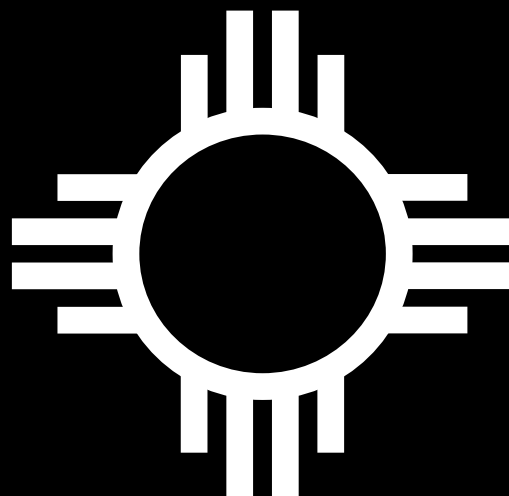


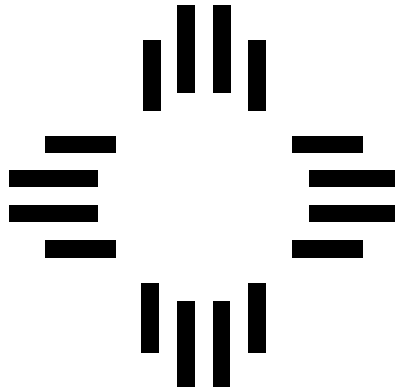
NEW MEXICO REGISTER



Volume XIV
Issue Number 20
October 30, 2003

New Mexico Register

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The official publication for all notices of rulemaking and filings of
adopted, proposed and emergency rules in New Mexico

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2003

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New Mexico Register

Volume XIV, Number 20

October 30, 2003

Table of Contents

Notices of Rulemaking and Proposed Rules

Hoisting Operator Licensure Examining Council	
Hoisting Operator's Licensure Examining Council Meeting	735
Human Services Department	
Income Support Division	
Notice of Public Hearing.	735
Mining Commission	
Notice of Continuation of Public Hearing of the New Mexico Mining Commission	735
Nursing, Board of	
Notice of Public Hearing.	735
Nursing Home Administrators Board	
Public Rule Hearing and Regular Board Meeting	736
Oil Conservation Commission	
Notice of Publication.	736
Taxation and Revenue Department	
Notice of Hearing and Proposed Rules	736

Adopted Rules and Regulations

Effective Date and Validity of Rule Filings

Rules published in this issue of the New Mexico Register are effective on the publication date of this issue unless otherwise specified. "No rule shall be valid or enforceable until it is filed with the records center and published in the New Mexico register as provided by the State Rules Act. Unless a later date is otherwise provided by law, the effective date of a rule shall be the date of publication in the New Mexico register." Section 14-4-5 NMSA 1978.

A=Amended, E=Emergency, N=New, R=Repealed, Rn=Renumbered

Children, Youth and Families Department	
Family Services Division	
8.8.3 NMAC R Governing Criminal Records Checks and Employment History Verification	755
8.8.3 NMAC N Governing Background Checks and Employment History Verification.	755
Education, Board of	
6.30.2 NMAC A Standards for Excellence	760
Human Services Department	
Medical Assistance Division	
8.325.7 NMAC Rn & A Pregnancy Termination Procedures	760
Personnel Board, State	
1.7.1 NMAC A State Personnel Administration - General Provisions	762
1.7.4 NMAC A State Personnel Administration - Pay	764

Other Material Related to Administrative Law

Transportation Commission	
Resolution No. 2003-5 (July) - Adopting The Manual on Uniform Traffic Control Devices, Millennium Edition (December 2000)	767

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Telephone: (505) 476-7907; Fax (505) 476-7910; E-mail rules@rain.state.nm.us.

Notices of Rulemaking and Proposed Rules

NEW MEXICO HOISTING OPERATOR LICENSURE EXAMINING COUNCIL

HOISTING OPERATOR'S LICENSURE EXAMINING COUNCIL MEETING

Notice is hereby given that the Hoisting Operator Licensure Examining Council will hold its regular meeting on Friday, December 5, 2003. The meeting will commence at 1:30 p.m. in the Bradbury Stamm Conference Room, 3701 Paso del Norte NE in Albuquerque, New Mexico. Council Members will meet with the CID Director and discuss concerns, ideas and or recommendations. A copy of the Agenda will be available at the office of the Program Administrator prior to said meeting.

Anyone needing special accommodations is requested to notify the Program Administrator at 505-222-9100 111 Lomas Blvd. NW – Suite 200, Albuquerque, New Mexico of such needs at least ten days prior to the meeting.

NEW MEXICO HUMAN SERVICES DEPARTMENT INCOME SUPPORT DIVISION

NOTICE OF PUBLIC HEARING

The Human Services Department will hold a public hearing to consider adopting revised rules in the New Mexico Works Cash Assistance Program and in the Food Stamp Program. The hearing will be held at 9:00 am on Monday December 1, 2003. The hearing will be held at the Income Support Division conference room, 2009 S. Pacheco St., Santa Fe, NM. The conference room is located in Room 120 on the lower level.

The Department proposes to revise the Food Stamp Program and New Mexico Works Cash Assistance Program rules to:

implement the option provided in Section 4109 of the Farm Bill of 2002 allowing New Mexico to extend a semi-annual reporting requirement to all households that are not exempt by law from the requirement; and
revise rules for reporting a change for non periodic reporting households in unearned income from a threshold of \$25 to \$50 for both programs; and

revise the reporting requirement for households not subject to semiannual reporting as

follows:

increase the threshold for reporting changes unearned income from \$25.00 to \$50.00 and for earned income from \$25.00 to \$100.00. A household must report changes within 10 days of the date the change occurs, rather than 10 days from the date a change becomes known to the recipient household.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in the public hearing, please contact the Department toll free at 1-800-432-6217, TDD 1-800-609-4TDD (4833), or through the New Mexico Relay System toll free at 1-800-659-8331. The Department requests at least a 10-day advance notice to provide requested alternative formats and special accommodations.

Individuals wishing to testify or requesting a copy of the proposed regulation should contact the Income Support Division, P.O. Box 2348, Pollon Plaza, Santa Fe, NM 87505-2348, or by calling toll free 1-800-432-6217.

Individuals who do not wish to attend the hearing may submit written or recorded comments. Written or recorded comments must be received by 5:00 PM on the date of the hearing. Please send comments to:

Pamela S. Hyde, JD, Secretary
Human Services Department
P.O. Box 2348 Pollon Plaza
Santa Fe, NM 87504-2348

You may send comments electronically to:
Sharon.Regensberg@state.nm.us

NEW MEXICO MINING COMMISSION

NOTICE OF CONTINUATION OF PUBLIC HEARING OF THE NEW MEXICO MINING COMMISSION

The New Mexico Mining Commission will continue its hearing on Petition 03-01 at 10:00 A.M. **Monday, November 17, 2003** in Porter Hall, the Oil Conservation Division (OCD) conference room on the 1st floor of the Energy, Minerals and Natural Resources Department building located at **1220 South St. Francis Drive** in Santa Fe, NM. The petition proposes changes to 19.10.12 NMAC - Financial Assurance Requirements of the New Mexico Mining Act Rules. If required, the Commission may continue the hearing on the following day, November 18, 2003 in Porter Hall, or at

such other time and/or place to be announced by the Commission at the hearing.

Copies of the agenda, the proposed rule change and the Commission's order may be obtained by contacting Alysia Leavitt or John Pfeil with the New Mexico Energy, Minerals & Natural Resources Department, Mining and Minerals Division at 476-3400.

NEW MEXICO BOARD OF NURSING

NOTICE OF PUBLIC HEARING

Notice is hereby given that the New Mexico Board of Nursing will convene a Rules Hearing to amend:

- 16.12.1. NMAC General Provisions
- 16.12.2. NMAC Nurse Licensure
- 16.12.3. NMAC Nursing Educational Programs

Notice is hereby given that the New Mexico Board of Nursing will convene a Rules Hearing to introduce new rules:

- 16.12.6. NMAC Nurse Licensure Compact
- 16.12.7. NMAC Trial Program for Medication Aides to Serve Persons in Licensed Nursing Facilities
- 16.12.8. NMAC Trial Program for Medication Aides to Administer Medication in Public Schools

These Hearings will be held at the Board of Nursing Conference Room, 4206 Louisiana NE, Suite A, Albuquerque NM 87109, on Monday, December 1, 2003 at 9:00 a.m.

Any person wishing to present testimony at the Hearings is requested to submit, to the Board of Nursing Office, a written statement of intent (10 copies) to be received no later than November 17, 2003

The Statement shall provide:

Name of Witness:
Who Witness represents:
Brief statement of subject matter of testimony; & anticipated length of presentation.

Notice: Any person presenting testimony, who is representing a client, employer or group, must be registered as a lobbyist through the Secretary of State's Office (505) 827-3600 or do so within 10 days of the Public Hearings.

Persons requiring special accommodations at the hearings are asked to call the Board

office (841-8340) no later than November 3, 2003 so that arrangements can be made. Hearing impaired persons call TDD 1-800-659-8331.

Drafts of proposed changes may be downloaded from our website: www.state.nm.us/nursing or requested through the Board of Nursing office.

NEW MEXICO NURSING HOME ADMINISTRATORS BOARD

PUBLIC RULE HEARING AND REGULAR BOARD MEETING

Notice is hereby given that the New Mexico Nursing Home Administrators Board will convene a public rule hearing at 1:30 p.m. on Friday, December 12, 2003. The hearing will be held in the Conference Room of the Peak Medical Building located at 5635 Jefferson N.E. in Albuquerque, New Mexico.

The purpose of the rule hearing is to consider for adoption proposed amendments to the following Board Rules and Regulations in 16.13 NMAC: PART 2, "Fees"; PART 3, "Application For Licensure By Examination"; PART 4, "Examination of Approved Applicants"; PART 5, "Application for Licensure by Reciprocity"; PART 7, "License Issuance"; PART 17, "Disciplinary Proceedings"; and PART 18, *Grounds For Disciplinary Action*.

