November 9, 2021

Via Email
Department of Health
Medical Cannabis Program
P.O. Box 26110
Santa Fe, NM 87502-6110
MCP.comment@state.nm.us

Re: Comments on Proposed Rule 7.34.3

Dear Department of Health,

Please accept these public comments from New Mexico Top Organics-Ultra Health, Inc., and Ultra Health, LLC sent in relation to the proposed Department of Health ("DOH") regulation 7.34.3 NMAC, to be considered ahead of the November 12, 2021 public hearing.

I. Adequate Supply Purchase Limitation

The proposed rule 7.34.3.9 NMAC states, "A qualified patient and a qualified patient's primary caregiver may collectively purchase within any three-month period a quantity of usable cannabis no greater than 425 total units. For purposes of department rules, this quantity is deemed an adequate supply…A qualified patient and a primary caregiver may possess the amounts of cannabis permitted in accordance with the Cannabis Regulation Act, NMSA 1978, § 26-2C-1 et seq. Once commercial cannabis sales are authorized by the Cannabis Control Division to begin in accordance with NMSA 1978, § 26-2C-6(K), qualified patients and primary caregivers will be able to make commercial purchases above the adequate supply limit, in accordance with the Cannabis Regulation Act."

This proposed regulation is illegal. It violates the Cannabis Regulation Act in multiple ways.

First, the Cannabis Regulation Act ("CRA") transferred the vast majority of the medical cannabis program from DOH to the Cannabis Control Division ("CCD") within the Regulation and Licensing Department ("RLD"): "Except for administration of the medical cannabis registry, the power, duty and authority of the department of health related to the medical cannabis program shall be transferred to the division on the effective date of the Cannabis Regulation Act." NMSA 1978, § 26-2C-5 (2021).

Thus, DOH legally has no authority to limit purchases for medical patients in any way. DOH has no authority to promulgate any rules related to cannabis, except if those rules concern the medical cannabis registry. DOH simply has no legal authority or power to promulgate or enforce its proposed rule 7.34.3.9 NMAC.

Indeed, the "medical cannabis registry" is defined in the Cannabis Regulation Act as the "system by which the department approves or denies applications and issues and renews registry identification cards for qualified patients." § 26-2C-3(MM). Limiting the purchases of medical cannabis patients, which is what 7.34.3.9 NMAC does, has nothing to do with processing registry identification cards.

Therefore, on June 29, 2021 (the effective date of the Cannabis Regulation Act), DOH lost any authority that would allow it to define an adequate supply, create purchase limitations, or enforce purchase limitations.

Second, Section 26-2C-25(A)(1) of the CRA provides that the "following conduct is lawful for a person who is twenty-one years of age or older and shall not constitute grounds for detention, search or arrest of a person…possessing, using, being under the influence of, displaying, **purchasing, obtaining** or transporting **not more cannabis than authorized by the Cannabis Regulation Act** or the medical cannabis program" (emphasis added). There is no specific effective date for this section, and so the effective date was June 29, 2021, which is the generally effective date of the CRA.

There are several coordinating sections of the CRA that further clarify the extent of the rights granted by Section 26-2C-25(A)(1). Section 26-2B-25(A)(2) of the CRA provides that the "following conduct is lawful for a person who is twenty-one years of age or older and shall not constitute grounds for detention, search or arrest of a person …possessing in excess of two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis if the excess is stored in the person's private residence and not visible from a public place." Section 26-2C-3(B)(4)(a) directs the Cannabis Control Division within RLD to promulgate rules stating that "**a person** who is twenty-one years old or older **shall not purchase more than two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis at one time**" (emphasis added).

All of these sections broadly refer to a "person"—not a "consumer," not a "recreational purchaser," and not a "non-medical purchaser." "Person" plainly includes medical cannabis patients. Furthermore, Section 26-2C-25(A)(1) specifically includes "possessing," "purchasing" and "obtaining." It is both a possession limitation and a purchase limitation.

