

# NMAC

## Transmittal Form



Volume:  Issue:  Publication date:  Number of pages:  (ALD Use Only) Sequence No.

Issuing agency name and address:  Agency DFA code:

Contact person's name:  Phone number:  E-mail address:

Type of rule action: (ALD Use Only)  
New  Amendment  Repeal  Emergency  Renumber  Most recent filing date:

Title number:  Title name:

Chapter number:  Chapter name:

Part number:  Part name:

Amendment description (If filing an amendment):  Amendment's NMAC citation (If filing an amendment):

Are there any materials incorporated by reference? Yes  No  Please list attachments or Internet sites if applicable.

If materials are attached, has copyright permission been received? Yes  No  Public domain

**Specific statutory or other authority authorizing rulemaking:**

Notice date(s):  Hearing date(s):  Rule adoption date:  Rule effective date:

# Concise Explanatory Statement For Rulemaking Adoption:

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## Findings required for rulemaking adoption:

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### Findings MUST include:

- Reasons for adopting rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;
- Reasons for any change between the published proposed rule and the final rule; and
- Reasons for not accepting substantive arguments made through public comment.

The findings in support of this amendment are as stated in the attached Statement of Reasons for Adoption of the rule, which is hereby incorporated by reference.

### Issuing authority (If delegated, authority letter must be on file with ALD):

Name:

Chris D. Woodward

Check if authority has been delegated

Title:

Assistant General Counsel

Signature: (BLACK ink only)

Date signed:

Chris D. Woodward  
Digitally signed by Chris D. Woodward  
Date: 2021.03.10 07:58:02 -07'00'

03/10/2021

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**STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF HEALTH**

**IN THE MATTER OF THE AMENDMENT OF  
SECTION 7.34.4.28 NMAC**

**STATEMENT OF REASONS  
FOR ADOPTION OF AMENDMENT TO  
RULE SECTION 7.34.4.28 NMAC**

The Cabinet Secretary for the New Mexico Department of Health (“Department”), Tracie C. Collins, M.D., hereby adopts an amendment to Medical Cannabis Program rule 7.34.4.28 NMAC, concerning Medical Cannabis Program reciprocity. The Cabinet Secretary has familiarized herself with the rulemaking record, and finds as follows:

1. The Department of Health is authorized to promulgate rules as may be necessary to carry out the duties of the Department and its divisions. NMSA 1978, § 9-7-6(E).

2. The Department is also authorized to promulgate rules to implement the purpose of the Lynn and Erin Compassionate Use Act. NMSA 1978, § 26-2b-7.

3. The Lynn and Erin Compassionate Use Act was amended in 2019 to include provisions for granting Medical Cannabis Program reciprocity for persons who hold proof of authorization to participate in the medical cannabis program of another state of the United States, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo. *See* NMSA 1978, § 26-2b-7(I), (J).

4. The statute authorizes the Department of Health to promulgate rules relating to medical cannabis program reciprocity. NMSA 1978, § 26-2b-7(I).

5. The statute further authorizes the Department of Health to identify requirements for the granting of reciprocity, including (but not limited to) provisions to limit the period of time

in which a reciprocal participant may participate in the Medical Cannabis Program. NMSA 1978, § 26-2b-7(I).

6. The statute authorizes reciprocal participants to “participate in the medical cannabis program in accordance with department rules”. NMSA 1978, § 26-2b-7(J)(1).

7. On September 11, 2020, the Department of Health, Medical Cannabis Program issued correspondence to licensed nonprofit medical cannabis producers regarding requirements for reciprocal participation in the Medical Cannabis Program.

8. By that correspondence, the Medical Cannabis Program (“Program”) expressed that New Mexico residents could not become registered as reciprocal participants in the Program, but would instead need to pursue enrollment as qualified patients in accordance with 7.34.3 NMAC. *Id.*

9. By that correspondence, the Program also stated that proof of authorization to participate in the medical cannabis program of California would consist of a medical marijuana identification card, and that “letters of eligibility in the California medical program” would not constitute proof of authorization for purposes of the New Mexico Medical Cannabis Program. *Id.*

10. The letter also stated that nonprofit producers may not register their employees or board members for reciprocity. *Id.*

11. On September 22, 2020, a lawsuit was filed in the Santa Fe District Court in the matter of *New Mexico Top Organics Ultra Health Inc v. New Mexico Department of Health et al.*, case no. D-101-CV-2020-02059 in which the Petitioner sought a writ of mandamus to invalidate the directives of the September 11, 2020 letter, based in part on the contention that

these directives constitute “rules” for purposes of the State Rules Act, NMSA 1978, §§ 14-4-134 through 14-4-11, which must therefore be promulgated in accordance with that Act.

