relied, *inter alia*, upon the memoranda issued by the Deputy United States Attorney General giving guidelines to federal prosecutors in light of state ballot initiatives that legalize marijuana under state law and provide for the regulation of state marijuana production, processing and sale. The *Lewis* decision also cited the Consolidated and Further Appropriations Act, enacted December 16, 2014, to fund the federal government in 2015 and quoted part of its language: "(N)one of the funds made available in this Act to the Department of Justice may be used with respect to the (S)tate of…New Mexico…to prevent such States from implementing their own State laws that authorize the use distribution, possession or cultivation of medical marijuana."

The United States Department of Justice, in a memorandum from Deputy Attorney General James M. Cole on August 29, 2013, issued guidelines for determination of priorities for federal prosecution of marijuana crimes: preventing distribution to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and, preventing marijuana possession and use on federal property.

Cole also wrote: "The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcements systems that will address the threats those state laws could pose to public safety, public health, and other law enforcement interests." The Cole memo concluded that "(N)othing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest." **As of January 20, 2017, a new administration has been installed in Washington and may decide to change or even withdraw the guidelines regarding marijuana crimes listed above, and may change its policy regarding the investigation and prosecution—if appropriate—of marijuana related offenses and financial transactions.**

The federal-state law conflict has had a direct effect on financial transaction in the states that have legalized marijuana. Financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under the money laundering statutes (18 U.S.C. Secs. 1956 and 1957), the unlicensed money transmitter statute (18 U.S.C. Sec. 1960) and the BSA. Sections 1956 and 1957 of Title 18 make it a criminal offense to engage in certain financial and monetary transactions with the proceeds of a "specified unlawful activity," including proceeds from marijuana-related violations of the (Controlled Substances Act) CSA. Transactions by or through a money transmitting business involving funds "derived from" marijuana-related conduct can also serve as predicate for prosecution under 18 U.S.C. Sec. 1960. Additionally financial institutions that conduct transactions with money generated by marijuana-related conduct could face criminal liability for, among other things, failing to identify or report financial transactions that involved the proceeds of marijuana-related violations of the CSA. See, e.g., 31 U.S.C. Sec. 5318(g). Notably for these purposes, prosecution under these offenses based on transactions involving marijuana proceeds does not require an underlying marijuana-related conviction under federal or state law." At least one Colorado marijuana business has been charged with money laundering and an additional charge accuses as individual of attempting an illegal financial transaction by trying to deposit proceeds from a medical marijuana dispensary into a bank account. See, *U.S. v. Hector Diaz, et al*., 13-CR-00493 REB (D-Colo).

On February 14, 2014 Deputy AG Cole issued a follow-up memorandum to all United States Attorneys regarding marijuana related financial crimes. He noted that provisions of the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act remain in effect with respect to marijuana-related conduct. He said that in deciding "whether to charge individuals or institutions with any of these offenses based on marijuana-related violations of the CSA (Controlled Substances Act, 21 U.S.C. Sect. 801, et seq.), prosecutors should apply the eight enforcement priorities described in the August 29 guidance and reiterated above…(and)…if a financial institution or individual offers services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate." Cole reiterated that the memo was just a guide to exercise of investigative and prosecutorial discretion and "…does not alter in any way the Department's authority to enforce federal, including federal laws relating to marijuana, regardless of state law."

Banks and other financial institutions have been wary of providing financial services to marijuana businesses so it has remained largely a cash only business, including employment payroll. That raises security and safety issues for the businesses and their employees. It is unclear whether businesses can pay the IRS required payments for Social Security, Medicare and income taxes. A similar problem may exist for employees who are paid in cash in trying to make their tax payments. The Internal Revenue Code provides that no deduction or credit may be allowed for any amount

or credit on any trade or business if such trade or business consists of trafficking in a controlled substance (within the meaning of Schedules I and II of the Controlled Substances Act) which is prohibited by any federal law or any state law where the trade or business is done. See, Section 280E.

