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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 Amendment
Correction Substitute

Date Feb. 2, 2017
Bill No: SB 278

Sponsor: Gerald Ortiz-Pino&MStewart
Short Cannabis Revenue and
Title: Freedom Act

Agency Code: 264
Person Writing Gary Cade
Phone: 505-507-7752 Email cadeabq@gmail.com

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: SB 278, 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...(and) establish a licensing and permitting system for industrial hemp and agricultural hemp seed production.” It would allow persons to apply for a state license and pay license fees to the state to legally manufacture and sell marijuana, marijuana products and hashish to persons twenty-one years of age or older; impose a state excise tax of 15% on retail marijuana sales and permit local and county governments to impose an additional 5% excise tax on retail marijuana sales; and would convert to monetary civil penalties, or misdemeanors, the present sanctions for violating state law regarding marijuana, marijuana products, hashish and counterfeit forms of marijuana and new offenses created by the bill.

SB 278 would also allow persons previously convicted of marijuana crimes to petition the court for a review of their case if they, “would not have been guilty of an offense or who would have been guilty of a lesser offense as provided in this 2017 act, had the act been in effect at the time of the offense.” It would apply regardless of whether the conviction was after a trial or plea. The court would be required to grant the petition and, “recall the sentence or dismiss the sentence because it is legally invalid unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety.” Anyone resentenced after a petition to recall their sentence could not be sentenced to a longer term than their original sentence and could not have any charges reinstated that were originally dismissed as part of a plea bargain. If they had already completed their sentence and it would not have been a crime or would have been a lesser offense under the 2017 act they could still petition to have the conviction dismissed and sealed as legally invalid or re-designated as, “an infraction.”

SB 278 would require that any record relating to the arrest or conviction of a person for trafficking marijuana, distribution of marijuana or possession of marijuana, and “other offenses charged in the accusatory pleading,” may not be kept more than two years from the date of conviction or from the date of the person’s arrest if there was no conviction. If the person is incarcerated for an offense that would be subject to destruction, the two-year limit to retain their records would run from the date they are released from incarceration. If they were a juvenile when arrested or convicted, the records could be kept until they turn eighteen years old and then destroyed. The bill would include court records, records of any agency of the state or local government, and any records on any statewide criminal database.

SB 278 would establish an 13-person “Cannabis Control Board,” to regulate and provide oversight of the medical cannabis program and marijuana program established by the CFRA. The board members would be made up of: two CRFA licensees; two medical or public health professionals; two qualified patients under the medical cannabis program; one interested public citizen; one banking or finance professional; one representative of the labor industry; 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. They would “regulate the marijuana program established in the CRFA and promulgate rules applicable to the CRFA and medical cannabis programs. Among their assigned tasks would be establishment of a medical cannabis subsidy program and establishing qualifications for persons to be licensed to produce, possess, distribute or dispense medical cannabis. The annual license fees for medical cannabis producers would be \$15,000.00 for up to 150 mature plants, an additional \$5,000.00 for each additional 50 mature plants, up to a maximum annual fee of \$45,000.00.

SB 278 would also charge the state regulation and licensing department (“department”) with prescribing the rules and forms to implement the CFRA, license producers for the medical marijuana program and obtain research about the influence of marijuana items on a person’s ability to drive a vehicle. They would also license marijuana processors, marijuana wholesalers, marijuana retailers and marijuana testers. 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, products made from industrial hemp in New Mexico, and seeds to grow agricultural hemp)

SB 278 would permit possession of usable marijuana (dried marijuana flowers and leaves) by one or more persons, 21 or older, if the total amount did not exceed: 50 grams of marijuana at the person’s household or 25 grams outside their household; up to seven grams of marijuana extract (product obtained by separating resins from marijuana by solvent extraction); and, up to 14 grams of hashish (resin extracted from any part of marijuana). Each household could also produce, process, keep or store up to 225 grams of usable homegrown marijuana (grown for non-commercial purposes): six mature marijuana plants and six immature marijuana plants (plants with no observable flowers or buds) per person, so long as no more than 12 mature marijuana plants and 12 immature marijuana plants are present in a household. They could also make, process, keep or store up to 450 grams in solid form and 2000 grams 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 “transfer:” up to 25 grams of usable marijuana; up to 14 grams of hashish; up to 450 grams of marijuana products in solid form; up to 2,000 grams of marijuana products in liquid form; and, up to seven grams of marijuana extract, to another person age 21 or older if the transfer 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.

