| LFC Requester: | |
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**AGENCY BILL ANALYSIS**
**2016 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

**LFC@NMLEGIS.GOV**

***and***

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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. 14, 2016
**Bill No**: HB 75

**Sponsor:** Bill McCamley
**Short Title:** Cannabis Revenue and 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 |
|---|---|---|---|
| **FY15** | **FY16** | | |
| | | | |
| | | | |

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

| Estimated Revenue | | | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|
| **FY15** | **FY16** | **FY17** | | |
| | | | | |
| | | | | |

(Parenthesis ( ) Indicate Expenditure Decreases)

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

| | FY15 | FY16 | FY17 | 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 75, AKA Cannabis Revenue and Freedom Act ("CRFA"), is an omnibus bill to "establish a comprehensive regulatory framework relating to marijuana" and would *inter alia* permit the manufacture, processing, purchase, sale, possession and use of certain amounts of marijuana and marijuana products by persons who are at least 21 years old. It is identical to the CRFA bill introduced in 2015 by Rep. McCamley, except for changing pertinent dates.

The bill would permit production, processing and storage of homegrown marijuana at a household by one or more persons age 21 or older if the total amount did not exceed four plants and eight ounces of usable marijuana, and it would permit delivery of up to one ounce of homegrown marijuana at a time to another person for non-commercial purposes. It would also permit persons a household with at least one person age 21 or older to make, process, store and deliver—for non-commercial purposes to another person homemade marijuana products of up to sixteen ounces if in solid form, or up to 72 ounces if in liquid form. Use of marijuana in public places is prohibited. It is a fourth degree felony if possession of the marijuana or items is more than four times the amount permitted; possession of more than two times the amount permitted but not more than four times is a misdemeanor; and if the amount possessed is beyond the permitted amount but less than two times as much, it is a petty misdemeanor. It would also be unlawful to possess any marijuana extracts not purchased from a licensed retailer. If the illegal extract was in excess of one-fourth ounce it would be a fourth degree felony; less than that would be a misdemeanor. Using marijuana while driving a motor vehicle on a highway would also be a misdemeanor. Evidence that relates to conduct pursuant to and in compliance with CRFA would not be permitted in child abuse prosecutions for having a child in a motor vehicle or building or other premises.

The Controlled Substances Act ("CSA") would be amended to exclude industrial hemp and marijuana for purposes of or conduct pursuant to and in compliance with the CRFA. Marijuana, THC or chemical derivatives of THC used "…for the purpose of or with respect to conduct pursuant to and in compliance with the (CRFA)," would be specifically excluded as Schedule I controlled substances.

The CRFA would, apparently, establish a regulation and licensing department to regulate the purchase, sale, production, processing, transportation and delivery of marijuana items, including licensing commercial producers and vendors, and enforcing rules on the source of the marijuana and labeling items with their tetrahydrocannabinol concentration. Beginning July 1, 2017 the department would have to accept applications for licenses as a producer,

processor, wholesaler and retailer to "produce, process and sell marijuana" within the state, subject to the provision of the CRFA. Priority would be given to persons currently licensed under the New Mexico medical marijuana law. Fees could be up to $500.00 for each application and up to $2,000.00/year for issuance of a license once it was approved. Taxes would be assessed on items sold by the marijuana producer at the time of sale at the rate of $35.00/ounce on all marijuana flowers; $10.00/ounce on all marijuana leaves; and $5.00/immature marijuana plant. Proportional charges would be charged on sales of marijuana flowers and leaves of less than an ounce. Statements by the marijuana producers of their sales would be due every month. Beginning July 1, 2018, and in every even-numbered year thereafter, the tax rates would be adjusted for any increase in the cost of living. No county or city would be allowed to impose its own tax or fee in connection with the purchase, sale, production, processing, transportation or delivery of marijuana items. It would be illegal for any licensee to import or export marijuana. If the importation or exportation were "for consideration" it would be a fourth degree felony. If the importation or exportation were "not for consideration," it would be a misdemeanor.