Section 26-2C-25(A)(1) specifically allows "persons" to purchase "not more cannabis than authorized by the Cannabis Regulation Act **or** the medical cannabis program," without reference to whether the higher or lower amount controls. Thus, if the person purchased the higher amount, it would still be lawful.

When read in the context of 26-2C-3(B)(4)(a) and Section 26-2C-25(A)(2), Section 25(A)(1) of the CRA specifically and clearly allows any "person" twenty-one years of age or older to purchase, on and after June 29, 2021, "not more cannabis than authorized by the Cannabis Regulation Act." The amount of cannabis authorized for purchase "at one time" is two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis. DOH's proposed 7.34.3.9 NMAC, which would allow a qualified medical cannabis patient to purchase only 450-grams-over-90-days, blatantly contradicts the statutory provision.

In a broader sense, the "adequate supply" provisions—both statutory and regulatory—of the Lynn and Erin Compassionate Use Act have been nullified by the enactment of the Cannabis Regulation Act.

Under the Compassionate Use Act, possessing and purchasing cannabis was only lawful for qualified medical patients, and the purchases were only lawful up to a certain volume set by regulation. Under the Cannabis Regulation Act, possessing and purchasing cannabis became lawful for all adults beginning on June 29, 2021, and it became lawful up to a volume defined in statute, rather than a volume set by regulation.

The CRA's intent to displace DOH's authority over patient purchase limitations is obvious from the CRA's text. First, Section 26-2C-5 clearly states, "Except for administration of the medical cannabis registry, the power, duty and authority of the department of health related to the medical cannabis program shall be transferred to the division on the effective date of the Cannabis Regulation Act." By severely limiting DOH's authority, the CRA indicates its intent to supplant and supersede DOH's arbitrary and capricious limitations on medical patient purchases.

Next, Section 70 of the CRA, which is titled "temporary provision," reads, "To the extent any administrative rules are inconsistent with the provisions of this act, such rules are null and void." The provisions of the Act, as reviewed above, unmistakably authorize "persons" to purchase not more than two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis at one time, and that provision went into effect on June 29, 2021. There is nothing in the CRA that limits its effectuation to certain dates.

As between statutes and regulations, statutes trump regulations: any agency action "that is not in accordance with law should be reversed if the agency unreasonably or unlawfully misinterprets or misapplies the law.'" *N.M. Mining Assn. v. N.M. Water Quality Control Comm*., 2007-NMCA-010, ¶ 11, 141 N.M. 41, quoting *Archuleta v. Santa Fe Police Dep't*, 2005 NMSC-006, ¶ 18, 137 N.M. 161.

Furthermore, between two conflicting statutes, the later, more comprehensive one governs. "If statutes appear to conflict, they must be construed, if possible, to give effect to each. If the conflict is irreconcilable, the later-enacted statute governs." NMSA 1978, § 12-2A-10 (A) (1997). "If a statute is a comprehensive revision of the law on a subject, it prevails over previous statutes on the subject, whether or not the revision and the previous statutes conflict irreconcilably." § 12-2A-10 (C).

The Cannabis Regulation Act is a comprehensive revision of the law regarding cannabis, and therefore it prevails over the Compassionate Use Act where the two statutes conflict.

DOH's proposed rule is therefore illegal.

II. Additional Amounts of "Commercial" Cannabis

DOH's rule 7.34.3.9 NMAC states, "Once commercial cannabis sales are authorized by the Cannabis Control Division to begin in accordance with NMSA 1978, § 26-2C-6(K), qualified patients and primary caregivers will be able to make **commercial purchases** above the adequate supply limit, in accordance with the Cannabis Regulation Act" (emphasis added).

This provision is illegal. Now, although DOH's rule fails to define "commercial purchases" and fails to even define "commercial," it is obvious what DOH attempts to do here.

On September 24, 2021, DOH wrote, in an answer filed in case D-202-CV-2021-04058, "As commercial sales are not currently permitted, the LECUA [Compassionate Use Act] limits qualified patients to purchases of eight ounces within a three-month period. See 7.34.3.9(A), 7.34.4.8(L) NMAC. Hypothetically, if a qualified patient were able to purchase on the commercial, non-medical market above those limits currently permitted by regulation, by statute the cannabis excise tax would apply."

