

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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August 27, 2021

The Honorable Maggie Toulouse Oliver
New Mexico Secretary of State
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Re: **Opinion Request – Conversion of Medical Cannabis Distributors Nonprofits**

Dear Secretary Oliver:

You have requested an Attorney General opinion as to whether the New Mexico Secretary of State (“SOS”) may convert current medical cannabis distributors, currently registered as nonprofit corporations under a soon to be repealed rule, to domestic profit corporations or domestic limited liability companies (“LLCs”) pursuant to the conversion statutes in NMSA 1978, Sections 53-19-59 to -61. You additionally inquired if there is some other statutory provision that would allow the SOS to convert a nonprofit corporation to a profit corporation under the laws of New Mexico, should the conversion statutes at NMSA 1978, Sections 53-19-59 to -61 not apply to permit such conversion.

Background

In 2021, the New Mexico Legislature passed the Cannabis Regulation Act (“CRA”) (House Bill 2 (2021 Regular Session)), which decriminalized the possession, use, production, transportation, and sale of commercial cannabis for nonmedical adult use. Before passage of the CRA, only medical cannabis licensed producers were able to produce, possess, distribute, and dispense cannabis. The New Mexico Department of Health (“DOH”) administered this licensure program pursuant to the then applicable provisions of the Lynn and Erin Compassionate Use Act (“Compassionate Use Act”). *See* NMSA 1978, § 26-2B-6.1 (prior to 2021 CRA amendment) (directing the DOH to regulate and administer the medical cannabis program).

The medical cannabis program as administered by DOH required, as a condition of licensure, that a medical cannabis producer be a nonprofit corporation registered and in good standing with the SOS. *See* 7.34.4.22(A)(1) NMAC. This requirement was established only by DOH rule. There was never a statutory requirement in the Compassionate Use Act nor elsewhere that such medical cannabis producers be registered as a nonprofit corporation.

The recently passed CRA established a new Cannabis Control Division (CCD), a branch of the Regulations and Licensing Department that is charged with regulating, administering, and collecting fees in connection with commercial cannabis activity and licensing, the medical cannabis program, and cannabis education. As the CRA transferred the administration of medical cannabis producer licensure from the DOH to the CCD, the CCD's rules regarding cannabis producer licensure will supersede the above-cited DOH rule which required medical cannabis producers to be registered nonprofit corporations. The newly promulgated CCD rules do not require a cannabis producer, medical or otherwise, to be a registered nonprofit corporation. *See* 16.8.2.21 NMAC (effective August 24, 2021) (listing application requirements for cannabis producer license).

As a result of the changes brought on by the CRA, more than 30 previously licensed nonprofit medical cannabis producers are seeking guidance on changing their entity status, as the sale of nonmedical cannabis is now legal and CCD rules would no longer require nonprofit corporation status. For convenience, most such producers want to convert their nonprofit corporations to domestic profit corporations. Accordingly, the SOS requests this opinion to determine whether the SOS can convert such nonprofit corporations to domestic profit corporations, or, alternatively, to LLCs under New Mexico law.

As noted in your request, the New Mexico Legislature did attempt to address this issue of converting such nonprofit corporations, which were previously licensed according to the Compassionate Use Act, to profit corporations. House Bill 12 (2021 Regular Session) included a section that, in effect, would have permitted the automatic conversion of such medical cannabis nonprofit corporations to profit corporations, subject to filing requirements. The proposed language read as follows:

Any nonprofit corporation issued a license under Subsection N of this section shall be converted into a corporation by the secretary of state upon the filing of articles of organization by the nonprofit corporation, which shall be approved pursuant to an agreement of conversion in the manner provided for the conversion of a limited liability company in Section 53-19-60.1 NMSA 1978. To be valid, the agreement of conversion must be approved by all directors of the nonprofit corporation. Upon conversion, all property owned by the converting entity remains in the newly converted entity. All obligations of the converting entity continue as obligations of the newly converted entity. Any action or proceeding pending against the converting entity may be continued as if the conversion had not occurred.

House Bill 12 (2021 Regular session) at 36-37 (emphasis supplied).

Ultimately, this language was not included in the final version of the CRA, now codified at NMSA 1978, Sections 26-2C-1 to -42 (2021).

Analysis

The Nonprofit Corporation Act Does Not Permit Nonprofit Corporations to Convert to Profit Corporations or LLCs.

The statutes at NMSA 1978, Sections 53-8-1 to 99 (the "Nonprofit Corporation Act" or "NCA") govern the formation and powers of nonprofit corporations under New Mexico law. The NCA contains explicit reference to the procedure for a merger or consolidation by nonprofit corporations. *See* NMSA

1978, § 53-8-40 (providing for procedure whereby two or more nonprofit corporations may merge into one nonprofit corporation); NMSA 1978, § 53-8-41 (providing procedure whereby two or more nonprofit corporations may consolidate into a new nonprofit corporation). The NCA contains no provision for the conversion of a nonprofit corporation to a profit corporation or other type of business entity, such as an LLC.

