

Via Email

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Dear Sirs and Madams,

The purpose of this letter is to address conflicts that now exist between Medical Cannabis Program regulations and the Cannabis Regulation Act, which has now been officially signed into law. These conflicts threaten the orderly administration of the Medical Cannabis Program and threaten licensed producers' ability to meet patient needs. The undersigned licensed producers seek proactive measures from both the Department of Health ("DOH") and the Department of Regulation and Licensing ("RLD") so that a crisis of supply may be averted.

The Cannabis Regulation Act Nullifies 7.34.3.9 NMAC

As you may know, the Medical Cannabis Program currently enforces what is an effective purchase limitation on patients enrolled in the Program: patients can purchase only 230 grams, or approximately eight ounces, of dried usable cannabis material in a 90-day period. At the time of any sale, dispensary employees must enter a patient's name and registry identification card number into BioTrack and verify that the patient has not purchased more than 230 grams in a 90-day period.

Although the 230 grams is effectively a purchase limitation due to DOH's mandate that purchases be entered into BioTrack, the relevant law actually contemplates a *possession* limitation. NMSA 1978, Section 26-2B-4(A) (2007, amended through 2019) provides that qualified patients and caregivers "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" (emphasis added). Section 26-2B-3(A) goes on to define "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" (emphasis added). Section 26-2B-7(A)(2) then directs DOH to "define the amount of cannabis that is necessary to constitute an adequate supply."

In keeping with the statutory emphasis on "possession," rather than purchases, DOH promulgated 7.34.3.9 NMAC, which provides that 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 (emphasis added). 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.)"

Reading these sections together indicates that the "adequate supply" figure is a possession limitation: if the patient possesses more than the "adequate supply," he or she may be subject to arrest, prosecution, or penalty. Although both the statute and the regulation are phrased in terms of possession, DOH has always enforced a purchase limitation: because of the mandate to enter purchase amounts into BioTrack, licensed producers cannot sell more than 230 grams to patients in a 90-day period.

For RLD's edification, this purchase limitation is enforced collectively among the state's 30-plus producers. A patient cannot go to an Ultra Health dispensary, buy 230 grams, then go to a Sacred Garden dispensary, buy 230 grams, and then go to a Pecos Valley dispensary and buy 230 grams. The patient can buy 230 grams in a 90-day period overall, because all of the state's dispensaries and producers must use the same BioTrack database.

The recently passed Cannabis Regulation Act nullifies the 230-gram possession/purchase limitation, and as of the effective date of the Cannabis Regulation Act, enrolled patients will be able to purchase much greater quantities of cannabis than 230 grams in a 90-day period.

First, Section 25(A)(1) of the Cannabis Regulation Act 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).

This is a very broad provision: it relates to a “person,” which plainly covers medical cannabis patients. It specifically includes “purchasing” and “obtaining.” It also has no particular date of efficacy, which means that the date of efficacy is June 29—the general effective date of the Cannabis Regulation Act. Thus, on June 29, New Mexico persons who are twenty-one years of age or older may lawfully purchase not more cannabis than authorized by the Cannabis Regulation Act or the medical cannabis program.

The amount of cannabis authorized for purchase by the Cannabis Regulation Act is considerably higher than that currently allowed by the Medical Cannabis Program. The amount is two ounces of cannabis, sixteen grams of cannabis extract, and 800 milligrams of edible cannabis “at one time,” per Section 3(B)(4)(a) and Section 25(A)(2). Particularly, Section 3(B)(4)(a) directs that rules provides 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).

Furthermore, the two ounces/sixteen grams extract/800 milligrams edible cannabis is the purchase limitation, and the lawful possession limitation is nonexistent. Section 26(A)(2) makes lawful, as of June 29, “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.”

Reading these provisions together, it is obvious that on June 29, it will be lawful for New Mexico persons who are twenty-one years of age or older to purchase not more than two ounces of cannabis, sixteen grams of cannabis extract and 800 milligrams of edible cannabis at one time. It will also be lawful for New Mexico persons who are twenty-one years of age or older to possess more cannabis in their private residences.

There is another provision in the Cannabis Regulation Act that also affects DOH’s practice of mandating that dispensaries track patient purchases in BioTrack. Section 6(M) states in part, “As to activity under the medical cannabis program, the licensee shall continue to operate under rules promulgated for the medical cannabis program until the division promulgates rules for medical cannabis activity, **except** that a qualified patient, a primary caregiver and a reciprocal participant **shall not be prohibited from purchasing and obtaining cannabis products** pursuant to the medical cannabis program” (emphasis added).

This provision is even more generous: it plainly states that there shall be no prohibition on qualified patients purchasing and obtaining cannabis products. This could very well mean that patients have no purchase limitations *whatsoever* and that on June 29, 2021, state regulators cannot prohibit patients from purchasing as much cannabis as they wish.