The United States Department of Treasury Financial Crimes Enforcement Network ("FinCEN") also issued its own guidance to financial institutions seeking to provide services to marijuana-related businesses on February 14, 2014. They created a three-tiered system for filing Suspicious Activity Reports ("SARs") based on an institution's reasonable belief as to whether the marijuana-related business implicates one of the Cole memo priorities: Marijuana Limited—business does not implicate a Cole memo priority; Marijuana Priority—business does implicate a Cole memo priority; and, Marijuana Termination—bank has terminated the relationship. The requirement to file an SAR was specifically stated to continue unaffected, regardless of any state law that legalizes marijuana-related activity. Marijuana-related businesses are divided into two categories, directly related (e.g. growers and providers/dispensaries) and indirectly related who provided goods or services to growers and providers (e.g. commercial landlord who leases property to marijuana related-businesses, or a business that sells supplies to a grower or provider). SAR's are not required for indirectly related businesses.

The FinCEN memo noted due diligence is critical for banks and financial institutions doing business with marijuana-related businesses. They include verifying the state business license authorizing them as a grower or provider and their expected cash flow. The FinCEN guides identify 11 scenarios that could raise a red flag including: operating the business as a front for money laundering, being unable to produce state licensing documentation, financial anomalies related to population demographics and revenue produced by business competitors, inconsistent tax reports, inability to demonstrate revenue derived from sale of marijuana in compliance with state law, rapid movements of funds in and out of the bank, commingling funds with personal accounts, transactions by persons who have no known connection to the business, transactions apparently structured to avoid currency transaction reporting requirements ($10,000/day for deposits or withdrawals and $10,000 limit for payments in cash and monetary instruments for purchase of goods and services), marijuana-related business principal who reside outside the state where it is located, and marijuana-related business engaging in interstate or international activity.

It is unknown what impact the bill might have on the criminal justice system. The Bernalillo county district attorney's office, which prosecutes cases in the most populous county in New Mexico, has reported the number of marijuana possession cases they prosecuted has been relatively small, and is declining.

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

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

Attorneys General for the states of Nebraska and Oklahoma have asserted that their states, as neighboring states to Colorado, are having to bear the costs associated with an increasing number of marijuana-related cases now occurring in their states while Colorado reaps the financial

rewards, and filed suit claiming that federal law must trump the Colorado state law permitting recreational use.

HB 89 has different restrictions for "immature" marijuana plants (no observable flowers or buds) and "mature" marijuana plants ("not an immature marijuana plant"). No guidance is provided on when that distinction should be determined, and someone pruning their mature plant(s) could easily make it like an immature plant. The bill is not clear on whether some or all of the offenses it would now designate as a "misdemeanor" or a "petty misdemeanor" would be subject to the punishment provided in Section 31-19-1 for those crimes (misdemeanor: up to 364 days imprisonment in county jail, or fine up to $1000, or both; petty misdemeanor: up to six months imprisonment in county jail, or fine up to $500 or both) or would have different sanctions. This is especially so for those new offenses that would be created. The bill would make it illegal to provide marijuana to "a person who is visibly intoxicated," but there is no objective standard for intoxication prescribed and no guidance on how that can be ascertained. Anyone who uses marijuana while driving would be guilty of driving while intoxicated but proving they used while driving will be especially challenging. There is no attempt to quantify the amount of marijuana that someone may have in their system and safely drive a vehicle. It is likely that if marijuana usage increases, the number of persons driving a vehicle after ingesting marijuana, or even while using it, will also increase.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

HB 89 would prohibit sale or delivery to anyone under age 21. That potentially is in conflict with the Compassionate Use statute (medical marijuana) which even permits persons under 18 years old to receive prescribed cannabis if they have been fully informed by their health care provider and have permission of their parent or guardian. See, Sect. 26-2B-4(C), NMSA 1978.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS