

# NMAC

## Transmittal Form

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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:  New  Amendment  Repeal  Emergency  Renummer  (ALD Use Only) 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:

This rulemaking by the Secretary of the Department of Health is made in accordance with the following authorities: Sections 9-7-6, 26-2b-7, 26-2b-2, and 24-1-3 NMSA 1978.

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

# Concise Explanatory Statement For Rulemaking Adoption:

## Findings required for rulemaking adoption:

### 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: 2022.02.09 14:03:28 -07'00'

2/09/2022

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

**IN THE MATTER OF AMENDMENTS TO 7.34.2.7 NMAC,  
7.34.4 NMAC, AND SECTIONS OF 7.34.3 NMAC**

**STATEMENT OF REASONS  
FOR ADOPTION OF RULE AMENDMENTS**

The Acting Cabinet Secretary for the New Mexico Department of Health (“Department”),  
David Scrase, M.D., hereby adopts amendments to the following rule sections:

1. 7.34.2.7 NMAC (“Definitions”);
2. 7.34.3.7 NMAC (“Definitions”);
3. 7.34.3.8 NMAC (“Qualifying Medical Conditions”);
4. 7.34.3.9 NMAC (“Quantity of Usable Cannabis That May Be Possessed by a Qualified Patient or Primary Caregiver”);
5. 7.34.3.10 NMAC (“Qualified Patient and Primary Caregiver Registry Identification Card Application Card Requirements”);
6. 7.34.3.11 NMAC (“Registry Identification Cards”);
7. 7.34.3.13 NMAC (“Possession of Usable Cannabis”);
8. 7.34.3.19 NMAC (“Disposal of Unused Cannabis”);
9. 7.34.3.22 NMAC (“Reciprocity”); and
10. 7.34.4.28 NMAC (“Reciprocity”).

The Acting Cabinet Secretary has familiarized himself 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, including but not limited to rules to govern the manner in which the Department will consider applications for registry identification cards and for the renewal of identification cards for qualified patients and primary caregivers, and rules to define the amount of cannabis that is necessary to constitute an “adequate supply”, including amounts for topical treatments. NMSA 1978, § 26-2b-7.

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3. A public rule hearing concerning the proposed amendments was held via the Cisco Webex online video conferencing platform on November 12, 2021 pursuant to NMSA 1978, § 9-7-6(E).

4. 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 13, 2021, as more fully described in the Affidavit at Exhibit 7 (Affidavit of Publication in the New Mexico Register).

5. 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 13, 2021, as more fully described in the Affidavit at Exhibit 6 (Affidavit of Publication, Abq. Journal).

6. 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 5 (Affidavit of Notice to the Public).

7. In accordance with NMSA 1978, § 26-2B-7(A), the Department of Health consulted the Medical Cannabis Advisory Board (“MCAB”) concerning the proposed amendments to the Medical Cannabis Program rules. The Medical Cannabis Advisory Board reviewed the proposed amendments at its meeting on December 7, 2021, and unanimously recommended in favor of their adoption, as reflected in the MCAB Meeting Minutes at Exhibit 18.

8. By a letter dated September 30, 2021, the Acting Cabinet Secretary, David Scrase, M.D., designated Mr. Craig Erickson, Esq. to serve as hearing officer for the purpose of

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conducting the hearing and submitting a recommendation regarding the proposed rule amendment.

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

10. 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, by this reference, the Secretary hereby adopts and incorporates all of the findings and recommendations of the Hearing Officer that are stated in Hearing Officer's Report, issued by the Hearing Officer on January 18, 2022 and received by the Secretary on January 20, 2022.

11. Virtually all of the public comments (both oral and written) in this rulemaking were submitted by representatives of the licensed medical cannabis producer Ultra Health. *See* Ex. 10, 14-16. Ultra Health primarily contended that NMDOH lacks authority to set regulatory standards concerning the "adequate supply" limit at 7.34.3.9 NMAC.