The meaning of DOH's proposed 7.34.3.9 NMAC is clear: medical cannabis patients may purchase 450-units-over-90-days without paying any applicable tax, but any volume exceeding the 450-units-over-90-days would be taxed.

There is no statutory justification for this position, and the proposed regulation violates statute. NMSA 1978, Section 7-42-3(C) (2021) states, "The cannabis excise tax shall not apply to retail sales of medical cannabis products sold to a qualified patient or a primary caregiver who presents a registry identification card issued pursuant to the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978] or a reciprocal participant who presents similar proof from another state, the District of Columbia or a territory or commonwealth of the United States at the time of the sale."

Section 7-42-3(C) contains no volume limitation whatsoever. It simply says that "sales of medical cannabis" to "a qualified patient or a primary caregiver who presents a registry identification card" are not subject to the excise tax. By claiming that volumes of cannabis "above the adequate supply" limit are "commercial" and therefore taxable, DOH adds words to the statute. DOH has no authority to add words to the statute.

"An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority." *Wilcox v. New Mexico Bd. of Acupuncture and Oriental Medicine*, 2012-NMCA-106, ¶ 7, quoting Rivas v. Bd. of Cosmetologists, 101 N.M. 592, 593, 686 P.2d 934, 935 (1984). "The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 22, 961 P.2d 768.

Additionally, NMSA 1978, Section 7-9-73.2 (2021) states, "Receipts from the sale of prescription drugs and oxygen and oxygen services provided by a licensed medicare durable medical equipment provider and cannabis products that are sold in accordance with the Lynn and Erin Compassionate Use Act may be deducted from gross receipts and governmental gross

receipts." Again, there is no volume limitation here. The only limitation on the gross receipts tax exemption is that the sale must be "in accordance" with the Compassionate Use Act, meaning that only qualified patients who present a registry identification card will be relieved from sales tax. However, the manner of sale does not imply any volume limitation. The DOH is once again reading words into the statute that are not there.

Finally, DOH has no authority to decide what is and what is not taxable. "Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes." *Qwest Corp. v. N.M. Pub. Regulation Comm'n*, 2006–NMSC–042, ¶ 20, 140 N.M. 440, 143 P.3d 478. Nowhere in the Compassionate Use Act or DOH's enabling statute does the Legislature delegate the authority to DOH to make decisions on taxation. Taxation is an area of exclusive legislative control. In attempting to make decision on what should and should not be taxed, DOH is usurping the role of the elected Legislature.

The attempt by DOH to control taxation is recklessly unlawful. The statutes are obvious and clear, and DOH is simply crowning itself king. However, this is not a monarchy, and DOH is subject to standards of constitutionality. As an agency created by statute, it is limited to the power and authority defined by statute.

III. Reciprocal Limitations

DOH's proposed regulation 7.34.3.22(B) NMAC places the same purchase limitations on reciprocal participants as 7.34.3.9 NMAC places on medical cannabis patients. The purchase limitations are unlawful for the same reasons that 7.34.3.9 NMAC is unlawful.

IV. Lack of Substantial Evidence and Lack of Medical Advisory Board Consultation

Even *if* DOH had lawful authority to promulgate purchase limitations for patients (which it does not), the rule would still fail because it is unsupported by substantial evidence and because the DOH failed to consult the Medical Advisory Board.

It is axiomatic that all administrative regulations in New Mexico must be supported by substantial evidence. The DOH should know this based on the extensive briefings in case D-101-CV-2020-01485. The DOH has provided no evidence at all, let alone substantial evidence, to support its 425-units-over-90-days "adequate supply" figure. Attached is a screenshot of the Department's website where the rule is listed. There, the DOH has provided no studies, no surveys, no supporting documents, no comparisons to other states. In short, DOH has provided no evidence whatsoever.

