

Via E-mail and U.S. Postal Mail

January 12, 2021

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Re: Public Comments Received Concerning Proposed Amendment to 7.34.4.28 NMAC

Dear Mr. Erickson:

This letter is written on behalf of the New Mexico Department of Health, Medical Cannabis Program (“Department”; “Program”) to address public comments received in the course of the ongoing rulemaking concerning the proposed amendment to rule section 7.34.4.28 NMAC concerning Medical Cannabis Program reciprocity. This letter is also written to address the recommendations of the Medical Cannabis Advisory Board that were made at the Advisory Board’s public meeting on December 9, 2020.

The only public comments received by the Department concerning the proposed rule amendment came from representatives of the licensed medical cannabis producer New Mexico Top Organics – Ultra Health (“Ultra Health”). The comments from Ultra Health’s representatives repeat the same faulty legal arguments that Ultra Health propounded in the case of *New Mexico Top Organics – Ultra Health, Inc. v. New Mexico Department of Health, Dominic Zurlo, and Secretary Billy Jimenez*, case no. D-101-CV-2020-2059. As described in greater detail herein, Ultra Health’s legal arguments were rejected by the First Judicial District Court.

I. Ultra Health’s Lawsuit and Its Outcome

On September 11, 2020, the Department of Health, Medical Cannabis Program issued a letter to licensed nonprofit medical cannabis producers, offering guidance concerning compliance with the Medical Cannabis Program’s reciprocity requirements. The letter stated, in pertinent part:

- 1) that New Mexico residents may not be registered as reciprocal participants, but must instead enroll as qualified patients in the Medical Cannabis Program;
- 2) that individuals who seek to participate reciprocally in the NM Medical Cannabis Program based on authorization to participate in the California medical cannabis program must show a California-issued medical marijuana identification card, and that a letter from a medical practitioner alone would not constitute “proof of authorization”; and

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3) that a reciprocal participant's state-issued identification card must match the information on their proof of authorization, including the state of residence.

On September 22, 2020, Ultra Health filed a Verified Petition for Alternative Writ of Mandamus in case no. D-101-CV-2020-2059. The Petition sought to prohibit the Medical Cannabis Program from enforcing the terms of its September 11, 2020 letter to producers. As grounds for the issuance of a writ of mandamus, Ultra Health made various arguments that the requirements of the September 11, 2020 letter were contrary to the Lynn and Erin Compassionate Use Act, NMSA 1978, §§ 26-2B-1 through -10 and beyond the lawful authority of the Department. Ultra Health argued in its Petition that the Lynn and Erin Compassionate Use Act does not require presentation of a medical cannabis enrollment card as "proof of authorization", and that the Legislature did not intend to restrict reciprocity in this manner; that the state of California allows persons to participate in its medical cannabis program on the basis of a letter from a physician; and that the statute does not preclude New Mexico residents from becoming reciprocal participants. Ultra Health also argued that the requirements of the September 11, 2020 letter conflicted with the Lynn and Erin Compassionate Use Act because the Legislature did not require that a reciprocal participant's proof of authorization to participate in the medical cannabis program of another jurisdiction be issued in the same jurisdiction where their government-issued identification card was issued. Ultra Health further argued that the Department's September 11, 2020 letter constituted a "rule" that had not been duly promulgated in accordance with the NM State Rules Act, NMSA 1978, §§ 14-4-1 through -11, and that the requirements stated in that letter which were not expressly stated in existing rule or statute were therefore unenforceable.

On October 8, 2020, Department of Health Acting Cabinet Secretary Billy J. Jimenez adopted an emergency rule that amended 7.34.4.28 NMAC. The emergency rule addressed several items described in the September 11, 2020 letter, and was largely identical in substance to the currently proposed amendment. Like the currently proposed amendment, the emergency rule included revisions to the reciprocity rule that prohibited New Mexico residents, as well as enrolled qualified patients in the NM Medical Cannabis Program, from participating as reciprocal participants, and that required that the jurisdiction in which a person's medical cannabis authorization was issued match their state of residence. The emergency rule also required that a "proof of authorization" consist of a card or other document issued by an enrolling governmental entity, rather than (for example) a letter from a health care practitioner.

On October 9, 2020, a hearing was held on Ultra Health's Verified Petition for Alternative Writ of Mandamus in the First Judicial District Court (Hon. Matthew J. Wilson). Subsequently, on October 13, 2020, the Court issued a Writ of Mandamus that invalidated the Department's emergency rule adopted October 8, 2020. The stated basis for the Writ was that "[t]he DOH's justification for their emergency rule is inadequate". The Court held that the findings of the Acting Cabinet Secretary did not include a sufficient basis for a finding of "imminent peril", as required for the adoption of an emergency rule pursuant to the NM State Rules Act at NMSA 1978, § 14-4-5.6(A)(1).

