Testimony
House Human Services Committee
Senate Bill 2344
Tuesday, March 21, 2017
North Dakota Department of Health

Good morning, Chairman Weisz and members of the Human Services Committee. My name is Arvy Smith, and I am the deputy health officer for the North Dakota Department of Health (DoH). I am here to support and provide information on Senate Bill 2344 regarding a medical marijuana program in North Dakota.

On November 8, 2016, the people of North Dakota voted to establish a medical marijuana program in the state. As we have stated, the new law posed some challenges for which we immediately started analyzing and seeking solutions to. Engrossed Senate Bill 2344 provides those solutions. In addition, the bill increases safety and efficiency factors at levels selected by the sponsors of this bill, and addresses priorities identified in U.S. Deputy Attorney General, James M. Cole's August 29, 2013 letter (attached) regarding marijuana enforcement by the federal government. In Cole's memo, the U.S. Department of Justice (DOJ) reiterated that marijuana remains illegal under the federal Controlled Substances Act, but the DOJ would focus its efforts on certain enforcement priorities including: preventing the distribution of marijuana to minors, preventing diversion of marijuana from a legal market to an illegal market, and preventing violence and the use of firearms in the cultivation and distribution of marijuana.

The legal marijuana industry is a relatively new industry, and states are still learning how best to establish policy and regulate this industry. While we reviewed other states' practices, policies, laws, etc. and a model law developed by the National Conference of State Legislatures (NCSL), it is important to note that the early implementers are continuing to update their laws and regulations to make improvements. We are using this information in developing North Dakota's medical marijuana program.

Introduction/Background

The North Dakota law, as included in Measure 5, was based on Delaware administrative rule, and while this provided a good start, as Delaware and other states improve their laws, changes will be necessary in North Dakota as well. Administrative rule is essentially how an agency will implement a law passed by the legislature. Rules contain a higher level of detail than what is typically contained in state law. The high degree of details and technicalities incorporated

into law by the original measure make it less flexible to adjust as needed for a new industry.

The medical marijuana system includes several key components including growing and manufacturing facilities, dispensaries, laboratories, designated caregivers, and finally qualifying patients. The term compassion center is used when discussing both the manufacturing facilities and the dispensaries. Measure 5 provides that compassion centers grow, cultivate, manufacture, and sell products either directly to qualifying patients or to designated caregivers who may provide for up to five qualifying patients, including themselves.

Safety

In order to address safety and the priorities of the U.S. Deputy Attorney General, the following changes are included in SB 2344:

- Allows patients to purchase the equivalent of 2.5 oz. of dried leaves or flowers in a combustible delivery form per month instead of 3 oz. every fourteen days and limits the amount patients can possess to 3 oz. at any given time (Section 2; page 5 line 30). Many sources indicated that 3 oz. every fourteen days was excessive. Also allows patients to purchase 10 grams of liquid per month, including oil, or pill delivery form or possess no more than 15 grams at any given time. These changes are to reduce diversion as a result of excessive purchasing and possession of marijuana.
- Prohibits patients and designated caregivers from growing their own plants and removes the ability of designated caregivers to have up to 8 plants per qualifying patient. Limitation of growing and dispensing not only reduces the possibility for diversion from a legal market to an illegal market, but also significantly reduces the cost to state and local government. Note that if this provision does not stay in the bill, the fiscal note for SB 2344 will increase significantly.
- Limits forms of use for minors to oils, limits the THC contents for minors at less than 6%, and requires pediatrician sign off for individuals under age 19. The original measure allowed all forms of use for all qualifying patients.
- Allows smoking or vaping of marijuana by adult qualifying patients if a physician attests that no other form of usable marijuana would be effective in providing therapeutic or palliative benefits.
- Requires seed to sale bar coding of every plant by manufacturing facilities. (Section 25; page 66 line 23). This is industry standard.

- Forbids the sale of edibles or marijuana infused food products by a dispensary. Patients would be able to purchase an oil form which they can use to create an edible form or use in a vaporizing system.
- Prohibits individuals < 19 years of age from purchasing or being in possession of marijuana. Use of marijuana for medical purposes is allowed through a parent or guardian registered caregiver.
- Strengthens various security requirements.

Efficiency and Cost Effectiveness

With regard to efficiency and cost effectiveness, the following changes are included in SB 2344:

- Allows compassion centers (manufacturers and dispensaries) to be either non-profit or for profit business models and LLCs. Removes the requirement for compassion centers to be non-profit and the DoH to certify compliance with non-profit status; Since federal 501(c)(3) status is not available because marijuana is federally illegal, a clear standard is not available. Discussion with other states indicates that the non-profit status requirement doesn't seem to add value to the process.
- Allows only 4 manufacturing facilities to grow, manufacture and sell marijuana to dispensaries; allows only 8 dispensaries to sell marijuana to qualifying patients and designated caregivers; the DoH may add dispensaries if product is not readily accessible to North Dakota clients. (Section 12; page 55 line 27). Also requires compassion centers to ensure access to qualifying patients and include a distribution plan in their application. (Section 26, page 68, lines 29)
- Requires fees to cover all DoH implementation costs by the 2019-21 biennium (Section 41; page 82 line 10). This requirement is included in other states and NCSL model law.
- Moves deadlines for processing qualifying patient, designated caregiver and compassion center applications from law to administrative rule. This allows better managing of staff and workload and flexibility to adjust deadlines.
- Removes the ability for the department to add debilitating conditions petitioned by the public (Section 6; page 21 line 10)
- Requires local planning and zoning approval of manufacturers and dispensaries prior to DoH reviewing the application. (Section 14, page 57, lines 15-17) This is consistent with model law and other states' laws to avoid unnecessary costs.