Applying the principle of statutory construction known as *expressio unius est exclusio alterius* aids us in determining whether nonprofit corporations can convert to other business entities such as a profit corporation or LLC. That principle provides that, “[w]here authority is given to do a particular thing and a mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded.” *City of Albuquerque v. New Mexico Pub. Regulation Comm’n*, 2003-NMSC-028, ¶ 21, 134 N.M. 472, 134, 79 P.3d 297, 308. Further, where “the legislature did not see fit to include it in the statute, [...] it is excluded.” *City of Santa Rosa v. Jaramillo*, 1973-NMSC-119, ¶ 11, 85 N.M. 747, 750, 517 P.2d 69, 72. “We are not permitted to read into a statute language which is not there, particularly if it makes sense as written.” *Id.* (internal citation omitted).

Here, the NCA expressly provides that nonprofit corporations can undergo specific types of transformations, namely a merger or consolidation into another nonprofit corporation. No provision of the NCA provides for other types of entity transformations, such as a conversion to another type of business entity like a corporation or LLC. Accordingly, following the principle of *expressio unius est exclusio alterius*, we conclude that the NCA does not contemplate nor permit a nonprofit corporation to convert to a profit corporation or LLC.

The Conversion Statutes at NMSA 1978, Sections 53-19-59 to 61 Do Not Apply to Permit the Conversion of Nonprofit Corporations to Profit Corporations or LLCs.

The same principle of statutory construction leads us to conclude that conversion statutes located outside of the NCA do not apply to allow nonprofit corporations to convert to profit corporations or LLCs. The Limited Liability Company Act (“LLC Act”) at NMSA 1978 Sections 53-19-1 to 74 contains specific references to conversions from one business entity type to another. *See* NMSA 1978, § 53-19-60 (providing that a corporation, partnership or limited partnership may be converted to an LLC pursuant to that section); NMSA 1978, § 53-19-60.1 (providing that an LLC may be converted to a corporation, partnership or limited partnership pursuant to that section). These express references to conversion contained within the LLC Act further highlight that had the Legislature intended to permit nonprofit corporations to convert to other entities, it could have easily included such language in the NCA Act. Where the Legislature chose not to do so, we are not permitted to read into the NCA such language allowing for nonprofit corporation conversion to other types of business entities. *See Jaramillo*, 1973-NMSC-119, ¶ 11.

It is worth noting, in support of this conclusion, that our sister states have explicitly provided for the conversion of nonprofit corporations into other types of business entities through specific reference in statute. *See* Tex. Bus. Orgs. Code Ann., § 22.256 (Texas nonprofit corporation statute providing for process of conversion); A.R.S., § 10-11102 (Arizona statute governing restructuring of nonprofit corporations providing for conversion). By comparison, these sister state statutes highlight that under New Mexico law, nonprofit corporations are not empowered to convert to other types of business entities.

Finally, the legislative history related to the CRA supports the conclusion that nonprofit corporations, such as previously licensed medical cannabis producers, are not currently empowered under New Mexico law to convert to profit corporations or LLCs. The language in House Bill 12, which would have allowed a licensed medical cannabis producer to avail itself of the conversion process set forth in the LLC Act for the conversion of an LLC to a profit corporation or other entity, was not included in the final CRA, thereby demonstrating that the Legislature recognized that nonprofit corporations such as licensed medical cannabis producers are not empowered under existing New Mexico law to convert to profit corporations. Accordingly, nonprofit corporations remain unable to convert to a profit corporation or LLC under current New Mexico Law, as the Legislature declined to implement that statutory provision in House Bill 12 which would have granted medical cannabis nonprofit corporations the ability to do so.

The Secretary of State Cannot Convert Nonprofit Medical Cannabis Producers to Profit Corporations or LLCs Under New Mexico Law.

No other statutory provision of New Mexico law appears to allow for the conversion of a nonprofit corporation to another type of business entity. Accordingly, where no statute appears to permit a nonprofit corporation to convert to another business entity such as a profit corporation or LLC, the SOS cannot convert a previously licensed medical cannabis nonprofit corporation to a domestic profit corporation or domestic LLC. The SOS lacks statutory authority to make such conversions. *See Qwest Corp. v. NMPRC*, 2006-NMSC-042, ¶ 20, 140 N.M. 440, 446, 143 P.3d 478, 484, as revised (Sept. 25, 2006) (“Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes.”).

Conclusion

Because New Mexico law does not currently permit a nonprofit corporation to convert to another type of business entity, the Secretary of State cannot convert previously licensed nonprofit corporation medical cannabis producers to domestic profit corporations or LLCs.

Please be advised that this opinion is a public record, not subject to the attorney client privilege. As such, we may provide copies to the public. If this office may be of further assistance, or if you have any questions regarding this opinion, please do not hesitate to contact our office.

Sincerely,



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Cc: Dylan K. Lange, SOS General Counsel (dylan.lange@state.nm.us)