Persons desiring to present their views on the proposed rules may write to request draft copies from the Board office at 2055 S. Pacheco, Suite 400, Santa Fe, New Mexico 87505; or call (505) 476-7121 or 476-7122; or access them in the "News" link on the Board's Website at www.rld.state.nm.us/b&c/nhab. All written comments, mailed to the Board office or e-mailed to nursinghomeadminbd@state.nm.us or Carmen.payne@state.nm.us, must be submitted no later than Friday, November 28, 2003, in order for the Board members to receive the comments in their packets for review before the rule hearing. Persons wishing to present their comments at the hearing will need ten (10) copies of any comments or proposed changes for distribution to the Board and staff.

A regular business meeting will follow the rule hearing during which action will be taken on the proposed rules. During the regular meeting, the Board may enter into Executive Session to discuss licensing matters.

If you have questions, or if you are an individual with a disability who

wishes to attend the hearing or meeting, but you need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to participate, please call the Board office at (505) 476-7121 at least two weeks prior to the meeting or as soon as possible.

NEW MEXICO OIL CONSERVATION COMMISSION

NOTICE OF PUBLICATION

STATE OF NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT OIL CONSERVATION DIVISION SANTA FE, NEW MEXICO

The State of New Mexico, through its Oil Conservation Commission, hereby gives notice that the Commission will conduct a public hearing at 9:00 A.M. on **December 11, 2003** in Porter Hall at 1220 South St. Francis Drive, Santa Fe, New Mexico, concerning the adoption of amendments to 19.15.14.1201, 19.15.14.1202, 19.15.14.1204, 19.15.14.1205, 19.15.14.1207 through 1209, and 19.15.14.1221 NMAC. The proposed amendments will change the notice and publication requirements for hearings before the Oil Conservation Commission or the Oil Conservation Division, provide for a shortened notice period in emergencies, change the time for filing of pre-hearing statements and specify the parties entitled to be furnished copies of Division and Commission orders. Additionally, the amendments will modify the provisions providing for an expedited procedure for compulsory pooling applications. If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact Division Administrator Florene Davidson at (505) 476-3458 or through the New Mexico Relay Network (1-800-659-1779) as soon as possible. Copies of the text of the referenced rules and proposed amendments are available from Ms. Davidson at 505 476-3458 or from the Division's web site at <http://www.emnrd.state.nm.us/ocd/what-snew.htm>

Given under the Seal of the State of New Mexico Oil Conservation Commission at Santa Fe, New Mexico on this 22nd day of September, 2003.

STATE OF NEW MEXICO

OIL CONSERVATION DIVISION

Lori Wrotenbery, Director

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

NOTICE OF HEARING AND PROPOSED RULES

The Department proposes to adopt the following regulations:

3.1.4.12 NMAC (*Extensions*)
Section 7-1-13 NMSA 1978 Tax
Administration Act

3.1.4.13 NMAC (*Reporting According to
Business Location*)

3.2.1.7 NMAC (*Definitions*) Section 7-9-
3(A) NMSA 1978 Gross Receipts &
Compensating Tax Act

3.2.1.11 NMAC (*Construction*)
Section 7-9-3.4 NMSA 1978

3.2.1.14, 16, 18, and 19 NMAC (*Gross
Receipts - General; Gross Receipts - Real
Estate and Intangible Property; Gross
Receipts - Services; Gross Receipts -
Receipts of Agents*) Section 7-9-
3.5 NMSA 1978

3.2.1.25 NMAC (*Manufacturing -
General Examples*) Section 7-9-3(H)
NMSA 1978

3.2.1.30 NMAC (*Use*) Section 7-9-
3(N) NMSA 1978

3.2.2.11 NMAC (*Reporting of Progress
Payments*) Section 7-9-11 NMSA
1978

The Department also proposes to repeal
3.2.215.12 NMAC (*General Examples*) to
Section 7-9-57 NMSA 1978 of the Gross
Receipts and Compensating Tax Act.

The proposals were placed on file in the
Office of the Secretary on October 16,
2003. Pursuant to Section 9-11-6.2 NMSA
1978 of the Taxation and Revenue
Department Act, the final of the proposals,
if filed, will be filed as required by law on
or about December 30, 2003.

A public hearing will be held on the propos-
als on Thursday, December 4, 2003, at 9:30

a.m. in the Secretary's Conference Room No. 3004/3138 of the Taxation and Revenue Department, Joseph M. Montoya Building, 1100 St. Francis Drive, Santa Fe, New Mexico. Auxiliary aids and accessible copies of the proposals are available upon request; contact (505) 827-0908. Comments on the proposals are invited. Comments may be made in person at the hearing or in writing. Written comments on the proposals should be submitted to the Taxation and Revenue Department, Director of Tax Policy, Post Office Box 630, Santa Fe, New Mexico 87504-0630 on or before December 4, 2003.

3.1.4.12 EXTENSIONS

A. GOOD CAUSE FOR EXTENSIONS:

(1) "Good cause" for which the secretary or secretary's delegate may grant extensions is construed strictly. Such extensions for no more than a total of 12 months will be granted only in situations in which the taxpayer shows a good faith effort to comply with the statute.

(2) Example 1: If the taxpayer operates a multistate business and the filing of returns for New Mexico taxes at the statutory due date would cause the taxpayer unreasonable bookwork and recordkeeping, an extension will be given favorable consideration by the secretary or secretary's delegate.

(3) Example 2: If the taxpayer is temporarily disabled because of injury or prolonged illness and the taxpayer can show that the taxpayer is unable to procure the services of a person to complete the taxpayer's return, an extension will be given favorable consideration.

(4) Example 3: If the conduct of the taxpayer's business has been substantially impaired due to the disability of a principal officer of the taxpayer, physical damage to the taxpayer's business or other similar impairments to the conduct of the taxpayer's business causing the taxpayer an inability to compute taxes before the due date, an extension of time will be given favorable consideration.

(5) Example 4: If the taxpayer's accountant has suddenly died or has become disabled and unable to perform services for the taxpayer and the taxpayer can show that the taxpayer is unable either to complete the return or to procure the services of a person to complete the return before the due date, an extension will be given favorable consideration.

(6) Example 5: If the taxpayer is awaiting the outcome of a court or administrative proceeding or the action of the internal revenue service on a federal tax claim, an extension will be given favorable consideration provided that the extension does not

contravene the time limits established by this statute or other New Mexico or federal statute.

B. PROCEDURE FOR OBTAINING EXTENSIONS - PERIOD OF EXTENSION:

(1) The procedures in Subsection 3.1.4.12B NMAC apply only to extensions which the applicant must request; these procedures do not apply to automatic extensions under Subsection 3.1.4.12E NMAC.

(2) Any taxpayer may request an extension of time in which to file a tax return. Such a request must be in writing and must be received by the department on or before the date that the tax is due. The application for extension must clearly set forth:

(a) the tax or tax return to which the extension, if granted, will apply;

(b) a clear statement of the reasons for the requested extension; and

(c) the signature of the taxpayer or the taxpayer's authorized representative.

(3) The extension will not be granted unless a reason satisfactory to the secretary or secretary's delegate appears in the request.

(4) An approved extension will ordinarily be granted for a period of 30 days. A request for longer extensions must state the reason why the 30 days is insufficient. Additional 30-day extensions or a longer extension may be granted by the secretary or secretary's delegate for up to a maximum aggregate extension of 12 months.

(5) Example 1: P is in the business of preparing tax returns. P realizes that, because of the great volume of business, P will be unable to complete all of P's customers' tax returns before the due date. P submits to the secretary a request for an extension of time on behalf of each customer whose return P is unable to complete. The request will be denied. It is irrelevant to consider whether or not P's request states a good cause because an extension will not be granted unless the taxpayer's personal necessity is the basis of the request. In this case, each of the taxpayers must request an extension and give "good cause" for this privilege.

(6) Example 2: On April 20, ~~199X~~ 20XX, T is granted a 30-day extension for payment of March, ~~199X~~ 20XX, taxes due April 25, ~~199X~~ 20XX. On May 20, ~~199X~~ 20XX, T, showing good cause, requests a further extension of the March taxes for 12 months. A 12-month extension will not be granted because the payment or filing date for any tax liability may not be extended for more than 12 months after the date on which the taxes were due and no series of extensions exceeding 12 months when aggregated will be granted to any tax-

payer. The maximum extension that could be granted to T is until April 25 of the year following ~~199X~~ 20XX.

C. EXTENSIONS GRANTED WHEN NO LIABILITY HAS ARISEN:

(1) An extension may be granted even though the tax liability has not yet arisen. The following examples illustrate the application of Subsection 7-1-13E NMSA 1978.

(2) Example 1: B's business is destroyed by flood on June 1, ~~19XX~~ 20XX. B, a cash-basis taxpayer, is expecting to receive payment in July for items sold in May. In June B requests a six-month extension for those taxes for which B will be liable in July and which will become due August 25, ~~19XX~~ 20XX. Upon a showing of good cause, the request may be granted notwithstanding that the liability for the tax has not yet arisen.

(3) Example 2: Under the same facts as in Example 1, in January of the following year, B, showing good cause, requests a further extension of the July, ~~19XX~~ 20XX taxes for a period of nine months to September 25 of the year following ~~19XX~~ 20XX. The nine-month extension will not be granted because the reporting period for any tax liability may not be extended for an aggregate period of more than 12 months after the date the taxes were due. The maximum extension which could have been granted was until August 25 of the year following ~~19XX~~ 20XX.

D. AUTOMATIC EXTENSION FOR REPORT OF FEDERAL FORM 990-T INCOME: A taxpayer who is required to file a New Mexico Corporate Income and Franchise Tax Return to report taxable income from unrelated activities included in a federal Form 990-T is hereby granted an automatic extension to the 15th day of the fifth month following the close of the taxable year to file a return reporting that income and to pay the tax owed. Interest will accrue during the period of the automatic extension.

E. AUTOMATIC FEDERAL INCOME TAX EXTENSIONS - GENERAL:

(1) An automatic extension of time to file a federal income tax return as provided in the Internal Revenue Code shall be considered to be an approved federal extension of time and shall be sufficient to extend the time for filing the New Mexico income tax return. If it is necessary to submit a form to the internal revenue service to claim an automatic extension for filing the federal income tax return, then a copy of the federal form claiming the automatic extension for federal tax purposes shall be attached to the taxpayer's New Mexico income tax return and shall serve as the

basis for extending the time for filing the New Mexico return to the date of filing the federal return under the automatic extension provided by the Internal Revenue Code. If it is not necessary to submit a form to the internal revenue service to claim an automatic extension for filing the federal income tax return, then the due date for filing the New Mexico income tax return shall be extended automatically to the same date as the extension for the federal return unless the federal extended date is more than four months from the original due date, in which case the extended due date for the New Mexico return shall be four months after the original due date.

(2) If the taxpayer desires additional time beyond the automatic extension for filing the New Mexico income tax return, a written request for the additional time must be made by the taxpayer prior to the expiration of the extended federal date. If it is necessary to submit a form to the internal revenue service to claim an automatic extension for filing the federal return, then a copy of the federal form requesting the automatic extension for filing the federal return must accompany the taxpayer's request for additional time to file the New Mexico income tax return beyond the extended federal date. The total combined extension for filing the New Mexico return shall not exceed 12 months beyond the actual due date for that return.

F. INVALIDATION OF FEDERAL EXTENSION: If an extension of time to file a federal income tax return is invalidated for any reason for federal income tax purposes, it is also invalidated for New Mexico income tax purposes.

G. FAILURE TO FILE, PAY OR PROTEST BY EXTENDED DUE DATE:

(1) The term "extended due date" means:

(a) for income tax returns, the latest date to which the due date for filing the New Mexico income tax return has been extended by either an extension granted by the internal revenue service with respect to the taxpayer's federal income tax return or by an extension granted by the department; and

(b) for all other tax returns, the latest date to which the due date for filing the tax return has been extended by the department.

(2) A taxpayer becomes a delinquent taxpayer if the taxpayer fails by the extended due date either to file the required return and, if a tax is due, to pay the tax due or to protest in accordance with Section 7-1-24 NMSA 1978 the payment or filing requirement.

ACCORDING TO BUSINESS LOCATION

A. REPORTING ACCORDING TO BUSINESS LOCATION - GENERAL:

(1) Any person maintaining more than one place of business in New Mexico and reporting under one identification number is required to report the taxable gross receipts for each location on a single CRS-1 form. Receipts from locations in each municipality or in each county outside a municipality where a place or places of business are maintained must be indicated separately on the CRS-1 form.

(2) A person who maintains multiple places of business in a single municipality or multiple places of business not within a municipality but within a single county and who reports under one identification number is required to combine the taxable gross receipts from these places of business, indicating the total taxable gross receipts derived from all locations in each municipality or county on the CRS-1 form.

(3) For persons engaged in the construction business, "place of business" includes each place where construction is performed.

(4) The "place of business" of a person who has no other place of business in New Mexico, but who has sales personnel who reside in New Mexico, includes each place where such personnel reside. Such persons are required to report gross receipts in the manner provided in Paragraphs 3.1.4.13A(1) and (2) NMAC. The place of business of a person who has no other place of business and does not have sales personnel who reside in New Mexico but who does have service technicians who perform service calls in New Mexico is "out of state", whether the service technicians live in New Mexico or elsewhere. For the purposes of Paragraph 3.1.4.13A(4) NMAC, a "service technician" is an employee whose primary work responsibility is the repair, servicing and maintenance of the products sold or serviced by the employer and whose sales activities are at most incidental.

(5) A person, other than an itinerant peddler, who is liable for the gross receipts tax and who has no "place of business" or resident sales personnel or other employees such as service technicians in New Mexico is required to indicate on the CRS-1 form that the business location is "out-of-state".

(6) A person is required to report receipts for the location where the place of business is maintained even though the sale or delivery of goods or services was not performed at or from the place of business. It should be noted, however, that each construction site, as indicated in Paragraph

3.1.4.13A(3) NMAC, is a "place of business" for this purpose.

(7) If a person has more than one place of business in New Mexico, the department will accept, on audit, this person's method of crediting sales to each place of business, provided the method of crediting is in accordance with the person's regular accounting practice and contains no obvious distortion.

(8) Example 1: The X Company maintains its only place of business in Roswell, but sends its sales personnel to different cities in New Mexico to solicit sales and take orders. X is not required to report its gross receipts for each municipality in which its sales personnel are operating. X reports its gross receipts only for Roswell because its sole place of business is Roswell.

(9) Example 2: The Z Company maintains its only place of business in Grants. It makes deliveries in its own trucks to customers in various other cities within New Mexico. Z is not required to report its gross receipts for each municipality in which it makes deliveries. Z reports its gross receipts only for Grants. It is not maintaining a place of business in municipalities outside Grants solely because of its deliveries.

(10) Example 3: The W Furniture Company maintains its only office and showroom inside the city limits of Carrizozo. W's furniture warehouse is located outside the Carrizozo city limits. Furniture sold by W is, for the most part, delivered from its warehouse. W's "place of business" is in Carrizozo and it must report all its gross receipts for that municipality, regardless of the location of its warehouse.

(11) Example 4: The X Appliance Company maintains offices and showrooms in both Truth or Consequences and Las Cruces. The Truth or Consequences place of business initiates a sale of a refrigerator. The refrigerator is delivered from stock held in the Las Cruces place of business. X's place of business to which it credits the sale will be accepted on audit, if the crediting is in accordance with X's method of crediting sales in its regular accounting practice and contains no obvious distortion. If X credits the sale to its Truth or Consequences place of business, the department will accept Truth or Consequences as the location of the sale. The same result will occur if X credits the sale to its Las Cruces place of business.

B. REPORTING ACCORDING TO BUSINESS LOCATION - UTILITIES:

(1) Each municipality and the portion of each county outside a municipality in which customers of a utility are located constitute separate places of business.

The physical location of the customer's premises or other place to which the utility's product or service is delivered to the customer is a business location of the utility.

(2) The department will accept, on audit, a utility's method of crediting its sales to its places of business, provided the method of crediting is based on the location of its customers as business locations and the method of crediting contains no obvious distortion.

(3) For the purposes of Section 3.1.4.13 NMAC, "utility" means a public utility or any other person selling and delivering or causing to be delivered to the customer's residence or place of business water via pipeline, electricity, natural gas or propane, butane, heating oil or similar fuel or providing cable television service, telephone service or Internet access service to the customer's residence or place of business.

C. REPORTING BY PERSONS ENGAGED IN THE LEASING BUSINESS: A person from out of state who is engaged in the business of leasing as defined in Section 7-9-3 Subsection E of Section 7-9-3 NMSA 1978 and who has no place of business or resident sales personnel in New Mexico is required to indicate "out-of-state" on the CRS-1 report form and to calculate gross receipts tax due using the tax rate for the state. An out-of-state person engaged in the business of leasing who has a place of business or resident sales personnel in New Mexico is required to report gross receipts for each municipality or area within a county outside of any municipalities in which the person maintains a place of business or resident sales personnel. An in-state person engaged in the business of leasing with more than one place of business is required to report gross receipts for each municipality or area within a county outside of any municipality in which the person maintains a place of business.

D. REPORTING TAXABLE GROSS RECEIPTS BY A PERSON MAINTAINING A BUSINESS OUTSIDE THE BOUNDARIES OF A MUNICIPALITY ON LAND OWNED BY THAT MUNICIPALITY: For the purpose of distribution of the amount provided in Section 7-1-6.4 NMSA 1978, persons maintaining a place of business outside the boundaries of a municipality on land owned by that municipality are required to report their gross receipts for that location. For the purpose of calculating the amount of state and local gross receipts tax due, such persons shall use the sum of the gross receipts tax rate for the state plus all applicable tax rates for county-imposed taxes administered at the same time and in the same manner as the gross receipts tax.

E. ITINERANT PEDDLERS - TEMPORARY BUSINESS LOCATIONS:

(1) An itinerant peddler is a person who sells from a nonreserved location chosen for temporary periods on a first-come, first-served basis. An itinerant peddler does no advertising or soliciting, has no one employed to sell and is not employed as a salesperson.

(2) An itinerant peddler shall report taxable gross receipts by the municipality or the area of a county outside any municipality where the peddler maintains a place of business. If the itinerant peddler sells from only one location, that location shall be the place of business. If an individual peddler has no set sales location, the place of business shall be the peddler's temporary or permanent residence within New Mexico.

(3) Example: X occasionally places a blanket on a sidewalk in a town wherever X can find space for the blanket and sells homemade pies. X is an itinerant peddler because the space is not reserved specifically for X, it is chosen for temporary periods, and X is not employed nor does X have employees. Additionally, because X cannot be expected to be found regularly carrying on business at the same sidewalk location every day, X's place of business, for reporting purposes, is X's residence.

(4) Any person who pays a fee to occupy a particular location or space for a determined period of time and who sells any item or performs any service at that location is not an itinerant peddler and shall report that location as a place of business.

(5) Example: X pays \$50.00 to rent a space for a booth for two days during a festival. X is not an itinerant peddler because the space was assigned, and during the festival X could normally be expected to be found carrying on business at that place. X must therefore report the gross receipts from sales made during the festival to the location of the space.

(6) Any person who, in advance, advertises through print or broadcast media or otherwise represents to the public that the person will be at a particular location for a specified period of time and who sells property or performs service at that location shall report that location as a place of business.

(7) Example: X sells fish from a truck in a shopping center parking lot. X places an advertisement in the local paper informing the public where X will be located and the dates when X will sell fish at that location. X is not an itinerant peddler because X advertises and solicits business, and X can normally be expected to be found at that location during the time designated in the advertisement. The shopping center is

X's place of business and X must report all activity occurring there to that location.

F. OBVIOUS DISTORTION: For purposes of Section 3.1.4.13 NMAC, obvious distortion shall be presumed whenever the method used to credit sales to a place of business treats similar transactions inconsistently. Any method which intentionally credits sales to a location with a lower combined tax rate primarily for the purpose of reducing the taxpayer's total tax liability shall be presumed to contain obvious distortion, shall not be allowed and may be the basis of establishing intent to evade or defeat tax under the provisions of Section 7-1-72 NMSA 1978.