On October 27, 2020, the New Mexico Department of Health published a Notice of the hearing in this rulemaking (Exhibit 3 in the rulemaking record) in the Albuquerque Journal and in the New Mexico Register. The Notice stated that a public hearing would be held on December 4, 2020 at

9:00 a.m., and informed the public of how to obtain the proposed rule revisions, as well as how to attend the hearing and how to submit public comment.

On November 14, 2020, Ultra Health filed a Motion for Order to Show Cause in case no. D-101-CV-2020-2059, in which it alleged that the Respondents violated the Court's October 13, 2020 Writ of Mandamus by pursuing this rulemaking. The Motion claimed that “[t]he District Court rejected the Department’s attempted changes to the Medical Cannabis reciprocal program as well as the Department’s arguments that these changes were consistent with the New Mexico Medical Cannabis Act [sic] or were otherwise within the Department’s rule making authority.” The Motion further claimed that “[t]he District Court found that both the September 11 Mandate and the October 8 Emergency Rule conflicted with the plain language of the New Mexico Medical Cannabis Act, specifically NMSA 1978, 26-28-7 (Registry identification cards; department rules; duties; reciprocity) and were therefore unenforceable as a matter of law....”

On November 23, 2020, the Court issued an Order to Show Cause that compelled the Respondents to appear at a hearing on December 10, 2020 and to explain why the Motion for Order to Show Cause should not be granted.

On November 14, 2020, Ultra Health also filed a Verified Application for Temporary Injunctive Order, in which it requested that the Court enjoin the Respondents from pursuing the instant rulemaking, and from permitting the Medical Cannabis Advisory Board to review the proposed amendment at its meeting on December 9, 2020. The Court issued an Order on December 3, 2020 in which it acknowledged the scheduled December 4, 2020 rule hearing and December 9, 2020 Medical Cannabis Advisory Board hearing, but declined to grant the Application for injunctive relief. The Order stated that the Court would “hold in abeyance” a final ruling on the application for injunctive relief, and that the Court would address all issues at the December 10, 2020 hearing on the Motion for Order to Show Cause.

On December 10, 2020, a hearing was held before Judge Wilson in the Santa Fe District Court on the Motion for Order to Show Cause and the Application for Temporary Injunctive Order. **Judge Wilson denied both the Motion and the Application from the bench, stating in part that “the writ does not say that the requirements for reciprocal participation imposed by the emergency rule and the mandate were incompatible with the [statute] or go beyond the Department of Health’s rulemaking authority.”** Judge Wilson further stated that **“the writ does not forbid the creation or promulgation of a regulation through the normal rulemaking process... the Court did not conclude the emergency rule conflicted with the Act.”** A written order denying both the Motion for Order to Show Cause and the Application for Temporary Injunctive Order was issued by the Court on December 17, 2020.

Ultra Health’s representatives have raised the same legal arguments in this rulemaking proceeding that Ultra Health made in case no. D-101-CV-2020-2059 in the Santa Fe District Court, arguments that were rejected by Judge Wilson. Contrary to Ultra Health’s assertions, the New Mexico Department of Health is not prohibited from pursuing this rulemaking, and the proposed rule amendment is not prohibited by statute. The proposed rule amendment is made pursuant to the authority vested in the Department by the Lynn and Erin Compassionate Use Act at NMSA 1978, § 26-2B-7(I), which requires the Department Cabinet Secretary to adopt rules concerning Medical

Cannabis Program reciprocity, and which further authorizes the Department Cabinet Secretary to “**identify requirements for the granting of reciprocity**, including provisions limiting the period of time in which a reciprocal participant may participate in the medical cannabis program.” *Id.* (emphasis added). The statute also repeatedly references the ability of the agency to specify “by department rule” a limit on the quantity of cannabis that a reciprocal participant can obtain and possess in a given period. NMSA 1978, § 26-2B-4(B), (C)(1), (C)(2).

