March 25, 2019

VIA Mail and Email

Kathyleen M. Kunkel
Kenny Vigil
New Mexico Department of Health
P.O. Box 26110
1190 St. Francis Dr., Suite N-4095
Santa Fe, NM 87502-6110
Kathy.Kunkel@state.nm.us
KennyC.vigil@state.nm.us

Re: Patient Purchase Limits - Petition to Initiate Rulemaking Process

Dear Secretary Kunkel,

Pursuant to Rule 1.24.25.10 NMAC, New Mexico Top Organics-Ultra Health, Inc. (Ultra Health) petitions the Department of Health to initiate a rulemaking regarding patient purchasing limitations, specifically to raise the patient purchase limitation to the common industry limit of 15 ounces in any three-month period; and eliminate the use of units as a system of measurement altogether, in exchange for the industry standard measurement of dry weight in ounces for flower and dry weight in ounces of THC for extracts and infused products.

As you may know, Rule 1.24.25.10 NMAC allows "any person" to "file a petition for rulemaking with an agency."

Ultra Health recently discussed with Department staff the potential for building a more robust medical cannabis program for patients in New Mexico. One of the subjects we discussed was that most other states with medical cannabis programs have standards for patient purchase limitations that are far more accommodating than New Mexico's.

Ultra Health has reason to believe that a reevaluation of patient purchase limitations will better the health and quality of life for the 70,000+ New Mexicans currently enrolled in the medical cannabis program.

Existing Rule Regarding Patient Purchase Limitations

The current rule regarding patient purchase/possession limitations is Rule 7.34.3.9 NMAC, which states, "A qualified patient and a qualified patient's primary caregiver may collectively possess within any three-month period a quantity of usable cannabis no greater than 230 total units. For purposes of department rules, this quantity is deemed an adequate supply." This roughly translates to 8 ounces, or 230 grams, per 90 days.

To calculate a unit, "one unit of usable cannabis shall consist of one gram of dried leaves and flowers of the female cannabis plant, or 0.2 grams (200 milligrams) of THC for cannabis derived products." Rule 7.34.3.9 NMAC.

There are exceptions allowed if the patient can produce "a statement by a medical practitioner explaining why a greater number of units of usable cannabis, or a higher concentration of THC in concentrated cannabis-derived product, is medically necessary." Rule 7.34.3.9 NMAC.

Proposed Rule in Underline and Strikethrough Format

The underlined material indicates new language, the strikethrough material indicates language to be removed.

7.34.3.9 QUANTITY OF USABLE CANNABIS THAT MAY BE POSSESSED BY A QUALIFIED PATIENT OR PRIMARY CAREGIVER:

A. Maximum quantity: A qualified patient and a qualified patient's primary caregiver may collectively possess within any three-month period a quantity of usable cannabis no greater than 15 ounces. ~~.230 total units~~. For purposes of department rules, this quantity is deemed an adequate supply. ~~(For ease of reference: 230 units is equivalent to 230 grams, or approximately eight ounces, of dried usable cannabis plant material.)~~ A qualified patient and primary caregiver may also possess cannabis seeds.

B. Dry weight measurement: ~~Calculation of units:~~ For purposes of department rules, dried usable cannabis plant material shall be measured in ounces, and all cannabis-derived products shall be measured by the dry weight of THC content in milligrams. ~~one unit of usable cannabis shall consist of one gram of the dried leaves and flowers of the female cannabis plant, or 0.2 grams (200 milligrams) of THC for cannabis-derived products.~~

C. Maximum THC content of concentrates: A qualified patient or primary caregiver shall not possess a concentrated cannabis-derived product that contains greater than seventy percent (70%) THC by weight.

D. Medical exception: A greater quantity of usable cannabis, not to exceed 115 additional grams ~~units~~, may be allowed, and a concentrated cannabis-derived product with THC content greater than seventy percent (70%) by weight may be allowed, at the department's discretion, upon the submission of a statement by a medical practitioner explaining why a greater amount ~~number of units~~ of usable cannabis, or a higher concentration of THC in concentrated cannabis-derived product, is medically necessary. Any such allowance shall be reviewed for approval by the program's medical director.

Legal Authority Authorizing the Agency to Adopt the Rule

The Department of Health does have explicit statutory authority to create and adopt a rule regarding patient purchase/possession limitations. This statutory authority is shown by several interlocking provisions of the Lynn and Erin Compassionate Use Act. First, NMSA 1978 §26-2B-4(A) states, "A qualified patient shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis if the quantity of cannabis does not exceed an adequate supply." This provision indicates there is and should be a cap on the amount of cannabis a qualified patient may *lawfully* purchase.