12. The Department of Health’s then Acting Cabinet Secretary, Billy J. Jimenez, adopted an emergency amendment to rule section 7.34.4.28 NMAC on October 8, 2020, pursuant to the State Rules Act at NMSA 1978, § 14-4-5.6. The emergency rule amendment was substantially identical in substance to the current amendment.

13. Subsequently, on October 13, 2020, the emergency rule amendment to 7.34.4.28 NMAC was invalidated by a Writ of Mandamus issued by the N.M. First Judicial District Court (Hon. Matthew J. Wilson).

14. The sole basis for issuance of the Writ was that 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), within his Statement of Reasons for adoption of the emergency rule.

15. The Court did not rule that the Department of Health lacked the authority to adopt the content of the emergency rule amendment to 7.34.4.28 NMAC through the ordinary (i.e., non-emergency) rulemaking process; and in fact, the Court emphasized this in denying a Motion for Order to Show Cause and an Application for Temporary Injunctive Order filed by the Petitioner in the case.

16. At the hearing on those matters, held on December 10, 2020, Judge Wilson stated 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.”

17. Judge Wilson further stated at the December 10, 2020 hearing 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.”

18. Thus, the issue of whether the Department of Health can lawfully adopt the content of the instant amendment to 7.34.4.28 NMAC has been adjudicated, and the Department’s lawful authority to adopt these reciprocity requirements has been confirmed by the New Mexico First Judicial District Court.

19. The amendment to rule section 7.34.4.28 NMAC is adopted in consideration of the content of the authorizing statute, the purposes of the statute and its reciprocity provisions, and in order to prevent abuses of the Medical Cannabis Program, as explained in more detail below.

20. The Department recognizes that reciprocity was created in the statute for the purpose of enabling out-of-state residents who participate in the medical cannabis program of another state to access medicine while visiting New Mexico.

21. The Department finds that reciprocity was not created in the statute to enable New Mexico residents to circumvent the enrollment criteria of the Lynn and Erin Compassionate Use Act, NMSA 1978, §§ 26-2b-1 through 26-2b-10 and associated Department regulations at 7.34.3 NMAC, although this would be the consequence if New Mexico residents were allowed to participate in the Medical Cannabis Program as reciprocal participants.

22. Such a result would be absurd, and contrary to the legislative intent of the Lynn and Erin Compassionate Use Act.

23. The Department also finds that it was not the intention of the New Mexico Legislature to permit an individual to participate in the New Mexico Medical Cannabis Program

as a reciprocal participant on the basis of an authorization issued by a jurisdiction other than that of the person's place of residence.

24. Again, the Department recognizes that the purpose of reciprocity is to enable out-of-state residents who participate in the medical cannabis program of another state to access medicine while visiting New Mexico.

25. Ensuring that a person's residence matches their place of enrollment not only helps to verify that the individual is who they claim to be and that they are truly enrolled in the medical cannabis program of another jurisdiction, but also tends to verify that the person is actually participating in the medical cannabis program in which they are enrolled.

26. With regard to the documents that may constitute "proof of authorization", as that expression is used in the statute at NMSA 1978, § 26-2b-7: the Department finds that a letter from a medical practitioner, taken alone, is not sufficient to demonstrably prove that an individual has been authorized to participate in the medical cannabis program of another jurisdiction.

27. A letter that is issued by a medical practitioner can easily be falsified, and, when taken alone, does not afford the same degree of proof as a card or other legal document that is issued by the originating jurisdiction to authorize participation in that jurisdiction's medical cannabis program.

28. A letter from a medical practitioner, taken alone, also does not provide any verification that the practitioner who signed the letter is in good standing with their licensing body; whereas a card or other authorization issued from a governmental entity in the originating state provides greater assurance that the reciprocal participant has met the eligibility requirements of the originating jurisdiction.

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29. Accordingly, the Department interprets the expression “proof of authorization”, as it is used at NMSA 1978, § 26-2b-7, as a card or other physical document issued by a governmental entity authorized by law to enroll the applicant in the medical cannabis program in the originating jurisdiction.

30. The final amendment to 7.34.4.28 NMAC incorporates revisions made after the public rule hearing based upon the recommendation of the Medical Cannabis Advisory Board.

31. The Medical Cannabis Advisory Board reviewed the amendment to 7.34.4.28 NMAC at its meeting on December 9, 2020. The Advisory Board recommended in favor of the proposed amendment, with only one exception: the Advisory Board recommended that the quantity of cannabis that a reciprocal participant is permitted to possess be increased.