II. Ultra Health’s Policy Contentions

Ultra Health representatives have raised various policy arguments contending that the proposed amendment is inappropriate. The Department’s rationales underlying the proposed amendment are described in the document entitled “Summary of Medical Cannabis Program Rule Amendments to 7.34.4.28 (“Reciprocity”)\”, which is contained at Exhibit 2 in the rulemaking record. However, in supplementation to Exhibit 2, the Department states as follows:

A. The Amendment is Proposed in the Interest of Qualified Patients

Ultra Health’s representatives have argued that the proposed amendment reflects an inconsiderate attitude towards medical cannabis patients. However, the amendment to the reciprocity rule is proposed in the interest of qualified patients. The proposed restrictions on Medical Cannabis Program reciprocity preserve supplies of cannabis for qualified patients, and also for reciprocal participants who are legitimately enrolled as participants in the medical cannabis program of their home state or territory. Allowing persons to participate “reciprocally” on the basis of a purported “proof of enrollment” from a state or territory that has no relationship to the person’s residence would undermine the legitimacy of the New Mexico Medical Cannabis Program and transform the NM Medical Cannabis Program into a *de facto* recreational marijuana program. Such an outcome would not be in the interest of qualified patients, and would be inconsistent with legislative intent.

B. The Proposed Amendment is Consistent with the Legislative Intent of the Lynn and Erin Compassionate Use Act

The stated purpose of the Lynn and Erin Compassionate Use Act is “to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments”. The statute does not express a legislative intention to allow New Mexico residents to become registered as reciprocal participants, but, in fact, expresses the opposite: the statute requires that enrolled patients be New Mexico residents, and specifies qualifying conditions for enrollment. To allow New Mexico residents to register as reciprocal participants would enable the circumvention of enrollment requirements for the Medical Cannabis Program, requirements that the Legislature instituted via the statute. The Legislature’s purpose in including a provision in the statute to allow reciprocity, at NMSA 1978, § 26-2B-7, was to allow persons from outside of New Mexico to obtain medicine when visiting New Mexico, not to undermine the integrity of the New Mexico Medical Cannabis Program.

The statute also does not express a legislative intention to allow persons to register as reciprocal participants on the basis of a letter from a California-licensed medical practitioner. Rather, the statute uses the expression “proof of enrollment”, which indicates an intention for reciprocal

participants to be persons actually enrolled by a governmental authority to participate in the medical cannabis program of another jurisdiction. The Department's proposed amendment reflects this intention.

III. The Medical Cannabis Advisory Board's Recommendations

The Medical Cannabis Advisory Board convened on November 16, 2020, to review the proposed amendment to the reciprocity rule at 7.34.4.28 NMAC. That portion of the Advisory Board's agenda was tabled, but was ultimately revisited at the Advisory Board's subsequent meeting on December 9, 2020. The Advisory Board recommended at that meeting in favor of the proposed amendment, with the lone exception concerning the quantity of cannabis that a reciprocal participant is permitted to possess. The Advisory Board recommended that the Department adopt the following text in the rule:

A reciprocal participant may collectively possess within any 6-month period a quantity of usable cannabis that is consistent with the limits allowed to the qualified patient and that the reciprocal participant may have an appeal process to file for a 6-month extension.

Thus, the Advisory Board recommended that persons participate reciprocally in the Medical Cannabis Program for a 6-month period each year that can be renewed for an additional six months, and that a process should be established to allow for this extension on request; and that the quantity of cannabis that a reciprocal participant can possess within the six-month period should be equivalent to the amount allowed for a qualified patient for that period.

In the existing rule, reciprocal participants can participate in the Medical Cannabis Program for all twelve months of the year, and the "reciprocal limit" (the amount of cannabis that a reciprocal participant can possess) is identical to the "adequate supply" possession limit for qualified patients under 7.34.3.9 NMAC: 230 units in each 3-month period. In the proposed amendment, reciprocal participants would still be permitted to participate for 12 months each year, but the reciprocal limit would be 230 units for the entire year, rather than for every three months. Thus, both the existing rule and the proposed rule actually provide for a longer reciprocal participation period than the six-months proposed in the Advisory Board's recommendation. The Department believes that it is appropriate to permit reciprocal participants to access medicine throughout the year, rather than limiting the period to six months per year.

However, as stated, the amendment proposes to decrease the quantity of cannabis that a reciprocal participant can possess over the course of a year. The Medical Cannabis Advisory Board has recommended that the reciprocal limit match the limit for qualified patients, an approach that would effectively mirror the standard of the existing rule. The Department understands the concerns that have been raised by the Advisory Board; and in consideration of the Advisory Board's recommendation, the Department proposes to rescind the proposed modification to the current reciprocal limit. Specifically: the Department proposes to *not* replace the reference to "three month" at 7.34.4.28(B) NMAC with "one year". Instead, the text of that sentence would remain as it is currently written: "A reciprocal participant may collectively possess within any three-month period a quantity of usable cannabis no greater than 230 total units."

Thank you for considering the Department's responses to the public comments and the recommendations of the Medical Cannabis Advisory Board.

Sincerely,

/s/ Chris D. Woodward 1-12-21

Chris D. Woodward
Assistant General Counsel