G. SPACE PROVIDED BY CLIENT CONSTITUTES BUSINESS LOCATION:

(1) Except as provided otherwise in Paragraph 3.1.4.13G(6) NMAC, any person performing a service who occupies space provided by the purchaser of the service being performed has established a business location if the following conditions are present:

(a) the space is occupied by the provider of the service for a period of six consecutive months or longer;

(b) the provider or employees of the provider of the service are expected, by the purchaser of the services or representatives of the purchaser, to be available at that location during established times; and

(c) critical elements of the service are performed at, managed or coordinated from the purchaser's location.

(2) The following indicia will be considered in determining if the above conditions are present:

(a) the provider of the service has assigned employees to the client's location as a condition of employment;

(b) telephone is assigned for the exclusive use by the service provider;

(c) the space has been designated for the use of the service provider;

(d) the space contains office furniture or equipment furnished by either the client or the service provider for the sole use of the service provider;

(e) the service provider is identified by business name on a sign located in or adjacent to the provided space;

(f) the client or other persons can expect to communicate, either in person or by telephone, with the service provider or employees or representatives of the service provider at the space provided by the client; and

(g) the contract between the client and the service provider requires the client to provide space to the service provider.

(3) Any person meeting the three conditions as evidenced by the listed indicia must report the receipts derived from the

performance of the service at the client's location to the municipality or county in which the furnished space is located.

(4) Example 1: X has entered into a contract to perform research and development services for the army at a location on White Sands missile range within Doña Ana county. The term of the contract is one year and is renewable annually. X is required by the contract to assign employees to the project at White Sands missile base on a full-time basis. The assigned employees consider White Sands as their place of employment. The Army furnishes X with office and shop space as well as furniture and equipment. The space is identified as X's location by a sign containing X's business name at the main entrance to the assigned space. A specific telephone number has been assigned for X's exclusive use during the term of the contract. X shall report the receipts from services performed at the White Sands location under this contract using Doña Ana county as the location of business for gross receipts tax purposes.

(5) Example 2: Y has entered into a maintenance contract with a state agency to maintain and repair computer equipment. The state agency provides storage facilities to Y for the storage of equipment and parts which will be used by Y in the maintenance and repair of computer equipment. Y's employees are present at the location of the state agency only when required to repair the computers. The agency contacts Y at Y's regular place of business to report equipment problems and to request necessary repairs. On receipt of a request from the agency, Y dispatches an employee to the agency's location to repair the equipment. The location of the state agency does not constitute a separate business location for Y. Y shall report its receipts from the state agency under this contract to the location where Y maintains a regular place of business.

(6) The provisions of Subsection 3.1.4.13G NMAC do not apply when:

(a) the provider of the service is a co-employer or joint employer with the client of the employees at the client's location or has entered into a contract to provide temporary employees to work at the client's facilities under the client's supervision and control; and

(b) the provider of the service has no employees at the client's location other than employees described in Subparagraph 3.1.4.13G(6)(a) NMAC above.

H. REPORTING ACCORDING TO BUSINESS LOCATION - PERSONS SUBJECT TO INTERSTATE TELECOMMUNICATIONS GROSS RECEIPTS TAX ACT:

(1) Each municipality and the portion of each county outside all municipi-

palities in which customers of a person who is engaging in an interstate telecommunications business and who is subject to the interstate telecommunications gross receipts tax are located constitute separate places of business. Except for commercial mobile radio service as defined by 47 C.F.R. 20.3, the location of the person's customer is the location of the telephone sets, other receiving devices or other points of delivery of the interstate telecommunications service.

(2) The department will accept, on audit, the person's method of crediting its sales to its places of business, provided the method of crediting is based on the location of its customers as business locations and the method of crediting contains no obvious distortion.

(3) This version of Subsection 3.1.4.13H NMAC applies to all interstate telecommunications gross receipts tax returns due after January 1, 2000.

I. REPORTING ACCORDING TO BUSINESS LOCATION - COMMERCIAL MOBILE RADIO SERVICE PROVIDERS: For interstate telecommunications gross receipts tax returns due after January 1, 2000, each municipality and the portion of each county outside all municipalities in which customers of the provider of a commercial mobile radio service as defined by 47 C.F.R. 20.3 are located constitute separate places of business. With respect to the provision of commercial mobile radio service, the business location of a customer will be determined by the customer's service location. A customer's service location is determined first by the customer's billing address within the licensed service area. If the customer does not have a billing address within the licensed service area or if the customer's billing address is a post office box or mail-drop, then the customer's service location is the street or rural address of the customer's residence or business facility within that service area.

3.2.1.7 **DEFINITIONS:** The terms defined in Section 3.2.1.7 NMAC apply throughout Section 3.2 NMAC.

A. **Benefit:** A "benefit" is any consideration to either party. "Benefit" is not limited to profits, pecuniary gains, or any particular kind of advantage.

B. **Consideration:** "Consideration" is any benefit, interest, gain or advantage to one party, usually the seller, or any detriment, forbearance, prejudice, inconvenience, disadvantage, loss of responsibility, act or service given, suffered, or undertaken by the other party, usually the buyer.

C. **Detriment:** A "detriment" is a forbearance of either party of a

right which the party is entitled to exercise or any consideration flowing from either party, not limited to payment of money or transfer of property.

D. Financial corporations:

(1) A financial corporation is any corporation primarily dealing in moneyed capital and in substantial competition with commercial banks.

(2) Example 1: FC is a corporation which is primarily engaged in the following activities: (a) buying and selling mortgages on real estate, (b) initiating mortgages on real estate and selling these mortgages, and (c) servicing mortgages. FC is a financial corporation because it is primarily dealing in moneyed capital and is in substantial competition with commercial banks.

(3) Example 2: IA is an insurance agency which, as an adjunct of its primary business, loans money to finance premiums. IA is not a financial corporation because it is not primarily dealing in moneyed capital and it is not in substantial competition with commercial banks.

(4) Example 3: A corporation which receives a commission on sales of money orders to its customers as an adjunct of its primary business is not a financial corporation within the meaning of [Subsection D] Subsection C of Section 7-9-3 NMSA 1978 simply because it engages in this business activity.

(5) Example 4: A corporation which is engaged in the following activities is not a financial corporation because it is not primarily dealing in moneyed capital and is not in substantial competition with commercial banks:

(a) acting as an investment advisor to a mutual fund and others and receiving a fee for such services;

(b) acting as principal underwriter for the same mutual fund as in 1 above and receiving a fixed percentage of the selling price of the securities sold as a commission or fee; or

(c) issuing a weekly stock analysis report as an advisory service, receiving for this service payment in the form of subscription fees.

E. Franchise.

(1) A "franchise" is an agreement in which the franchisee agrees to undertake certain business activities or to sell a particular type of product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor agrees to assist the franchisee through advertising, promotion and other advisory services. The franchise usually conveys to the franchisee a license to use the franchisor's trademark or trade name in the operation of the franchisee's business.

(2) Example: Y, a pie company of Cambridge, Massachusetts, grants to X of Virden, New Mexico, the right to make pies according to their exclusive recipe and to operate Y Pie shops throughout New Mexico. The right to make the pies and operate the pie shops, whether granted for a "one-time" payment or for a continuing percentage of the proceeds of the shops, is a franchise. Therefore, the receipts of Y, from its granting of the franchise are subject to gross receipts tax.

F. Computer-related terms:

(1) "Computer software" means computer programming in whatever form or medium.

(2) "Custom software" means computer programming developed specifically at the order of another or for a specific purpose. "Custom software" includes the modification of existing computer programming.

(3) "Packaged software" means computer programming embodied in electronic, electromagnetic or optical materials for transfer from one person to another, with or without explanatory materials, instructions or other programming and intended to be sold or licensed without modification to multiple buyers or users.

(4) "Software" means "computer software".

G. Practitioner of the healing arts: A "practitioner of the healing arts" is a person licensed to practice in this state medicine, osteopathic medicine, acupuncture and oriental medicine, dentistry, podiatry, optometry, chiropractic, nursing or similar medical services for human beings. The term also includes veterinarians licensed to practice in this state.

3.2.1.11 CONSTRUCTION.

A. Construction service as distinguished from other services.

(1) The term "construction" is limited to the activities, or management of the activities, which are listed in ~~[Subsection C of Section 7-9-3]~~ Section 7-9-3.4 NMSA 1978 and which physically change the land or physically create, change or demolish a building, structure or other facility as part of a construction project.

(2) "Construction" does not include services that do not physically change the land or physically create, change or demolish a building, structure or other facility as part of a construction project, even though they may be related to a construction project. The fact that a service may be a necessary prerequisite or ancillary to construction or a construction project does not in itself make the service a construction service. Excluded from the meaning of "construction" are activities such as,

but not limited to: hauling to or from the construction site except as otherwise provided in Subsection C of Section 3.2.52.10 NMAC, maintenance work, landscape upkeep, the repair of equipment or appliances, laboratory work or accounting, architectural, engineering, surveying, traffic safety or legal services.

(3) "Construction" does not include leasing, such as renting or leasing equipment with or without an operator.

B. Speculative builders.

A person is engaged in the construction business if that person constructs improvements on real property which the person owns and which improved property is held for sale in the ordinary course of business.

C. Construction includes. Pursuant to ~~[Subsection C of Section 7-9-3]~~ Section 7-9-3.4 NMSA 1978 the term "construction" includes the painting of structures, the installation of sprinkler systems and the building of irrigation pipelines.

D. Construction does not include.

(1) Pursuant to ~~[Subsection C of Section 7-9-3]~~ Section 7-9-3.4 NMSA 1978, the term "construction" does not include the installation of carpets or the installation of draperies.

(2) A person engaged in the construction business, however, may deliver a Type 6 nontaxable transaction certificate for the purchase of carpets, draperies, or installed carpet or installed draperies to the seller.