Additionally, DOH has failed to consult with the Medical Cannabis Advisory Board. NMSA 1978, Section 26-2B-7 (2021) states, "**After consultation with the advisory board**, the department shall promulgate rules in accordance with the State Rules Act…" (emphasis added). Again, the Department should know of this requirement, since it was one of the reasons that a court overturned DOH rules in case D-101-CV-2020-01485. There is no indication that the DOH properly consulted with the Medical Cannabis Advisory Board.

The last time the Medical Advisory Board met to discuss the "adequate supply" was in December 2020. However, any cannabis-related events that occurred prior to June 29, 2021 are irrelevant, because the world of cannabis in New Mexico fundamentally changed on June 29, 2021 with the effectuation of the Cannabis Regulation Act.

If DOH had consulted with the Board after June 29, 2021, the Board could have considered issues in light of the Cannabis Regulation Act, including the notion of simply setting the "adequate supply" to correspond with the statutory standard: "two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis at one time." However, DOH failed to consult with the Board on this matter, which again renders the rule unlawful.

Sincerely,

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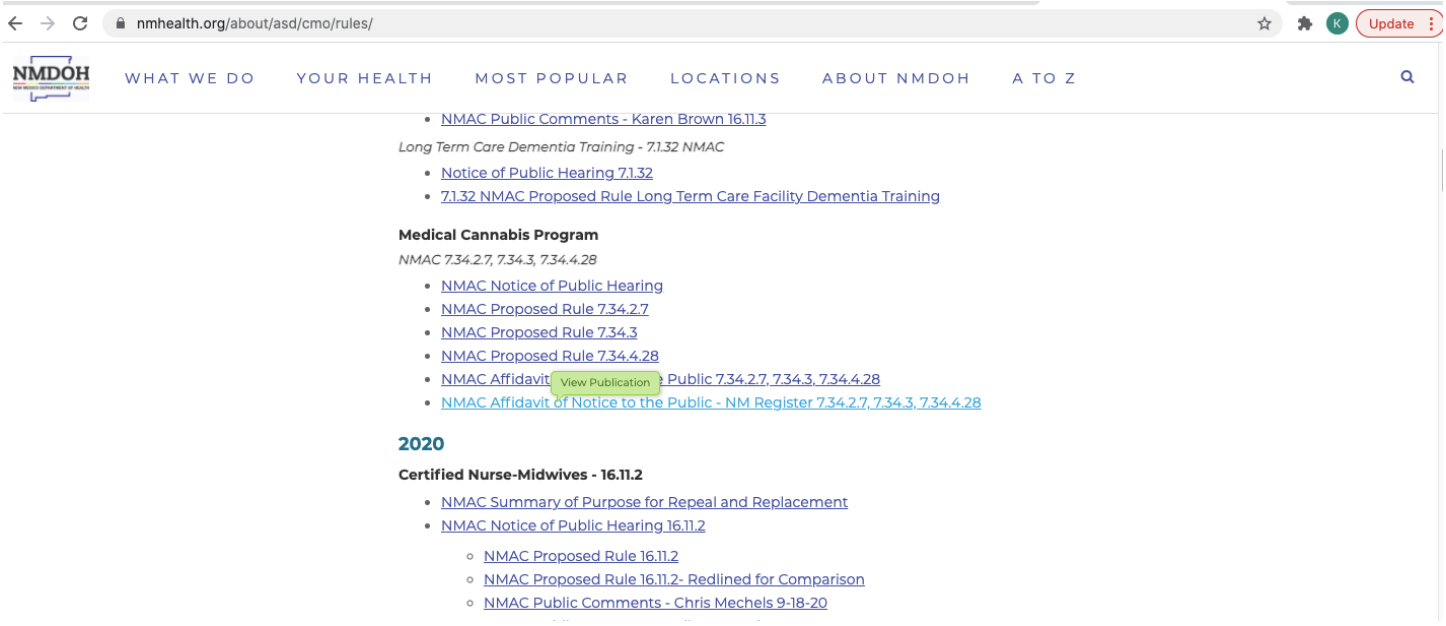
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