SB 278 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). It would also create “marijuana testers,” to conduct tests to identify or analyze the strength, effectiveness or purity of marijuana items. 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, 2018 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, pursuant to the CRFA, from persons currently licensed as producers under the New Mexico medical marijuana law. Beginning on July 1, 2020 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 \$500.00, and an annual license fee of up to \$2,000.00. The annual license fees for producers would be \$15,000.00 if the “...producer will possess up to one hundred fifty marijuana plants” and an additional \$5,000.00 for each additional 50 marijuana plants the producer will possess, up to a maximum fee of \$45,000.00. 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; hashish; THC extracted or isolated from marijuana; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compounds, (etc.) of the mature stalks; fiber produced from the stalks; oil or cake made from the seeds of the plant; sterilized seed of the plant that is incapable of germination; marijuana extracts; or industrial hemp or a commodity or product made from industrial hemp.” Persons could hold multiple production, processing, wholesale and retail licenses, except a person licensed as a marijuana tester could not hold any other licenses relating to marijuana. Producers would have to certify that would produce at least 500,000 grams of marijuana for qualified medical cannabis patients.

SB 278 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, possess 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 within 42 days of a primary, general or school election.

SB 278 would impose an excise tax of fifteen per cent (15%) on the, “price paid for the marijuana item” (marijuana, marijuana products, marijuana extracts and hashish). After administrative costs were deducted the cannabis tax would be distributed to multiple groups: 40% would go to the public school fund (“augment appropriations for the state equalization guarantee distribution”); 23% to a new substance abuse prevention and behavioral health fund (“establish, operate and maintain alcohol and substance prevention, early intervention and treatment and related behavioral health services”); 20% to a new cannabis revenue economic development fund (“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 district attorney public safety fund (“support evidence-based arrest and incarceration diversion programs for low-level nonviolent drug related offenses and support development of intoxicated driving detection programs”); 7.5% to a new public defender safety fund (“for operations”); and 2% to the department of health (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.

SB 278 would substantially revise most of the criminal code statutes relating to marijuana and reduce the sanctions to civil penalties of \$50.00 or misdemeanors. Marijuana, hashish, THC and chemical derivatives of THC would be specifically removed from the list of Schedule 1 controlled substances for certified research patients, qualified medical marijuana patients and a person “whose conduct complies with the (CRFA).” Marijuana violations of the Controlled Substances Act would be as follows. Trafficking (manufacture, distribution, sale, barter or giving) marijuana and trafficking marijuana in a drug-free school zone would be classified as misdemeanors, regardless of whether it was a first or subsequent offense. Distribution or possession with intent to distribute marijuana, or synthetic cannabinoids, would also be classified as misdemeanors, regardless of whether it was a first or subsequent offense and regardless of the amounts involved. There would be no difference if the offense occurred in a drug-free school zone. 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. If distribution involved, “a small amount of marijuana or synthetic cannabinoids for no remuneration it would be treated the same as if it was illegal possession. Possession of more than one ounce but less than eight ounces of marijuana or synthetic cannabinoids, “outside a person’s residence” would be subject to a \$100 fine, and possession of more than eight ounces (regardless of the quantity, or whether it was a first or subsequent offense) outside a person’s residence would be a misdemeanor. Possession of more than one ounce of marijuana in a drug-free school zone would be a misdemeanor, regardless of whether it was first or subsequent offense and regardless of the amount involved. 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 would be a petty misdemeanor, punishable by a fine of up to \$100 or 48 hours community service.