(3) Even though receipts from selling carpet installation services or drapery installation services to a person engaged in the construction business are receipts from the sale of a service for resale, a person engaged in the construction business may deliver a Type 7 nontaxable transaction certificate for the purchase of carpet installation services or drapery installation services.

~~[(4) Erecting fences is not "construction" within the meaning of Subsection C of Section 7-9-3 NMSA 1978.]~~

E. Oil and gas industry construction.

(1) "Construction", as this term is used in ~~[Subsection C of Section 7-9-3]~~ Section 7-9-3.4 NMSA 1978, includes the following activities related to the oil and gas industry:

(a) building and altering of gas compression plant facilities and pump stations, including: clearing of property sites; excavating for foundations; building and setting foundation forms; mixing, pouring, and finishing concrete foundations for buildings and plant equipment on foundations; fabricating and installing piping; installing electrical equipment, insulation,

and instruments; erecting buildings; placing sidewalks, drives, parking areas; installing storage tanks; and dismantling equipment and reinstalling elsewhere;

(b) building of or extension of gas-gathering pipelines, including: connecting gathering lines to lease separators, fabricating and installing meter runs, digging trenches, beveling pipe, welding pipe, wrapping pipe, backfilling trenches, testing pipelines, fabricating and installing pipeline drips and installing conduit for pipelines crossing roads or railroads;

(c) building of or extension of product pipelines, including: building pressure-reducing stations; connecting pipelines to storage tanks, fabricating and installing valve assemblies, digging trenches, beveling pipe, welding pipe, wrapping pipe, laying pipe, backfilling trenches, testing pipelines and installing conduit for pipeline crossing roads or railroads;

(d) building secondary-recovery systems, including: excavating and building foundations, installing engines and water pumps, installing pipelines for water intake, installing pipelines for carrying pressured water to input wells, installing instruments and controls and erecting buildings;

(e) installing lease facilities, including: installing wellheads, flow lines, chemical injectors, separators, heater-treaters, tanks, stairways and walkways; building foundations; and setting pump units and engines, central power units and rod lines;

(f) demolishing pipelines, including: digging trenches to uncover pipelines, dismantling and removing drips and meter runs, backfilling trenches, tamping and smoothing right-of-way;

(g) increasing pipeline capacity, including: removing small pipelines and replacing with larger lines, and digging adjoining trenches and laying new pipelines;

(h) repairing plant, including: replacing tubing in atmospheric condensers, replacing plugged boiler tubing; removing cracked, broken or damaged portions of foundations and replacing anew; replacing compressors, compressor engines, or pumps; and regrouting and realigning compressors;

(i) drilling wells, including: drilling ratholes, excavating cellars and pits, casing crew services, cementing services, directional drilling, drill stem testing and fishing jobs in connection with drilling operations;

(j) general dirt work, including: building roads, paving with caliche or other surfacing materials; digging pits, trenches, and disposal ponds, building firewalls and foundation footing; and constructing pads from caliche or other materials.

(2) "Construction", as the term is used in ~~[Subsection C of Section 7-9-3]~~ Section 7-9-3.4 NMSA 1978, does not include the following activities related to the oil and gas industry:

(a) well servicing, including: acidizing and fracturing formations; pulling and rerunning rods or tubing; loading or unloading a well; shooting; scraping paraffin; steaming flow lines and tubing; inspecting equipment; fishing jobs, other than in connection with drilling operations; bailing cave-ins; reverse circulating and resetting packers;

(b) lease and plant maintenance, including: cleaning; weed-control; preventive care of machinery, pipelines, gathering systems, and engines; tank cleaning; testing of flow lines by pressure or X-ray means; cleaning lines and tubing by acid treatment or mechanical means, or replacing and restoring machinery components;

(c) transporting equipment, including: transporting drilling rigs, rigging-up and rigging-down, and hauling water and mud;

(d) salvaging of materials from a "production unit", as defined in the Oil and Gas Emergency School Tax Act, such as: killing the gas pressure, removing casing heads, welding pull nipples on the casing, cutting or shooting casing strings, pulling casings from the well bore, cementing to fill the abandoned well or plug the well, filling the cellar, and welding steel pipe markers;

(e) rental of equipment such as: power tongs, blowout preventors, tanks, pipe racks, core barrels, integral parts of a drilling rig or integral parts of a circulation unit;

(f) measuring, "logging" and surveying services in connection with the drilling of an oil or gas well. "Logging" as that term is used in this subsection is a method of testing or measuring an oil or gas well by recording various aspects of the geological formations penetrated by the well.

F. Construction includes prefabricated buildings; prefabricated versus modular buildings.

(1) The sale of prefabricated buildings, whether constructed from metal or other material, is the sale of construction. A prefabricated building is a building designed to be permanently affixed to land and manufactured (usually off-site) in components or sub-assemblies which are then assembled at the building site. Prefabricated buildings are not designed to be portable or relocatable.

(2) A portable building or a modular relocatable building is a building manufactured (usually off-site) which is designed to be relocatable and, when delivered to the installation site, generally

requires only blocking, levelling and, in the case of modular relocatable buildings, joining of modules. For the purposes of Subsection F of Section 3.2.1.11 NMAC, neither portable buildings, modular relocatable buildings nor manufactured homes defined as vehicles by Section 66-1-4.11 NMSA 1978 are prefabricated buildings.

G. Construction materials and services; landscaping.

(1) Landscaping items, such as ornaments, rocks, trees, plants, shrubs, sod and seed, which are sold to a person engaged in the construction business, that are an integral part of the construction project, are construction materials. Persons who seed, lay sod or install landscape items in conjunction with a construction project are performing construction services.

(2) Receipts from selling landscaping items to, and from seeding, laying sod or installing landscape items for, persons engaged in the construction business may be deducted from gross receipts if the buyer delivers a nontaxable transaction certificate to the seller as provided in Section 7-9-51 and Section 7-9-52 NMSA 1978, respectively.

H. Nontaxable transaction certificates.

(1) Nontaxable transaction certificates are available from the department for persons who are performing construction as set forth in ~~[Subsection C of Section 7-9-3]~~ Section 7-9-3.4 NMSA 1978 to issue to providers of construction materials and construction services.

(2) Only persons who are licensed by the state of New Mexico as construction contractors may apply for and use nontaxable transaction certificates under the provisions of Sections 7-9-51 NMSA 1978 and 7-9-52 NMSA 1978, except that a person who performs construction activities as defined in ~~[Subsection C of Section 7-9-3]~~ Section 7-9-3.4 NMSA 1978 in the ordinary course of business, and who is exempt from the laws of the state of New Mexico requiring licensing as a contractor may issue such certificates.

I. Fixtures.

(1) Construction includes the sale and installation of "fixtures" such as kitchen equipment, library equipment, science equipment and other miscellaneous equipment installed so that it becomes firmly attached to the realty. Fixtures are considered to be items of tangible personal property which are necessary or essential to the intended use of a construction project and which are so firmly attached to the realty as to constitute a part of the construction project.

(2) Receipts from the sale of furniture, kitchen equipment, library shelves and other furniture or equipment sold on an

assembled basis that does not become a "fixture" is a sale of tangible personal property and not construction.

J. Construction materials; general.

(1) The term "construction materials" means tangible personal property which is intended to become an ingredient or component part of a construction project.

(2) Tangible personal property intended ultimately to become an ingredient or component part of a construction project although not purchased for a specific project is nonetheless a construction material. *Example:* A government agency makes bulk purchases of asphalt which is stored by the agency for use in future road construction or repair projects. The asphalt is a construction material.

(3) Tools, equipment and other tangible personal property not designed or intended to become ingredients or component parts of a construction project are not construction materials if such materials accidentally become part of a construction project. *Example:* A workman accidentally drops a pair of gloves and a hammer into a form into which concrete is being poured. Because the gloves and the hammer are not intended to be included in the concrete structure, they are not construction materials.

K. Meaning of "building".

(1) As used in ~~[Subsection C of Section 7-9-3]~~ Section 7-9-3.4 NMSA 1978, the noun "building" means a roofed and walled structure designed for permanent use but excludes an enclosure so closely combined with the machinery or equipment it supports, houses or serves that it must be replaced, retired or abandoned contemporaneously with the machinery or equipment.

(2) A "building" includes the structural components integral to the building and necessary to the operation or maintenance of the building but does not include equipment, systems or components installed to perform, support or serve the activities and processes conducted in the building and which are classified for depreciation purposes as 3-year property, 5-year property, 7-year property, 10-year property or 15-year property by Section 168 of the Internal Revenue Code or, if the Internal Revenue Code is amended to rename or replace these depreciation classes, would have been classified for depreciation purposes as 3-year property, 5-year property, 7-year property, 10-year property or 15-year property but for the amendment.

(3) *Example:* A building may include any of the following equipment, systems or components:

(a) elevators and escalators used

in whole or in part to move people;

(b) heating, cooling and air conditioning systems except for air conditioning and air handling systems and components, separately depreciated under Section 168, installed to meet temperature, humidity or cleanliness requirements for the operation of machinery or equipment or the manufacture, processing or storage of products;

(c) electrical systems except for electrical systems and components, separately depreciated under Section 168, installed to power machinery or equipment operated as part of the activities and processes conducted in the building and not necessary to the operation or maintenance of the building; and

(d) plumbing systems except for plumbing systems and components, separately depreciated under Section 168, installed to perform, serve or support the activities and processes conducted in the building, such as for the handling, transportation or treatment of ingredients, chemicals, waste or water for a manufacturing or other process.

3.2.1.14 GROSS RECEIPTS - GENERAL.

A. **Gross receipts:** Unless the receipt is from one or more of the following, it is not taxable:

(1) selling property in New Mexico;

(2) leasing property employed in New Mexico;

(3) performing services outside of New Mexico the product of which is initially used in New Mexico; or

(4) performing services in New Mexico.

B. **Credit card sales:** Gross receipts of the seller of property or services or the lessor of property include the full sale or lease contract amount of any property or service sold or of any property leased when payment is made through the use of a credit card which has been issued by a third party. The seller or lessor may not deduct from gross receipts the amount charged by the credit card company for converting the account into cash.