32. In consideration of the Advisory Board’s recommendation, the Medical Cannabis Program, through correspondence with the Hearing Officer dated January 12, 2021, subsequently proposed to remove the proposed revisions to the reciprocal limit, and to leave this text as is currently written in the rule at 7.34.4.28(B) NMAC: “A reciprocal participant may collectively possess within any three-month period a quantity of usable cannabis no greater than 230 total units.”

33. A public rule hearing concerning the proposed amendment to 7.34.4.28 NMAC was held via the Cisco Webex online video conferencing platform on December 4, 2020 pursuant to NMSA 1978, § 9-7-6(E).

34. In accordance with NMSA 1978, Section 14-4-5.2, notice of the public hearing for the proposed rule changes was published in the New Mexico Register, the official publication for notices of all rulemaking in New Mexico, on October 27, 2020.



35. In accordance with the Department of Health Act at NMSA 1978, Section 9-7-6(E), notice of the public hearing for the proposed rule changes was also published in the Albuquerque Journal, newspaper on October 27, 2020.

36. Notice of the rulemaking was also provided to the public in accordance with NMSA 1978, Section 14-4-5.2, as more fully described in the Affidavit at Exhibit 4.

37. By a letter dated October 16, 2020, the then Acting Cabinet Secretary, Billy J. Jimenez, designated Mr. Craig Erickson to serve as hearing officer for the purpose of conducting the hearing and submitting a recommendation regarding the proposed rule amendment.

38. Members of the public were afforded an opportunity to comment on the proposed rules at the hearing, and in writing prior to the hearing.

39. The Secretary finds that the Hearing Officer has appropriately considered the comments received, and finds that the recommendations of the Hearing Officer are appropriate; and the Secretary hereby incorporates the findings and recommendations of the Hearing Officer that are stated in Hearing Officer's Report, issued by the Hearing Officer on January 28, 2021 and received by the Secretary on January 29, 2021.

40. The Secretary finds that the proposed rule amendment, including the revision made after the hearing, fall within the scope of the rulemaking proceeding, that they are a logical outgrowth of the notice given and comment received, and that commenters were afforded a fair opportunity to present their views on the contents of the final plan. *See* N.M. Att'y Gen. Op. 87-59 (1987) (*citing* *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979)); *see also* *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo Cty. Air Quality Control Bd.*, 1969-NMCA-089, ¶ 39, 80 N.M. 633, 642.

41. The purpose of the proposed amendment to 7.34.4.28 NMAC is to modify the requirements for Medical Cannabis Program reciprocity, as described above.

42. The rule amendment to section 7.34.4.28 NMAC is adopted pursuant to the police powers of the State of New Mexico, Department of Health, to regulate, promote, and protect public health and safety.

43. The Cabinet Secretary finds that the proposed rule amendment is appropriate and consistent with authorizing laws; and for each of the reasons stated, the amendment to 7.34.4.28 NMAC is hereby adopted.

NEW MEXICO DEPARTMENT OF HEALTH

  
Tracie C. Collins, M.D., Cabinet Secretary

3/8/2021  
Date

This is an amendment to 7.34.4 NMAC, Section 28 effective 3/23/2021.

7.34.4.28 **RECIPROCITY:** Beginning July 1, 2020, an individual who holds proof of authorization to participate in the medical cannabis program of another state of the United States, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo may lawfully purchase and possess cannabis, provided that the quantity of cannabis does not exceed the reciprocal limit identified in this section. A qualified patient may not be registered or participate as a reciprocal participant in the New Mexico medical cannabis program.

**A. Reciprocal participation:**

**(1) General requirements:** A reciprocal participant:

- (a) may participate in the medical cannabis program in accordance with department rules;
- (b) shall not be required to comply with the registry identification card application and renewal requirements established pursuant to this section and department rules;
- (c) shall at all times possess proof of authorization to participate in the medical cannabis program of another state, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo and shall present proof of that authorization when purchasing cannabis from a licensee; and
- (d) shall register with a licensed non-profit producer for the purpose of tracking sales to the reciprocal participant in an electronic system specified by the department.

**(2) Minors:** In the event that a reciprocal participant is a minor, a licensed non-profit producer shall not sell or transfer cannabis to the minor, but may sell or transfer cannabis to a parent or legal guardian of the minor who holds proof of authorization to purchase cannabis on the minor's behalf that was issued by another state of the United States, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo.