SB 278 would create some new offenses. Sale or delivery by a licensee to a person under age 21 would be punishable by possible suspension or revocation of their license, a fine of up to \$10,000.00, or both, for a first offense. A second offense would result in mandatory suspension or revocation of their license, a \$10,000.00 fine, or both.

It would be a misdemeanor if a person in control knowingly allowed someone under age 21 (who was not there on a temporary basis for a service call, or an emergency) to remain or consume marijuana on the premises of a licensed marijuana business. Import or export of marijuana would be a misdemeanor. Also misdemeanors would be: making false statement to the department to induce or prevent their action; maintenance of a noisy, lewd, disorderly or unsanitary establishment or supplying impure or deleterious marijuana items; misrepresenting marijuana items to any person; selling or offering for sale marijuana items that do not comply with minimum standards established by CRFA rules; selling or offering to sell marijuana items that have been altered in any way by a person not licensed to alter the items; using or allowing use of a label or marking on marijuana items that does not precisely and clearly indicate its contents or could deceive a person as to its nature, composition, quantity, age or quality of the marijuana items.

Entry to licensed premises (except in an emergency or otherwise permitted by rule) by a person under age 21 would be punished by a \$50.00 civil penalty. Using marijuana in public, unless it was at a licensed business with a public use permit, would be punishable by a \$50.00 civil penalty. Other offenses punishable by a \$50.00 civil penalty would be: sale, gift or otherwise making available marijuana item to an visibly intoxicated person; having homegrown marijuana or homemade marijuana products in public view; production, processing or storage of homemade marijuana extracts if they were produced using a volatile solvent; maintaining or permitting a common nuisance (place where marijuana items are sold, manufactured, bartered, given away, used or kept in violation of state law); and, any other violation of the CRFA unless it is specifically otherwise provided.

SB 278 would also set up a regulatory system for production and sale of industrial hemp that would be administered by the department of agriculture. The minimum crop size would be 2.5 acres. 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.” Any crop that contained an average THC concentration greater than three-tenths per cent on a dry weight basis could be detained, seized or embargoed. A civil penalty of up to \$2,500.00 could be levied for violation of the license or permit or department rules relating to growing or handling industrial hemp.

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.

SB 278 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.

SB 278 would allow persons previously convicted of marijuana offenses, and other related charges, to petition the courts to set aside their convictions if their conduct would not have been a crime or would have been a lesser crime if the bill had been in effect at the time they committed their offense. Allowing persons to have their previous convictions dismissed or modified would be contrary to the New Mexico constitution and long-established law. “No person shall be exempt from prosecution and punishment for any or crime or offenses against any law of this state by reason of the subsequent repeal of such law.” NM Constitution, Art. IV, Sect. 33. Repeal of a statute did not bar or abate proceedings before it was repealed. *State v. Tipton*, 78 N.M. 600 (1967) See also, *State v. McAdams*, 83 N.M. 544 (Ct. App. 1972) (Prosecution of prior crimes shall be

governed, prosecuted and punished under the laws existing at the time such prior crimes were committed.) It might also be argued that setting aside prior convictions would be a violation of the separation of powers because it would impinge on valid laws passed by previous legislatures, signed by the Governor, prosecuted by duly elected district attorneys in cases where the trial or plea were done that were presided over and reviewed by the proper courts. “(N)o person or collection of persons charged with the exercise of powers properly belonging to one of these departments (legislative, executive and judicial), shall exercise any of the powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.” NM Constitution, Art. III, Sect. 1. If the constitutional hurdles can be overcome there is no guidance on what relief would otherwise be available to persons whose marijuana cases were not dismissed or recalled, or perhaps received less than the expected or requested relief. Treating persons differently for the same crime(s) is virtually certain to draw complaints they were denied equal process under law and might even result in civil litigation. Poring over old cases will, at a minimum, increase the workload of the courts, prosecutors and defenders and require more personnel and financial resources.