C. **Consideration other than money:**

(1) If the consideration received by the seller or lessor for the item sold or leased or for the service performed is in a form other than money, the fair market value of the consideration received or the fair market value of the item sold or of the lease or of the service performed must be included in gross receipts. The value of the consideration received or the item sold or of the lease or of the service performed is the fair market value at the time of the transaction.

(2) Example 1: X has Y, a garage owner, repair X's automobile. In exchange for the service performed by Y, X gives Y a deer rifle. The fair market value of the rifle at the time of the transaction is the measure of Y's gross receipts.

(3) Example 2: X, a New Mexico construction company, contracts with Y Electric Co-op Association for the construction of transmission lines. The contract requires X to furnish all materials and labor for a fixed price; however, it permits a reduction of the contract price in the amount of the value of materials furnished by Y. The gross receipts of X include the value of any material supplied by the co-operative.

(4) Example 3: X is a firm engaged in the construction business in New Mexico. The receipts of X from the sale of a completed construction project include the value of construction services performed by the buyer of the construction project pursuant to a "sweat labor contract" if the performance of services are required to fulfill a contractual obligation of X. A "sweat labor contract", as used in this example, is a contract whereby the buyer of a completed construction project agrees to perform certain construction services for the seller of the construction project as partial payment of the sale price of the construction project.

(5) Example 4: M agrees to drill an oil well for the XYZ Oil Company. The contract provides that M will drill the well for \$7.50 per foot and a 1/8 interest in the minerals which belong to XYZ. The well, when completed, produces forty barrels of oil per day for a period which is expected to last for ten years. M admits that the \$7.50 per foot that is received from drilling the well are gross receipts subject to the gross receipts tax. M questions whether the value of the 1/8 interest is gross receipts. The value of the mineral interest is consideration and must be included in M's gross receipts. It will be valued at its fair market value at the time the well is completed.

(6) Example 5: The A Oil Company hires the B Drilling Company to drill a well on its property. A furnishes drill bits to B, but A has the right to deduct the rental value of the bits from the total footage or day rate price it agrees to pay B for the drilling. The use of the drill bits is partial consideration, furnished by A, for the performance of the drilling service by B and the reasonable value of their use must be included in B's gross receipts. A also must include the rental value of the bits in its gross receipts because it is leasing the drill bits to B. However, if A furnishes drill bits to B and does not have the right to deduct the rental value of the bits from the total footage or day rate price which it has agreed to pay B for the drilling, then no amounts

from the drill bit transaction are includable in either A's or B's gross receipts. The same applies if B furnishes the drill bits.

D. **Consideration less than fair market value:**

(1) In a transaction where the actual consideration received does not represent the fair market value of the property sold or leased or of the service sold, the fair market value shall be included in the gross receipts of the seller or lessor. Fair market value is the value which the property or service can command in an arms length transaction between two independent parties in an open market.

(2) The following example illustrates the application of ~~Subsection F of Section 7-9-3~~ Section 7-9-3.5 NMSA 1978 with respect to consideration less than fair market value. *Example:* X, a land and cattle company, is a corporation which is affiliated with Y, an equipment company. Because of their affiliation, X leases a \$30,000 tractor from Y for \$1.00 a month. Y reports that its gross receipts from this transaction are \$1.00. Y's gross receipts are the market value of a monthly lease of a \$30,000 tractor. Y must pay gross receipts tax on the adjusted amount.

E. **Sale of commercial paper:**

(1) The full sale or leasing contract amount of property or service sold, excluding any type of time-price differential, is included in the seller's gross receipts even though the seller subsequently sells the contract and does not receive the total contract price in money. No deduction is allowed for discounts suffered from the sale of commercial paper arising from a sale or lease.

(2) Example: X sells a washing machine to Y under a conditional sales contract in which the full sale contract amount, excluding time-price differential, is \$120. The principal on the washing machine is to be paid for over a twelve-month period at \$10 a month. X collects \$20 of principal under the contract and then assigns its rights to W for \$90. Depending upon the method regularly used for reporting gross receipts, X would either pay tax on the full contract amount for the month in which the sale was made (accrual basis) or pay tax measured by the receipts as they were received (cash basis). If X had elected to pay tax measured by its receipts as they were received, X would have reported \$20 during the first two months from this transaction. When X assigned the contract, X would have to include \$100 in the gross receipts for the third month since a deduction is not allowed for a discount suffered upon the transfer of a conditional sales contract.

F. **Interdepartmental transfers:**

(1) Receipts derived from an interdepartmental transfer of services or property are not subject to the gross receipts tax. To qualify as an interdepartmental transfer, the transfer must be a transfer of services or property within the same corporation or other taxable entity.

(2) Example: C, a company located in New Mexico, operates both an electric utility and a water utility. C records on its books the sale of the electricity to the water utility in order to comply with the Public Service Commission regulations but does not thereby incur gross receipts as that term is used in the Gross Receipts and Compensating Tax Act. Such book entries do not record receipts from selling property in New Mexico but record interdepartmental transfers. However, the value of the electricity at the time of its conversion to use by the water utility is subject to the compensating tax.

G. Service charges computed on balances:

(1) Service charges on accounts receivable balances or installment sales contracts which are not computed at the time of sale, are time-price differential charges, are not subject to the gross receipts tax and are not to be included in the sales price of an item brought into New Mexico for the purpose of computing the compensating tax.

(2) Example: X Corporation located outside New Mexico is engaged in the business of publishing books. X has several nonemployee salesmen soliciting orders on a commission basis in New Mexico. Every such order is forwarded to X's main office where it is reviewed and then either accepted or rejected. Accepted orders are shipped directly to the purchaser from X's binderies located outside of New Mexico. Since X has salesmen in New Mexico, it is an agent for collection of the compensating tax, pursuant to Section 7-9-10 NMSA 1978. The purchaser may elect to pay for the books on an installment basis. If after ninety (90) days from purchase, the balance has not been paid, a one percent (1%) per month service charge is added to the balance. This charge is not precomputed and no portion thereof is due unless the purchaser elects to pay on an installment plan extending over ninety (90) days. Such a charge is a time-price differential and is not a part of the sales price of the item. Therefore, it should not be included in the sales price when considering the amount of compensating tax that should be paid over to the state of New Mexico.

H. Corporations and organizations not organized for profit - fund raising activities:

(1) Receipts of a corporation or organization not organized for profit, other

than an organization granted a 501(c)(3) determination by the internal revenue service, derived from fund raising activities which are in the nature of donations, gifts, and contributions are not subject to the gross receipts tax.

(2) The department will presume that the total receipts of such a nonprofit organization from a fund-raising activity are receipts derived from a taxable activity if the project involves the performance of any service or the sale or lease of any property by the organization. This presumption may be overcome by establishing the following:

(a) the purchaser or lessee of the property or service intended by the purchase or lease to make a gift, donation, or contribution to the organization; and

(b) the purchase or lease price clearly exceeded the fair market value of the service or property or the fair rental value of the property.

(3) If these conditions are satisfied, the amount of consideration received by the organization in excess of the fair market price or fair rental value is not subject to the gross receipts tax.

I. Discount coupons: The gross receipts attributable to a sale in which a seller accepts discount coupons provided by buyers are measured by the cash received plus the value of the coupon. However, if the discount coupon is not redeemable by the seller, the acceptance of the coupon constitutes a cash discount allowed and taken and is excluded from gross receipts.

J. Gross receipts embezzled: Receipts that have been embezzled or lost through bookkeeping errors are not a cash discount allowed and taken; such receipts are not deductible under Section 7-9-67 NMSA 1978 because they are not a refund, allowance or uncollectible debt.

K. Vending machines:

(1) A vending machine is a device that, when the appropriate payment has been inserted into it, whether payment is made by coins, tokens, paper money, credit card, debit card or other means, dispenses tangible personal property, performs a service (including entertainment) or dispenses tickets, tokens or similar objects redeemable for money, tangible personal property or services; but "vending machine" does not include any device which is designed to primarily or solely to play a game of chance, such as slot machines, video gaming machines and the like.

(2) Amounts received from allowing the vending machine to be placed in a location as well as amounts received from use of or sales from vending machines are gross receipts and are subject to the gross receipts tax. The vending machine owner is

responsible for reporting the receipts and paying the gross receipts tax.

(3) Receipts derived from allowing vending machines to be placed in a location not owned or rented by the vending machine owner are gross receipts and are subject to the gross receipts tax. Except as provided otherwise in Subsection K of Section 3.2.1.14 NMAC, the person receiving the receipts is responsible for reporting the receipts and paying the gross receipts tax with respect to such receipts.

(4) If the vending machine owner and a person controlling the premises where the machine is located enter into a written agreement similar to the one below, the department will presume that a joint venture has been created, that the joint venture is registered with the department and that the vending machine owner has agreed to pay all gross receipts tax due with respect to the joint venture. In such a case, the person owning the machine, on behalf of the joint venture, will report and pay the gross receipts tax due on all the receipts derived from either allowing the vending machine to be placed in a location or sales from the vending machine for all parties in the joint venture and the person controlling the premises is relieved of the duty to report or pay gross receipts tax on those same receipts.

(5) Agreement: Total amounts collected from the vending machine shall be allocated between the vending machine owner and the person controlling the location. The vending machine owner will receive a percentage of the amounts collected net of gross receipts tax due, plus an amount equal to the gross receipts tax payable on the entire proceeds from the vending machine. The person controlling the location will receive a percentage of the amounts collected net of gross receipts tax due. The vending machine owner will report and pay any gross receipts tax due on all the receipts derived from either the use of or sales from the vending machine.

(6) In the event that no such agreement exists, the department will presume that no joint venture exists. In such a case, the vending machine owner will be subject to gross receipts tax on the entire amounts collected from the use of or sales from the vending machine, and the person controlling the premises will be subject to gross receipts tax on the amount that person receives from the vending machine owner for allowing the placement of the machine on the premises.

(7) In the event the vending machines are leased to the person who services them, the term "vending machine owner" means the lessee of the vending machines.