Now, DOH may claim that its 230-unit purchase limitation survives the Cannabis Regulation Act. However, Section 70 of the Cannabis Regulation Act plainly states, “To the extent any administrative rules are inconsistent with the provisions of this act, such rules are null and void.” 7.34.3.9 NMAC is very inconsistent with the provisions of the Cannabis Regulation Act, because it restricts medical cannabis patients—who by definition suffer from debilitating medical conditions—to a measly 230 grams in a 90 day period, while under the Act any person can purchase two ounces, sixteen grams, and 800 milligrams.

It would make no sense, and it would be highly prejudicial to the 112,000 sick New Mexicans enrolled in the medical cannabis program, to restrict medical access to 230 grams over 90 days while the man on the street corner can safely purchase two ounces of cannabis from an illicit source.

Second, NMSA 1978, Section 12-21-10 (1997), which is part of the Uniform Statute and Rule Construction Act, provides that if there is an irreconcilable conflict between statutes, “the later-enacted statute governs.” While Section 26-2B-4 exempts medical cannabis patients from arrest, prosecution, or penalty for possession of no more than an “adequate supply,” Section 25(A)(1) of the Cannabis Regulation Act exempts all persons twenty-one years of age or older from arrest, prosecution, or penalty for “possessing, using, being under the influence of, displaying, purchasing, obtaining or transporting not more” than two ounces of cannabis, sixteen grams of extract, or 800 milligrams of edible cannabis. These two provisions are in direct conflict, and the latter Cannabis Regulation Act prevails.

In sum, on June 29, 2021, the 30-plus licensed medical cannabis producers should be prepared for patients to purchase two ounces of cannabis, sixteen grams of extract, and 800 milligrams of edible cannabis at any one time. Furthermore, because the Legislature affirmed the Court of Appeals’ interpretation that medical cannabis is exempt from gross receipts tax, the price of cannabis will come down slightly, enabling patients to buy more than they have previously purchased.

More Purchases Require Substantially More Plants

After this lengthy explanation of how the Cannabis Regulation Act affects purchase limitations, DOH and RLD may wonder how this affects the undersigned licensed producers.

It affects the licensed producers because on June 29, 2021, the higher purchase limitations could result in a run-on medical cannabis. It has been the common experience of the undersigned producers that patients do not purchase as much cannabis as they truly wish to buy. They buy what they are legally allowed to buy, they buy what is available, and they buy what they can afford. The illicit market provides the rest. If patients *can* lawfully buy more from licensed producers, they *will* buy more, and if they can afford more because of the modest relief from sales tax, they will buy more.

It would be truly unfortunate, and it would jeopardize the health of more than 112,000 medical cannabis patients, if the medical cannabis supply ran out as patients took advantage of

the more generous purchase limits. Producers do not wish to have to turn away patients when they have no more product to sell. And producers do not wish to have the patients then turn to illicit sources of cannabis: the street corner, Colorado, or Arizona.

The likelihood of runs on cannabis, shortages, and turning away patients is much more likely because of 7.34.4.8(A)(2) NMAC, which prohibits producers from growing more than 1,750 cannabis plants larger than twelve inches. Producers can cultivate only a small number of plants, and this means they will have a limited supply to serve the increased purchase limits of patients.

Producers have experienced shortages for years, and those shortages have increased over the past year. The patient population has ballooned to more than 112,000. The ongoing pandemic has increased the severity of patients' medical conditions. Several producers have had their production stymied by DOH's delay in processing license amendments and inspections. One producer is out of the market entirely due to a license revocation. The start of the outdoor growing season has been affected by severe weather. All of these factors mean that stores throughout New Mexico are running out of product, even as producers continue to cooperate by making wholesale transactions. The current shortages are only a sneak peek of the extreme shortages that are likely to develop after June 29.

Therefore, the undersigned producers request that DOH and RLD raise the plant limitation until the full commercial market can be phased in. DOH's rules already contemplate an increase in the coming months: 7.34.4.8(B) NMAC dictates that each licensed producer may apply for an extra 1,000 plants after June 1, 2021. Releasing extra plants in April 2021 is not unreasonable when DOH already contemplated releasing extra plants in June 2021.

While not sufficient, an additional 1,000 plants per producer would be the lowest amount the DOH could possibly consider. In fact, **a much greater increase is necessary**. The new purchase limit in the Cannabis Regulation Act is at least **22.2 times greater** than the current purchase/possession limit allowed by DOH. If patients can purchase an amount of two ounces of cannabis, sixteen grams of cannabis extract, and 800 milligrams of edible cannabis "at one time," per Section 3(B)(4)(a) and Section 25(A)(2), then the purchase limit would potentially be unlimited, similar to other medications.

If 1,750 plants-per-producer, with 34 producers (keep in mind, another licensee was removed from the program and we are down to 33 producers), was purported to be sufficient to meet a purchase/possession limit of eight ounces over 90 days, then using an equivalent ratio, it would take approximately 38,850 ($1,750 \times 22.2 = 38,850$) plants per producer to meet a purchase limit of two ounces per day. The number is much greater than 38,850 plants per producer if purchases are unlimited as defined under the new statute as "at one time."