Setting aside or reducing certain convictions dealing with marijuana could directly affect any subsequent prosecutions related to those convictions. See, e.g., possession of a firearm by a felon (Sect. 30-7-16, NMSA 1978), and repeat offenses for: trafficking controlled substances (Sect. 30-31-20(B)(2), NMSA 1978), distribution of marijuana to a minor (Sect. 30-31-21(A)(2) and (B)(2), NMSA 1978), distribution of controlled or counterfeit substances (Sect. 30-31-22(A)(1)(b—d) and (D)(1)(b)and(d), NMSA 1978), as well as habitual offender prosecutions. Sect. 31-18-17, NMSA 1978. The bill provides no information regarding what should happen with those collateral cases if it is adopted.

SB 278 would require the records related to arrest and conviction of marijuana related crimes, and other crimes charged in the same accusatory pleading, destroyed two years after arrest (if no conviction) or after the conviction or after the person was released from incarceration. Frequently people are arrested for one crime, which may be unrelated to possession, use or sale of marijuana, but if evidence of marijuana crimes are found, law enforcement officers are required to investigate all violations and file a complaint or information if indicated. See, Sect. 29-1-1, NMSA 1978. If the marijuana charges are dismissed pre-trial because of a plea bargain, suppression issue or other good cause (e.g., unavailability of a critical witness, like a laboratory analyst) it is unclear if the bill would also cover those cases. The logistics of tracking all marijuana-related arrest, conviction and incarceration records are likely to be beyond the capacity of many state and local agencies, and many of the courts in New Mexico, especially if they are not sophisticated, and will require additional personnel and financial resources. Just keeping track of the applicable dates can be extremely difficult and can have different results. For instance, someone could be incarcerated briefly at arrest, released, after conviction given a brief sentence in jail and then placed on probation, and if they violated probation be incarcerated again for some or all of their remaining sentence. The bill gives no guidance on what should be the triggering date in cases like that and others with complex procedural history. No guidance is provided in the bill on the consequences if an agency or court does not destroy the records relating to marijuana crimes or who would be held responsible for that deficiency.

SB 278 would impose civil penalties of \$50.00 or, in some offenses—misdemeanor sanctions which are up to 364 days in jail, \$1,000.00 fine, or both. Nearly every offense in the bill carries the same punishment regardless of whether it is a first offense, or second or subsequent offense, and regardless of the amount of marijuana involved. It seems probable that people who have been involved in the illegal distribution of marijuana and now face punishments ranging from a fourth

degree felony, for a first offense for smaller amounts, up to a third or second degree felony sanctions if they were involved with 100 pounds or more of marijuana, will not be deterred by the prospect of only county jail time and a relatively small fine. Illegal dealers can sell marijuana without having to pay a state licensing fee or state, and possibly local or county, excise taxes, or having to operate a tidy and sanitary business, so they can probably sell it at lower prices than licensed marijuana retailers. The bill may also spur sales of synthetic cannabinoids and law enforcement officers will be hard pressed to know where those products came from, if they have been tested and are safe, and were purchased from a licensed vendor. Although persons under 21 are prohibited from being at a licensed marijuana operation and prohibited from receiving marijuana and marijuana products, there is no such prohibition from them being in a household where sizable quantities of marijuana and other marijuana products may be present.

SB 278 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. Pruning a plant might change its appearance to an immature plant.

SB 278 bill does not include any prohibition against using marijuana while driving. With marijuana, and hashish and other marijuana products more widely available, it’s likely more people will operate motor vehicles while under the influence, and may even use marijuana while driving. Some defendants charged with driving under the influence of marijuana might argue that the statute prohibits someone driving who is under the “influence of a drug” and since marijuana would be expressly excluded as a Schedule I narcotic the DWI statute should not apply to them. Even if that argument is not accepted, without an objective standard it still must be proven that they were “incapable of safely driving a vehicle,” and that has proved challenging and is more so if people are accustomed to coping with the effects of marijuana. There is no attempt to quantify the amount of marijuana that someone may have in their system and safely drive a vehicle. 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.

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

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

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

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.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

SB 278 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