12. In a letter dated December 3, 2021, contained at Exhibit 17, Assistant General Counsel Chris D. Woodward responded to Ultra Health's comments on behalf of the Department's Medical Cannabis Program. The Acting Cabinet Secretary finds that that response is well taken, and accordingly, adopts the reasoning of that letter, which is hereby incorporated in its entirety by this reference.

13. Contrary to the legal contentions of Ultra Health's representatives, the New Mexico Department of Health continues to be charged by the Lynn and Erin Compassionate Use Act with setting the "adequate supply" limit, as well as setting a reciprocal participation limit. Those authorities were not transferred to the Regulation and Licensing Department (RLD) by the Cannabis Regulation Act (CRA) at NMSA 1978, § 26-2C-5, which concerned only the transfer

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of “licensing duties”. The “licensing duties” that were transferred to RLD under the CRA concerned only licensing of commercial cannabis establishments, and did not include the setting of the adequate supply limit.

14. The recent case of *Jason Barker v. New Mexico Department of Health, Dr. Dominick Zurlo, Dr. David R. Scrase, New Mexico Regulation and Licensing Department, Linda Trujillo, John Blair, and Robert Sachs*, case no. D-202-CV-2021-04058, involved legal contentions identical to those raised by Ultra Health in this rulemaking.

15. In the *Jason Barker* case, a petitioner sought a writ of mandamus from the NM Second Judicial District Court against the Department of Health, the Regulation and Licensing Department, and various representatives of those two agencies, to prohibit the enforcement of purchase and possession limitations on medical cannabis found at 7.34.3.9(A) NMAC and 7.34.4.8(L) NMAC, and to require that qualified patients and primary caregivers be allowed to purchase unlimited quantities of cannabis, tax-free, applying only the two-ounce per-transaction limit of the Cannabis Regulation Act at NMSA 1978, § 26-2C-25(A)(2).

16. In a December 16, 2021 “Order Quashing Alternative Writ of Mandamus”, contained at Exhibit 19, the Bernalillo County District Court (Hon. Benjamin Chavez) rejected the Petitioner’s reasoning and quashed the alternative writ, concluding in relevant part that the Department of Health continues to possess authority under the Lynn and Erin Compassionate Use Act to set the adequate supply limit by rule, and concluding that the Department’s rules at 7.34.3.9(A) NMAC and 7.34.4.8(L) NMAC are not inconsistent with the Cannabis Regulation Act.

17. Accordingly, for the reasons stated, the Acting Cabinet Secretary finds that the rule amendments are within the Department of Health’s statutory authority.

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18. Ultra Health's representatives also argued that the 15-ounce adequate supply limit, specified in the amendment to 7.34.3.9 NMAC, lacks "substantial evidence": Ultra Health's argument on this subject contradicts its repeated requests over the years for the Department of Health to set a 15-ounce adequate supply limit, documented at Exhibits 11 and 13.

19. In those letters, Ultra Health's representatives petitioned the Department of Health and the Medical Cannabis Advisory Board, respectively, to increase the adequate supply limit to 420 units/grams, slightly less than the 425 units/grams limit specified in the pending amendment to 7.34.3.9 NMAC. Ultra Health claimed in those petitions that fifteen ounces of dried usable cannabis for a three-month period was a common industry standard; that it was adopted in several states, including Arizona, Arkansas, Illinois, Maine, and Nevada; and that this limit would be enough to ensure that patients can purchase, consistent with CDC guidance, a back-stock of medicine sufficient to allow them to keep a 30-day supply of medicine on-hand.

20. In an e-mail submitted by its counsel after the conclusion of the public hearing in this rulemaking, Ultra Health appeared to pivot away from its "substantial evidence" argument, claiming instead that "[a]ny cannabis-related events that occurred prior to June 29, 2021 are largely irrelevant, because the world of cannabis in New Mexico fundamentally changed on June 29, 2021 with the effectuation of the Cannabis Regulation Act." Ex. 16 at 1.