A more conservative approach is to examine Colorado's medical cannabis program. Colorado limits patients to two ounces **per day**, which is less generous than New Mexico's two ounces at one time. Despite the difference, it is still reasonable to use Colorado's history to obtain a figure of what patients will actually buy when given the option to buy higher amounts.

The most recent per member per month (PMPM) data for Colorado shows patients purchased 8.71 ounces PMPM, which is 3.22 times greater than the current purchase/possession limit.

Again, using an equivalent ratio, it would take approximately 5,639 ($1,750 \times 3.22 = 5,639$) plants per producer to meet purchases similar to Colorado's PMPM. However, this calculation only accounts for flower purchases, which make up about 54% of medical cannabis sales in Colorado. Extrapolating for New Mexico, each producer would need approximately 10,443 ($5,639/0.54 = 10,443$) plants to account for the full product mix of two ounces of cannabis, sixteen grams of extract, and 800 milligrams of edible cannabis.

As you know, RLD will assume control of the medical cannabis program on June 29. See Section 5 of the Cannabis Regulation Act, "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." It would not bode well for RLD's public image as the regulator of cannabis if the medical cannabis program descended into chaos on June 29. New Mexicans, both citizens and legislators, are looking to RLD to smoothly manage the transition to a full commercial market, and if RLD allows the medical cannabis program to degrade further, public criticism will not be withheld.

For RLD's edification, cannabis plants typically become harvestable approximately four months after cultivation begins. Therefore, producers need significant lead time in order to have sufficient product on the shelf on June 29, 2021. The prudent regulator would therefore *immediately* raise the plant limitation on licensed medical producers, from 1,750 to *at least* 5,500. Again, raising the limit was something DOH was already planning to do in June 2021. Alternatively, there exists reasonable evidence to support medical plants be increased from a low of 10,000 plants per medical producer to possibly a high of nearly 39,000 plants or more per medical producer.

Furthermore, the undersigned producers suggest that DOH and RLD immediately raise the limit to count only *mature* plants, rather than on plants-larger-than-twelve-inches. As you know, many parts of the Cannabis Regulation Act refer to "mature plants," such as Section 9(B) and 9(C). The Act defines "immature" cannabis plant as one with no observable flowers or buds. Therefore, a mature plant would be one with observable flowers or buds. Referring to "immature" and "mature" plants, rather than 7.34.4.28 NMAC's "seedlings," would be an appropriate phase-in of the new Cannabis Regulation Act regime.

Obviously, the undersigned producers have an interest in continuing to sell medical cannabis, but the undersigned producers have a greater interest and concern in the wellbeing of the patients they serve. The licensed producers have supported 112,000 sick and vulnerable New Mexicans for many years now, and close relationships have formed between many producer employees and the patients they serve. Producers are nothing without the patients they serve, and for that reason, the producers continuously advocate for those patients. One cannot work in this industry for very long without developing a powerful sense of compassion and sympathy for these patients, many of whom are merely one bad day away from disaster. The licensed

producers wish to do everything to avert that bad day—one that could easily be catastrophic for some patients.

If DOH and RLD do not take proactive measures to secure the medical cannabis supply, it is likely that litigation will ensue as qualified patients enforce the purchase limitations in the Cannabis Regulation Act.

Public Statements Regarding Supply

Government representatives have repeatedly made public statements referencing the need for sufficient supplies of cannabis. On March 18, 2021, RLD Superintendent Linda Trujillo told the *Albuquerque Journal*, “Our biggest fear is not there’s going to be too much [cannabis], but that there would be too little and businesses would crash.” On April 1, 2021, Rep. Deborah Armstrong told KOB that provisions in the legalization bill were there to “ensure that we have an adequate supply for the medical users.” On April 10, 2021, Governor Michelle Lujan Grisham told the *Albuquerque Journal*, “We have to start getting producers, growers, and farmers ready to go right now.”

With too little supply in the medical market, it will not only be businesses that could crash: patients could crash as the higher purchase limitations drive a run on cannabis.

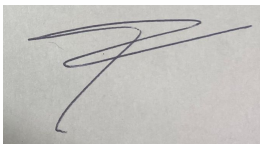
We would appreciate RLD and DOH’s answer by Tuesday April 20th, 2021.
The Undersigned:



Kylie Safa, Ultra Health



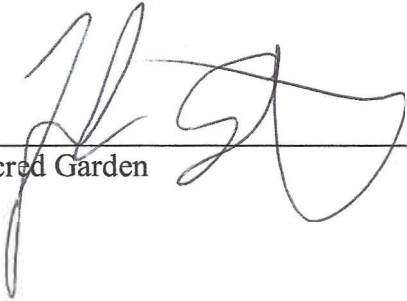
Andrew Gordon, G&G Genetics



Trevor Reed, Budding Hope



Fred Lucas, Kure



Zeke Shortes, Sacred Garden

cc: The Honorable Governor Michelle Lujan Grisham