The money from the CRFA would go into two newly established state funds. One would be a "cannabis administration fund" to carry out the CRFA department's duties. Any excess would be transferred to the "cannabis revenue fund" administered by the state taxation and revenue department for their duties relating to the Act. Any remaining amounts from the second fund would be disbursed to various government agencies: 40% to the state general fund for distribution pursuant to the Public School Finance Act; 25% to the department of health "to establish, operate and maintain alcohol and substance abuse prevention, early intervention and treatment and related mental health services;" 15% to the department of public safety for state police expenses; and 10% to the state's municipalities to assist local law enforcement in performing duties related to the CRFA based on how many licenses were present; and 10% to the state's counties to assist local law enforcement in performing duties related to the CRFA based on how many licenses they had in their counties.

Employees, and customers, of the licensed establishments would have to be at least 21 years old. A persons who bought marijuana that was under age 21 would have their driver's license suspended for a year in addition to other penalties. Except for licensed marijuana producers, licensees may not possess or sell mature marijuana plants. Marijuana items could not be imported into New Mexico or exported from the state by any licensee or their representative. An import or export violation would be a fourth degree felony if it was done for "consideration" and a misdemeanor if it was not done for consideration."

The CRFA would supersede any local law or ordinance regulating marijuana production, sales and usage, although local governments could establish reasonable regulations dealing with nuisance aspects of marijuana sales. Any county, or a municipality with at least 5,000 population, could 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 75 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**

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.

HB 75 would apparently set up a "regulation and licensing department" to deal with marijuana production and sales but it is unknown how much that would cost to establish and operate. The marijuana legalization measure adopted in Oregon (which appears to be the basis for much of HB 75) charges their Liquor Control Commission as the regulatory agency for marijuana. A variety of state agencies in New Mexico would be involved in administrative activities under HB 75.

**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 75 provides that only persons 21 years old or older may lawfully possess and use marijuana. 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. There are currently 23 states, including New Mexico, the District of Columbia and Guam that permit medical marijuana. See, e.g., Sec. 26-2B-1, et seq., NMSA. 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 75 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 three times 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 AG 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."

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."

On February 14, 2014 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. They created a three-tiered system for filing Suspicious Activity Reports ("SARs") based on the 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.

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 the 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. HB 75 would allow state income tax exemptions in the same amount they would have been permitted except for being excluded by Section 280E of the federal tax code.

HB 75 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 also likely that if marijuana usage increases, the number of persons driving a vehicle after ingesting marijuana, or even while using it, will also increase. The bill would establish a new crime: use of marijuana while driving if the person uses any marijuana while driving a motor vehicle on the highway. Violators would be guilty of a misdemeanor but it is not specified if that would be punished as a misdemeanor under the criminal code or the motor vehicle code. There are obvious challenges in detecting someone who is using of marijuana while driving.

The bill would also not establish any standardized limit for driving a motor vehicle after consuming marijuana that would be presumptive for intoxication. There is currently no plain or specific limit for driving while under the influence of any drug. Instead, the current statute says, "it is unlawful for a persons who is under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within the state." See, Sec. 66-8-102(B), NMSA. The prosecution of those cases are challenging, especially when the driver is suspected, or proven, to being under the influence of poly-drug combination, or alcohol and drugs. Expert testimony requirements will increase and trials will probably be longer, more complicated and more expensive.

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 that federal law must trump the Colorado state law permitting recreational use. No quantification in support of their claims of undue burden have been published yet, and one Oklahoma legislator is asking his AG not to pursue a lawsuit because of a concern that it may erode states' rights reserved to them under Amendment X to the U.S. Constitution.

**PERFORMANCE IMPLICATIONS**

**ADMINISTRATIVE IMPLICATIONS**

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

**TECHNICAL ISSUES**

HB 75 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.

HB 75 (at pps. 71-75) also includes a number of grammatical changes to statutes dealing with skiing. It is unclear how those proposed changes relate or are otherwise relevant to the CRFA.

**OTHER SUBSTANTIVE ISSUES**

**ALTERNATIVES**

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

**AMENDMENTS**