**(3) Residency requirements:**

**(a) Non-residents:** A person who is not a resident of New Mexico may participate in the medical cannabis program as a reciprocal participant, provided that the reciprocal participant's place of residence is consistent with their place of enrollment. (For example: a Colorado resident shall not be registered or otherwise participate as a reciprocal participant on the basis that he or she is enrolled in the medical cannabis program of a state or other jurisdiction other than Colorado.)

**(b) New Mexico residents:** A New Mexico resident who is not a member of a New Mexico Indian nation, tribe, or pueblo shall not participate in the medical cannabis program as a reciprocal participant, but may pursue enrollment as a qualified patient in accordance with rule 7.34.3 NMAC. A member of a New Mexico Indian nation, tribe or pueblo medical cannabis program may participate as a reciprocal participant, provided that the individual has proof of authorization to participate in the New Mexico Indian nation, tribe or pueblo's medical cannabis program.

**B. Reciprocal limit:** A reciprocal participant 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 the reciprocal limit. (For ease of reference: 230 units is equivalent to 230 grams, or approximately eight ounces, of dried usable cannabis plant material.)

**C. Registration; verification; tracking:** A licensed non-profit producer shall require the submittal of a reciprocal participant's contact information for registration purposes, to include the individual's full name, date of birth, mailing address, and the enrollment number specified in the individual's medical cannabis program enrollment card (if applicable); and shall record that information in an electronic tracking system specified by the department.

**(1)** The licensed non-profit producer shall confirm the accuracy of a reciprocal participant's contact information prior to each transaction.

**(2)** A licensed non-profit producer that registers a reciprocal participant or that sells or transfers cannabis or a cannabis product to a reciprocal participant shall first verify the reciprocal participant's identity by viewing comparing the individual's proof of authorization from the other state, territory or tribe, [~~and also viewing~~] to the reciprocal participant's government-issued photo identification card, and verifying that the information, including but not limited to place of residence, is consistent.

**(3)** A licensed non-profit producer that sells or otherwise transfers cannabis or a cannabis product to a reciprocal participant shall track the sale or transfer using an electronic system specified for that purpose by the department.

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(4) A licensed non-profit producer shall not register an employee or board member of the producer as a reciprocal participant.

(5) At the time of registration, a licensed non-profit producer shall electronically upload a copy of the reciprocal participant's proof of authorization, and a copy of the reciprocal participant's government issued photo identification which indicates the person's place of residence, into the electronic tracking system specified by the department.

(6) A licensed non-profit producer shall ensure that the individual registering as a reciprocal participant is not already registered as a reciprocal participant or a qualified patient in the New Mexico medical cannabis program, before entering registration information for the individual. Registration of a reciprocal participant who was previously registered may result in disciplinary action in accordance with this rule.

(7) At the time of registration, a licensed non-profit producer shall ensure that the reciprocal participant signs the participant's registration in the electronic tracking system specified by the department and acknowledges that they understand the requirements of participation in the program, including but not limited to acknowledging the time and quantity limits for reciprocal participation under this rule, as well as the notice concerning state and federal prohibitions against the transport of cannabis across state and international boundaries. A licensed non-profit producer shall ensure that the acknowledgement is signed by the reciprocal participant, and is not substituted by the signature of another person. A licensed non-profit producer that fails to comply with these requirements may be subject to disciplinary action in accordance with this rule.

**D. Proof of authorization:** Proof of authorization to participate in the medical cannabis program of another jurisdiction (an "originating jurisdiction") shall consist of a card or other physical document issued by a governmental entity authorized by law to enroll the applicant in the medical cannabis program in the originating jurisdiction. For purposes of reciprocal participation in the New Mexico medical cannabis program, permission from a medical practitioner shall not in itself be deemed proof of authorization to participate in the medical cannabis program of another jurisdiction, but shall be accompanied by a card or other proof of enrollment issued by an authorized governmental entity of the originating jurisdiction. (For example, a written letter from a physician authorizing the individual to participate in the California medical cannabis program shall not be deemed proof of authorization for the purpose of participating in the New Mexico medical cannabis program.)

[D] **E. Refusal of service:** A non-profit producer that reasonably suspects that either a person's proof of authorization or identification card is falsified may refuse to dispense cannabis to that individual.

[E] **F. Informational materials:** At the time of a sale or transfer of cannabis to a reciprocal participant, a non-profit producer shall provide informational materials to the reciprocal participant that include, at a minimum, a notice of the time and quantity limits for reciprocity under this section, and a notice concerning state and federal prohibitions against the transport of cannabis across state and international boundaries.

[7.34.4.28 NMAC - Rp. 7.34.4.28 NMAC, 6/23/2020; A/E, 10/8/2020; A, 3/23/2021]