Second, NMSA 1978 §26-2B-3(A) explicitly defines "adequate supply" as "an amount of cannabis, in any form approved by the department, possessed by a qualified patient or collectively possessed by a qualified patient and the qualified patient's primary caregiver that is determined by rule of the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three months and that is derived solely from an intrastate source"

Reading §26-2B-4(A) and §26-2B-3(A) together indicates the Legislature intended a limitation on the amount of cannabis a qualified patient could possess/purchase, and that the limitation should be based upon necessity and availability.

Finally, NMSA 1978 §26-2B-7(A)(2) explicitly directs and allows DOH to promulgate rules to "define the amount of cannabis that is necessary to constitute an adequate supply, including amounts for topical treatments." This ties in with the previously cited sections to give DOH authority to set the limitation point for patient purchase/possession.

Basis for Proposed Rule

Ultra Health believes now is an appropriate time to reevaluate the patient purchase limitation rule, because the patient purchase limitation rule may require some patient survey data. If DOH plans to survey patients on other medical cannabis-related subjects (such as consumption patterns), DOH could also address the purchase limitation rule within that survey. Additionally, as DOH is working diligently to promulgate a new rule regulating plant count, it should be noted that a change in patient purchase limits will directly affect how many plants producers will need to meet patient demand. Therefore, it seems reasonable to address these issues simultaneously, to ensure consistency between supply and demand.

The use of units as a means of measurement is unique to New Mexico. Every other state's medical cannabis program regulates purchase limits through more technical means of measurement (i.e. ounces, milligrams). The "calculation of units" as described in Rule 7.34.3.9 NMAC, does not serve the medical cannabis program well and is a common source of confusion for medical cannabis program participants. It also creates logistical complications with the State used tracking system. A conversion from units to ounces is the simplest, most timely, and cost-efficient solution for accurate tracking of transactions. It would benefit the program, and the program's patients, to have more accurate tracking and collect more meaningful data.

As DOH knows, the medical cannabis program has undergone significant change in the years since the program was first implemented in 2007. One of the most significant changes is the expansion of available products. Whereas in 2007, most patients were simply purchasing the unprocessed dried flower material to smoke, more and more patients now prefer more sophisticated cannabis products, both smokable and non-smokable. For example, the medical market in Colorado experienced a 100% increase in concentrate use between the years 2014 and 2017 (Orens, Light, Lewandowski, Rowberry, and Saloga, 2018, p. 23). For the purpose of tracking purchases, supply of these products can be defined in terms of milligrams of dry weight THC content, as is the industry standard. Milligrams are consistent with the avoirdupois ounce, allowing for simple conversions and tracking.

Example Purchases:

First Purchase: 1 oz flower + 1500 mg concentrate + 200 mg edible = 1 oz + 1700 mg 1 oz flower + 0.053 oz concentrate + 0.007 oz edible = **1.06 oz usable cannabis** **15 oz purchase limit – 1.06 oz purchased = 13.94 oz remaining purchase limit**
Second Purchase: 2 oz flower + 500 mg concentrate + 1000 mg edible = 2 oz + 1500 mg 2 oz flower + 0.018 oz concentrate + 0.035 oz edible = **2.053 oz usable cannabis** **13.94 oz purchase limit – 2.053 oz purchased = 11.887 oz remaining purchase limit**
Third Purchase: 0.5 oz flower + 6000 mg concentrate + 60 mg edible = 0.5 oz + 6060 mg 0.5 oz flower + 0.212 oz concentrate + 0.002 oz edible = **0.714 oz usable cannabis** **11.887 oz purchase limit – 0.714 oz purchased = 11.173 oz remaining purchase limit**

Additionally, as cannabis producers have become more experienced and refined their methods, patients have also become more knowledgeable about their needs and consumption habits. DOH has not performed a patient survey since 2013, and given the significant changes in the program, a study on consumption and need patterns seems due.

Another important factor in the discussion on patient limits is Rule 7.34.4.8 NMAC. This rule allows patients with personal production licenses "to possess no more than four mature female plants and a combined total of 12 seedlings and male plants, and may possess no more than an adequate supply of usable cannabis, as specified in department rule." Patients with PPLs can easily cultivate more than 8 ounces with the plant allotment allowed by rule. Therefore, patients who do not choose to cultivate on their own should be allowed to purchase enough medicine to meet their needs. Ultra Health believes patients should be allowed 15 ounces over a 90-day timeframe, which is in line with the amount patients can buy in other medical markets.