- Requires a bond to ensure adequate clean-up in the event a compassion center goes out of business. (Section 15, page 59, lines 1-3) This improves safety and potential cleanup costs to the DoH.
- Allows compassion center employees and volunteers to be non-residents of North Dakota.

Clarifications and Technical Changes

There are several technical changes to the law incorporated in SB 2344. A critical component added in Senate Bill 2344 is the language to decriminalize the growing, manufacturing, dispensing, possession and use of marijuana for medical purposes. The language is necessary to prevent patients, caregivers and agents of compassion centers, including lab testers and transporters, from arrest or prosecution, under state law, for their actions in compliance with medical marijuana laws. These protections from arrest and prosecution are included in Section 31 of SB 2344.

It is important to note that this language does not change the fact that use of marijuana is still illegal under federal law, and, while the federal government is not currently enforcing this law, there is nothing preventing the federal government from changing that stance. Related to this, a state agency cannot require or ask employees to perform activities that violate federal law in order to accomplish their job duties. Risk Management has advised the DoH that we cannot require our employees to handle, be in possession of, or transport marijuana for regulatory purposes. Consequently, the department will have to find unique ways to conduct random, controlled lab testing and use law enforcement if we find that marijuana product needs to be confiscated.

Another recommended improvement is to clearly define each of the terms used in the law and use them consistently throughout the law. One of these was the frequent use of the term "primary caregiver" in Measure 5 which was not defined and appears to be used in exchange for the term designated caregiver. In SB 2344, the term "primary caregiver" was changed to "designated caregiver" throughout the law. Additional terms including compassion center, dispensary, and manufacturing facility were clarified in SB 2344.

In using Delaware rules to develop the language of the measure that passed, the authors failed to change references to “these rules” to “this law” and in a couple of instances specifically referenced Delaware law. In addition to fixing these references, one of our suggested changes includes moving certain aspects of the law to administrative rule to provide the ability to adjust more rapidly, where necessary, through rule rather than law.

The measure, as passed, contains fourteen pages of regulations compassion centers are required to follow. Language included requirements to operate a compassion center, application requirements to be a compassion center and requirements for things to be included in the operating manual. The language of these requirements was not always consistent, causing confusion as to which requirements to follow. It is critical that the requirements to operate are consistent with the application requirements so that the department receives quality applications that address the requirements to operate and so that the compassion centers are regulated in accordance with the same rules for operation. If we are abundantly clear as to the requirements up front, we will receive better applications and be able to have operational compassion centers earlier than if we are continually sending their applications back to meet a set of regulations they were unaware of when they applied.

Additional clarifications the DoH is supporting are as follows:

- Establish that jurisdiction for judicial review is Burleigh County district court
- Establish all fees in law; fees for compassion centers were in the measure but fee amounts for designated caregivers and qualifying patients were not stated
- Remove the petition/public hearing process and use existing N.D. rules
- Clarify that the continuing appropriation included in the original measure is to the DoH
- Add violations and penalties
- Require conducting of an annual comprehensive inventory rather than biennially
- Clarify registry identification card contents

Fiscal Note

In summary, the fiscal note for engrossed SB 2344 shows the following:

DoH	**2017-19**	**2019-21**
Expenses	2,390,165	2,940,081
Revenue	1,307,500	3,510,000
General Fund App Needed	1,082,665	0
FTE	12	15

Attorney General

Expenses	162,085	346,516
Revenue	0	0
General Fund App Needed	162,085	346,516

In the 2017-19 biennium, since there won't be two full years of revenue and there will be one-time costs of $295,727, one-time general funding of $1,307,500 is needed. By the 2019-21 biennium, the revenue must be sufficient to cover all costs so the general fund need is $0 for the DoH. The cost for the Attorney General is to conduct the criminal background checks. While the designated caregivers and compassion centers or the agents must pay for the background checks, those fees are deposited directly to the general fund, so are not accessible to the Attorney General's Office.

The fiscal note also shows that revenue to the general fund and the state aid distribution fund totals $1,700,000 in the 2017-19 biennium and $3,400,000 in the 2019-21 biennium (91.3% to the general fund and 8.7% to the state aid distribution fund). The Tax Department is unable to calculate the amount of income tax that will be generated as a result of this legislation.

The assumptions used to calculate the fiscal note for each biennium are included in the fiscal note. Note that it is very difficult to estimate the numbers of qualifying patients and designated caregivers that will pursue registration so these numbers could change. Looking at other states, some were as low as .6 per 1,000 population and one was as high as 15.7 per 1,000 population. It appeared that those that allowed patients and caregivers to grow their own marijuana had higher numbers of registrants. Registrations are lower where the number of conditions covered and the forms of use are significantly restricted. Based on this information, we assumed 5 qualifying patients per 1,000 population, and assumed that half of the qualifying patients would have a designated caregiver resulting in 3,800 qualifying patients and 1,900 designated caregivers each year. The fiscal note assumed a $200 per year registration fee for qualified patients, designated caregivers and compassion center agents, an $80,000 per two years registration fee for manufacturing facilities and a $60,000 per two years registration fee for dispensaries.

Timeline

Finally, while not ideal, we plan to begin developing administrative rules immediately and make adjustments once legislation is finalized so that we can move them through the approval process as soon as possible. Once the rules for

compassion centers are finalized, we can begin accepting applications from compassion centers and awarding registrations. We have been told that from the time they are approved to operate, it will take two months for manufacturing facilities to set up business and three months until product can be harvested. Based on that, we expect product to be available for purchase approximately one year from now.

This concludes my testimony. I am happy to answer any questions you may have.