21. As explained, the Department of Health's authority to set the adequate supply limit is established by the Lynn and Erin Compassionate Use Act, and has been confirmed by the NM Second Judicial District Court. Furthermore, Ultra Health has not offered anything to demonstrate that changes resulting from the Cannabis Regulation Act will in some way impact consumption patterns among qualified patients or reciprocal participants, such that a larger limit

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is necessitated, or that a larger limit would be medically appropriate. In fact, Ultra Health has not proposed any alternative limit at all, but has simply declared, without explanation, that its previous endorsement of 15-ounces is now erroneous and lacks “substantial evidence”.

22. In his report, the Hearing Officer concluded that the proposed 15-ounce adequate supply limit was supported by substantial evidence, noting that “the basis for the 15-ounce adequate supply limit was articulated in written submissions from Ultra Health for the last two years, beginning in 2019.” The Hearing Officer concluded that this limit “is an industry standard that has been applied in several states”; that it was unanimously approved by the Medical Cannabis Advisory Board; and that it was further supported by the fact that less and one percent of qualified patients in the Medical Cannabis Program have sought access to additional quantities of cannabis under the previous medical exception of the rule. Report at p.25. The Acting Cabinet Secretary finds that these conclusions are well taken, and adopts the Hearing Officer’s reasoning.

23. With the coming of commercial cannabis sales in New Mexico, the adequate supply limit will no longer function as an acquisition limit for the vast majority of qualified patients and primary caregivers. When commercial cannabis sales begin (no later than April 1st of this year, per the CRA at NMSA 1978, § 26-2C-6(K)), any person 21 years of age or older will be able to purchase “commercial cannabis”, above and beyond “medical cannabis” purchases, with the only acquisition limit for those purchases being a limit per each individual transaction.

24. Also, as of June 29, 2021, the CRA has made it legal for any person 21 years of age and older to possess up to six mature and six immature cannabis plants at any time, a fifty-



percent increase over the previous 4-mature-plant limit for personal production license holders under the previous NMDOH rule.

25. Based on these factors, and based on each of them individually, the Acting Cabinet Secretary finds that the Department's 15-ounce adequate supply and reciprocal participation limits will not prevent individuals from obtaining needed medicine, and that the 425-unit limit is reasonable and appropriate.

26. The Acting Cabinet Secretary finds that the amendments are in harmony with the agency's express statutory authorities and/or spring from those powers that may fairly be implied therefrom, and that the amendments are consistent with the statutory purposes of the Department of Health. *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, ¶ 25, 133 N.M. 97, 106 (internal citations omitted).

27. The Acting Cabinet Secretary finds that the rule amendments 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* 1.24.25.14(C) NMAC; *see also* N.M. Att'y Gen. Op. 87-59 (1987) (*citing BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979)).

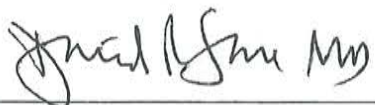
28. The purpose of the amendments is to modify the rule requirements for the New Mexico Medical Cannabis Program, as detailed in Exhibits 1, 2 and 3, and in the Notice of Public Hearing at Exhibit 4.

29. The rule amendments are adopted in the exercise of police powers of the State of New Mexico, Department of Health, to regulate, promote, and protect public health and safety.

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30. The Cabinet Secretary finds that the proposed rule amendments are appropriate and consistent with authorizing laws; and for each of the reasons stated, the rule amendments, as identified at Exhibits 1, 2, and 3, are hereby adopted.

NEW MEXICO DEPARTMENT OF HEALTH



\_\_\_\_\_  
David R. Scrase, M.D., Cabinet Secretary

2/9/2022

Date

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This is an amendment to 7.34.4 NMAC, Section 28 effective 2/22/2022.

**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 one year 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 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.] **[RESERVED]**

[7.34.4.28 NMAC - Rp. 7.34.4.28 NMAC, 6/23/2020; A, 10/8/2020; A, 3/23/2021; Repealed, 2/22/2022]