Raising the purchase limits should increase incentive and accessibility for patients to purchase from a lawful, regulated source. When patients are restricted in the regulated system,

from purchasing the quantities necessary to alleviate their symptoms, they have three options, (1) suffer through their debilitating medical condition until they are able to visit a practitioner, receive their statement, mail their statement to DOH, and await notice of an increase from DOH, (2) purchase from the illicit market where they are not restricted by purchase limits, but risk incurring criminal and civil penalties, and the potential to consume contaminated products, or (3) purchase from a regulated market in another state that has higher purchase limits than New Mexico, and risk federal drug trafficking charges upon returning to New Mexico as well as criminal and civil penalties. Increased purchase limitations will resolve this accessibility concern for patients, while also reducing DOH's administrative responsibilities.

New Mexico's patient purchase limitations are much more restrictive than those of other states. The following is a breakdown of how other states deal with the needs of their medical cannabis patients:

State	**Purchase limits (oz)**	**Supply period**	**3-month supply period (oz)**
Arizona AZ Rev Stat § 36-2806.02 (2016)	2.5	14 days	15
Colorado Title 25 Health § 25-15-106 (g)(I)	2	At any time	*NC
Illinois 410 ILCS 130/10(a)	2.5	14 days	15
Maine 10-144 CMR ch.122 § 1(k)	2.5	"At any one time"	NC
Nevada NRS 453A.200 (3)(B)	2.5	14 days	15
Oklahoma 310:681-5-12	3	"A single transaction"	NC
Oregon 333-008-0080	24	May possess at any one time	NC
Washington RCW **69.50.357**	3	1 day	270

**NC = Not comparable*

New Mexico appears to be the only state with such scant purchase limits. These examples indicate that other states are able to maintain regulatory control of their programs even with higher purchase limitations, and without the use of a fabricated unit of measurement. If sustaining a robust medical cannabis program is the objective, we should try to be more compassionate towards patient needs. The purchase limitations of other states are far more reflective of actual need than New Mexico's stringent eight ounces. These examples also show that Ultra Health's recommended 15 ounces per any 3-month period is in keeping with the industry practice.

Ultra Health would be happy and willing to further discuss the data, the experience of other states, and the range of products it currently offers, so that DOH can better understand the

issue of patient purchase limitations and the complications that arise from the use of units as a system of measurement.

Rulemaking Process

Rule 1.24.25.10 NMAC requires an agency which has received a petition to initiate rulemaking to grant or deny the petition. If the agency denies the petition, it must "issue a concise written statement explaining its reason for denial." Ultra Health looks forward to receiving the position of DOH regarding rulemaking for patient purchase limitations.

Respectfully,

Kylie Safa
Project Manager
Ultra Health
255 Camino Don Tomas
Bernalillo, NM 87004

Cc: Kristina Caffrey, Attorney, Egolf, Ferlic, Martinez & Harwood, LLC

Arizona Legislature. (n.d.). Retrieved from https://www.azleg.gov/viewdocument/?docName=http://www.azleg.gov/ars/36/02806-02.htmColorado Revised Statutes Title 25. Health § 25-1.5-106. (n.d.). Retrieved from https://codes.findlaw.com/co/title-25-health/co-rev-st-sect-25-1-5-106.html

Illinois General Assembly. (n.d.). Retrieved from http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3503&ChapterID=35

Maine https://www.maine.gov/dafs/bbm/mmmp/sites/maine.gov.dafs.bbm.mmmp/files/inline-files/2018-MMP-Rules-1111.pdf

NAC: CHAPTER 453A - MEDICAL USE OF MARIJUANA. (n.d.). Retrieved from https://www.leg.state.nv.us/NAC/NAC-453A.html

Oklahoma Department of Health 310 § 681-1-8. Retrieved from http://omma.ok.gov/Websites/ddeer/images/310-681%20EME2%20Medical%20Marijuana%20Rules%208-1-18%20wRedMark%20Revisions.pdf

Oregon Health Authority 333-008-0080. Retrieved from https://www.oregon.gov/oha/ph/diseasesconditions/chronicdisease/medicalmarijuanaprogram/pages/top20.aspx#patientlimits

Orens, A., Light, M., Lewandowski, B., Rowberry, J., & Saloga, C. (2018). *Market Size and Demand for Marijuana in Colorado 2017 Market Update*(Rep.). Denver, CO: Marijuana Policy Group. doi:https://www.colorado.gov/pacific/sites/default/files/MED Demand and Market Study 082018.pdf

Washington State Legislature RCW 69.50.357. Retrieved from https://app.leg.wa.gov/RCW/default.aspx?cite=69.51A.210