L. "Gross receipts"

excludes leased vehicle surcharge: For the purposes of Subparagraph (b) of [Paragraph (2) of Subsection F of Section 7-9-3] Paragraph (3) of Subsection A of Section 7-9-3.5 NMSA 1978, the term "leased vehicle gross receipts tax" includes the leased vehicle surcharge. The amount of any leased vehicle surcharge may be excluded from gross receipts.

M. Receipts from furnishing parts or labor under automotive service contract:

(1) When an automobile dealer, who is the promisor under an automotive service contract as that term is defined under Subsection C of Section 3.2.1.16 NMAC, furnishes parts or labor or both to satisfy the promisor's obligation to repair the breakdown involving a part specified in the contract, the dealer has taxable gross receipts equal to the retail value of the parts and labor furnished. A transfer of property or performance of service for a consideration has occurred and therefore a receipt from selling property or performing services has been realized by the dealer.

(2) The consideration received by the dealer is the discharge of the dealer's obligation to make the repair which obligation arose when the covered breakdown occurred.

(3) Receipts of a repair facility, including an automobile dealer, from furnishing parts and labor to fulfill the obligation of another person under an automotive service contract are gross receipts and not deductible under Sections 7-9-47 and 7-9-48 NMSA 1978, even though the seller has received NTTCs for other transactions.

N. Receipts from deductibles/co-payments under automotive service contracts: The receipts of a New Mexico automotive dealer or other repair facility, including the promisor under an automotive service contract, from the "deductible" or "co-payment" amount paid by a customer as required by automotive service contract as that term is defined in Subsection C of Section 3.2.1.16 NMAC in connection with the provision of repair services under contract are gross receipts.

O. Receipts of dealer from own reserve:

(1) The receipts of a New Mexico auto dealer for repairs provided by the dealer under an automotive service contract as that term is defined in Subsection C of Section 3.2.1.16 NMAC, on which the dealer is obligated as promisor are not gross receipts if:

(a) the receipts are paid from a reserve account established by the dealer under an agreement with an auto service contract administrator or an insurance company, or both, and

(b) the dealer is entitled to a

return of any amounts in the reserve account not used to pay for parts and labor or to pay other charges against the dealer in connection with the auto service contract.

(2) In this situation, the dealer is being "paid" from the dealer's own funds and has no receipts. However, the dealer as promisor is liable for gross receipts tax on the retail value of the parts or labor or both furnished to discharge the dealer's obligation.

P. Water conservation fee: Section 74-1-13 NMSA 1978 imposes the water conservation fee on the operator of a public water supply system. The fee is measured by the amount of water produced. The operator is not authorized to impose the water conservation fee on the operator's customers. If the operator of the system separately bills an amount characterized as a reimbursement of the water conservation fee to the operator's customers, the separately stated amount is simply an element of the price of the water sold and the "reimbursement" is included in gross receipts. The definition of "gross receipts" does not exclude the water conservation fee or amounts characterized as reimbursements of water conservation fee paid.

Q. Sales of items subject to the federal manufacturer's excise tax:

(1) The gross receipts from sales of items such as motor vehicle tires include the total amount of money or the value of other consideration received even though this amount includes the Federal Manufacturer's Excise Tax, 26 U.S.C.A. Section 4061 et seq (1986) which is separately stated on the invoice. Gross receipts do not include the amount of money attributable to the Federal Communications Excise Tax, 26 U.S.C.A. Section 4251, et seq (1986), and the Federal Air Transportation Excise Tax, 26 U.S.C.A. Section 4261 et seq (1986), which are user's taxes.

(2) Example: A tire dealer sells a tire in New Mexico to a retail customer for \$40.00 and separately states \$1.00 for Federal Manufacturer's Excise Tax on the sales ticket. The seller's gross receipts for this transaction are \$41.00.

R. Transactions among related persons are gross receipts:

(1) Each person engaging in business in New Mexico is subject to the provisions of the Gross Receipts and Compensating Tax Act. Each person who is a member of any group of related or affiliated persons and who engages in business in New Mexico is a taxpayer. The provisions of the Gross Receipts and Compensating Tax Act apply to the transactions between that taxpayer and all other persons, including the other related or affiliated persons, even though consideration is not received in

the form of cash or other monetary remuneration.

(2) Example 1: A cooperative association and X both engage in business in New Mexico. The cooperative sells services to X, one of its members. The cooperative is a taxpayer and the receipts from this transaction are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(3) Example 2: Both X and a cooperative association engage in business in New Mexico. X is a member of the cooperative and sells services to it. X is a taxpayer and the receipts from this transaction are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(4) Example 3: X engages in business in New Mexico, specifically by selling office supplies. X is also a partner in a partnership. Sales by X to the partnership are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(5) Example 4: C is a corporation engaging in business in New Mexico. S, an individual who is the majority stockholder in C, buys in New Mexico services and goods from C. C's receipts from these transactions with S are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(6) Example 5: C and S are corporations engaging in business in New Mexico. S is a wholly-owned subsidiary of C. C sells tangible personal property in New Mexico to S. C's receipts from the transaction are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(7) Example 6: X and Y are both divisions of corporation Z. X and Y are both parts of the same person, Z, and are not "related persons". Receipts from transactions between these two divisions are activities within Z and do not constitute gross receipts.

(8) Example 7: P, an individual, operates two businesses as sole proprietorships. One of P's businesses transfers tangible personal property to the other. Since both businesses and P are the same person, they are not "related persons" and the transaction does not constitute gross receipts.

S. Owner's receipts from transactions with owned entity are gross receipts:

(1) When a person who owns all or part of an entity has receipts from the sale of property in New Mexico to, the lease of property employed in New Mexico to or the performance of services in New Mexico for the entity, the person's receipts are gross receipts except when the transaction may be characterized for federal income tax purposes as a contribution of capital. The person's receipts include the actual amount of money

received by the person plus the value of any additional consideration. Additional consideration includes forbearance of charges against the person's ownership interest. These gross receipts are subject to the gross receipts tax unless an exemption or deduction applies.

(2) For the purposes of Subsection S of Section 3.2.1.14 NMAC, an "entity" means any business organization or association other than a sole proprietorship.

(3) Example: Q is a partner in a partnership. Q is entitled to 25% of the partnership's profits and losses and to bear 25% of its expenses. Q also operates a stationery store in New Mexico as a sole proprietor. Q's store sells some merchandise to the partnership for the partnership's use. The partnership pays Q the amount charged and apportions 25% of the cost to Q's ownership interest. Q's receipts from the sale are gross receipts and are subject to gross receipts tax unless an exemption or deduction applies. Same facts as above except that Q is not paid by the partnership but instead receives amounts characterized as reimbursements directly from the other partners totaling 75% of the amount charged for the merchandise. Q's ownership account is not charged any expense with respect to this transaction. Q's sole proprietorship has gross receipts from the transaction. The gross receipts equal the sum of the money received from the other partners plus the value of the amount not charged to Q's ownership account by the partnership (in this case one-third of the amount received from the other partners). The deduction provided by Section 7-9-67 NMSA 1978 for refunds and allowances does not apply to this transaction.

(4) Example: L is a partner in a partnership. L performs services for third parties as part of L's duties as a partner and is compensated for doing so by the partnership. To the extent that such compensation may be treated as wages for federal income tax purposes, L's receipts from the partnership in the form of compensation are exempt.

(5) Example: C is a corporation and S is C's wholly owned subsidiary corporation. C and S create L, a limited liability company; C and S each own 50% of L. L purchases a 20% interest in P, a limited partnership. C sells goods to P. P pays the amount charged. C has gross receipts from this transaction equal to the amount received for the goods.

3.2.1.16 GROSS RECEIPTS - REAL ESTATE AND INTANGIBLE PROPERTY.

A. Insurance proceeds:

(1) Receipts of an insured derived from payments made by an insurer pursuant

to an insurance policy are not subject to the gross receipts tax. Such receipts are not receipts derived from the sale of property in New Mexico, the leasing of property employed in New Mexico, or the performance of a service.

(2) Example: ABC is an auto dealer in the business of selling new and used cars. In addition to selling cars, ABC also maintains a service garage with a large inventory of automobile parts. As part of its regular sales practice, ABC allows potential purchasers to test drive the cars. ABC carries automobile insurance which is applicable in the situation where the potential purchaser is test driving the car. When an accident occurs, even though some or all the parts used to repair the automobile are taken from ABC's inventory of parts and ABC does the actual repair work, payment received from the insurance company for the damaged automobile is not gross receipts. Such a payment is not received as consideration for selling property in New Mexico, leasing property employed in New Mexico, or for performing services. ABC is not liable for compensating tax on the value of the parts used or the labor.

B. Speculative housing sales:

(1) Receipts of a person in the business of constructing improvements on real property owned and sold in the ordinary course of that person's construction business do not include amounts retained by financial institutions as prepaid finance charges or discounts, if these amounts are not received by the real estate vendor. It is immaterial whether or not such amounts are included in the quoted real estate sales price.

(2) The receipts of such a person include all amounts actually paid over which are attributable to improvements constructed on the real property sold in the ordinary course of that person's construction business.

(3) The receipts of such a person also include any amounts deducted by a title-insuring company to cover title insurance, legal fees, escrow fees, real estate brokerage commissions, real estate taxes, principal and interest on construction loans, liens, and the like.

(4) Example 1: X, a speculative builder, sells improvements to Y who arranges to finance \$43,000 with Z, a loan company. The loan company makes payment of \$41,800 to X and designates the amounts retained as prepaid finance charges and/or discounts. X's gross receipts in this example are \$41,800.

(5) Example 2: The same facts as Example 1 above are used except that the loan company Z made payment to a title insurance company, legal fees to a lawyer,

escrow fees to a bank and also paid the real estate brokerage commission. These payments referred to are part of the gross receipts of the speculative builder and are not deductible under Subsection B of Section 3.2.1.16 NMAC, whether or not actually paid over to the speculative builder.

C. Receipts from sale of automotive service contracts:

(1) "Automotive service contract" means an undertaking, promise or obligation of the promisor, for a consideration separate from the sale price of a motor vehicle, to furnish or to pay for parts and labor to repair specified parts of the covered motor vehicle only if breakdowns (failures) of those specified parts occur within certain time or mileage limits. The promisor's obligation is conditioned upon regular maintenance of the motor vehicle by the purchaser of the automotive service contract at the purchaser's expense. The automotive service contract may also obligate the promisor to reimburse the purchaser for certain breakdown related rental and towing charges. The automotive service contract may require the payment of a specified "deductible" or "co-payment" by the purchaser in connection with each repair.

(2) The receipts of a person from selling an automotive service contract are not gross receipts. The undertaking, promise or obligation of the promisor under the automotive service contract to pay for or to furnish parts and service if an uncertain future event (breakdown) occurs is not within the definition of property under ~~Subsection I~~ Subsection J of Section 7-9-3 NMSA 1978. Since the receipts from selling an automotive service contract do not arise "from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico", the receipts are not gross receipts as defined in ~~Subsection F of Section 7-9-3~~ Section 7-9-3.5 NMSA 1978 and are not subject to the tax imposed by Section 7-9-4 NMSA 1978.

(3) The furnishing by the promisor of parts or labor or both to fulfill the promisor's obligation when a breakdown occurs is a taxable event.

D. Receipts from insurance company under an automotive service contract program: The receipts of a New Mexico automotive dealer from an insurance company are not taxable gross receipts if the payments by the insurance company are to reimburse the dealer, who is promisor under an automotive service contract as that term is defined in Subsection C of Section 3.2.1.16 NMAC, for all parts and labor furnished by the dealer under the contract or for parts and labor furnished by the dealer under the contract in an amount in excess of a specified reserve established by

the dealer under an agreement with the insurance company. The receipt of the payments from the insurance company are not receipts from the sale of parts and labor but are payments to indemnify the dealer for the dealer's expense in fulfilling the dealer's obligation. The value of parts and labor furnished to make the repairs was subject to the gross receipts tax when the parts and labor were furnished to discharge the dealer's obligation as the promisor under the automotive service contracts.

E. Gift certificates:

(1) Receipts from the sale of gift certificates are receipts from the sale of intangible personal property of a type not included in the definition of "property" and, therefore, are not gross receipts.

(2) When a gift certificate is redeemed for merchandise, services or leasing, the person accepting the gift certificate in payment receives consideration, which is gross receipts subject to the gross receipts tax. The value of the consideration is the face value of the gift certificate.

F. Merchant discount and interchange rate fee receipts: Bank receipts derived from credit and debit card merchant discounts and bank interchange rate fees are not gross receipts within the meaning of the Gross Receipts and Compensating Tax Act and therefore are not taxable.

G. Prepaid telephone cards - "calling cards":

(1) Receipts from the sale of an unexpired prepaid telephone card, sometimes known as a "calling card", are receipts from the sale of a license to use the telecommunications system and, therefore, are gross receipts and are not interstate telecommunications gross receipts. Receipts from selling an expired prepaid telephone card are receipts from the sale of tangible personal property and are gross receipts and are not interstate telecommunications gross receipts.

(2) Receipts from recharging a rechargeable prepaid telephone card are receipts from the sale of a license to use the telecommunications system and are gross receipts and are not interstate telecommunications gross receipts.

(3) Subsection F of 3.2.1.16 NMAC is retroactively applicable to transactions and receipts on or after September 1, 1998.

3.2.1.18 GROSS RECEIPTS; SERVICES.

A. Receipts from performing a service in New Mexico. Receipts derived from performing a service in New Mexico are subject to the gross receipts tax.

B. Services performed

both within and without New Mexico. Receipts from services, other than research and development services and services subject to the Interstate Telecommunications Gross Receipts Tax Act, performed both within and without New Mexico are subject to the gross receipts tax on the portion of the services performed within New Mexico.

C. Allocating receipts from selling services performed within and without New Mexico.

(1) When a prime contractor performs services both within and without New Mexico, cost accounting records which reasonably allocate all costs to the location of the performance of the service shall be used to determine the amount of services performed in New Mexico. If adequate cost accounting records are not kept for the allocation of costs to specific locations, the receipts from performing such services shall be prorated based on the percentage of service actually performed within New Mexico. The percentage shall be calculated by dividing the time spent by the prime contractor in performing such services in New Mexico by the total contract time spent performing services everywhere. Other reasonable methods of prorating such services may be acceptable if approved by the department in advance of performing the services.

(2) Services subcontracted to third parties under a single contract by a prime contractor and used or consumed by the prime contractor in the performance of the contract shall be prorated by the prime contractor on the same basis, i.e., based either on allocated costs using cost accounting records or on the percentage of the total service actually performed within New Mexico by the prime contractor or other reasonable method approved by the department.

(3) If a subcontract service is actually a service purchased for resale, and all conditions of Section 7-9-48 NMSA 1978 are met and the subcontracted service is actually sold intact to the prime contractor's customer, the prime contractor may issue a Type 5 nontaxable transaction certificate to the subcontractor and the receipts from such subcontracted service will be deductible from the subcontractor's gross receipts.

(4) The subcontractor must use the same method of prorating the performance of services within and without New Mexico as used by the prime contractor.

(5) This subsection shall not apply to a contractor who is performing construction services.

D. Expenses incurred outside New Mexico and allocated to operations in New Mexico.

(1) General administrative and

overhead expenses incurred outside New Mexico and allocated to operations in this state for bookkeeping purposes, costs of travel outside New Mexico, which travel was an incidental expense of performing services in New Mexico, employee benefits, such as retirement, hospitalization insurance, life insurance and the like, paid to insurers or others doing business outside New Mexico for employees working in New Mexico and other expenses incurred outside New Mexico which are incidental to performing services in New Mexico, all constitute the taxpayer's expenses of performing services in New Mexico.

(2) No provision of the Gross Receipts and Compensating Tax Act allows a deduction for expenses incurred in performing services to determine gross receipts subject to tax. Therefore, the total amount of money or reasonable value of other consideration derived from performing services in New Mexico is subject to the gross receipts tax.

E. Receipts from performing services outside New Mexico.

(1) Receipts from performing services, except research and development services, outside New Mexico are not subject to the gross receipts tax under the provisions of Section 7-9-13.1 NMSA 1978.

(2) *Example 1:* P, a resident of New Mexico, is an expert forest fire fighter. P's receipts from fighting forest fires outside New Mexico are not includable in P's gross receipts.

(3) *Example 2:* D is a data processing bureau located in Lone Tree, Iowa. X, a New Mexico accounting and bookkeeping firm, mails accounting data to D. D then processes this material into general ledgers, payroll journals and other journals and then returns this material by mail to X. The receipts of D are receipts from performing services entirely outside New Mexico and therefore are not subject to the gross receipts tax.

(4) *Example 3:* L, an Albuquerque attorney, is retained by a Colorado firm to negotiate and draw up oil and gas leases for lands in southern Colorado. To accomplish this objective, L goes to Pueblo, Colorado, and there negotiates and draws the leases. Receipts from the fee are not includable in L's gross receipts because the service was performed entirely outside the state of New Mexico.

F. Sales of state licenses by nongovernmental entities.

(1) Amounts retained by nongovernmental entities as compensation for services performed in selling state licenses are gross receipts.

(2) *Example:* G owns and operates a small grocery store in rural New Mexico which is located near a popular

fishing area. As a convenience to the public, G sells New Mexico Game and Fish licenses. For its services in selling these licenses, G retains a small percentage of the total license fee. The amounts retained are gross receipts because they are receipts derived from services performed in New Mexico. G may not deduct the amounts retained pursuant to Section 7-9-66 NMSA 1978 which deals with commissions derived from the sale of tangible personal property not subject to the gross receipts tax. A New Mexico game and fish license is not tangible personal property pursuant to ~~Subsection I~~ Subsection J of Section 7-9-3 NMSA 1978.

G. Stockbrokers' commissions. Gross receipts include commissions received by stockbrokers, located in New Mexico, for handling transactions for out-of-state as well as in-state residents.

H. Attorneys' fees. Regardless of the source of payment or the fact of court appointment, the fees of attorneys are subject to the gross receipts tax to the extent that their services are performed in this state.

I. Directors' fees.

(1) The receipts of a member of a board of directors from attending a directors' meeting in New Mexico are receipts derived from performing a service in New Mexico and are subject to the gross receipts tax.

(2) *Example:* X is on the board of directors of a New Mexico corporation and a Texas corporation. X attends directors' meetings in Texas and New Mexico. For each directors' meeting that X attends, X is paid a fee of \$50.00. X is performing a service. The fee which X receives from performing this service in New Mexico is subject to the gross receipts tax. The fee which X receives from performing the service in Texas is not subject to the gross receipts tax. However, the burden is on X to segregate receipts which are not taxable from those which are taxable.

J. Anesthetists' fees.

(1) The receipts of a nonemployee anesthetist from anesthetic services performed for a surgeon are subject to the gross receipts tax.

(2) The receipts of an anesthetist from the performance of this service for a surgeon may be deducted from gross receipts if the surgeon resells the service to the patient and delivers a nontaxable transaction certificate to the anesthetist. The surgeon delivering the nontaxable transaction certificate must separately state the value of the service purchased in the charge for the service on its subsequent sale. The subsequent sale must be in the ordinary course of business and subject to the gross receipts tax.

(3) *Example:* A is an anesthetist who is employed by a hospital and also performs services for and receives compensation from a surgeon who is not associated with the hospital. The surgeon does not consider the anesthetist to be an employee and does not withhold income or other taxes from the anesthetist's compensation. Although the surgeon may exercise some control over the services performed by the anesthetist, the surgeon relies on the anesthetist's training and experience to accomplish the result desired. The receipts of the anesthetist from this service performed are subject to the gross receipts tax.

K. Athletic officials.

Receipts of a referee, umpire, scorer or other similar athletic official from umpiring, refereeing, scoring or officiating at a sporting event located in New Mexico, are receipts derived from performance of a service and are subject to the gross receipts tax. Such receipts will not be exempted from the gross receipts tax as "wages" unless the umpires, referees, scorers and other athletic officials demonstrate to the department that such receipts are derived from an employment relationship whereby they are employees within the meaning of Section 3.2.105.7 NMAC.

L. Racing receipts.

(1) Unless the receipts are exempt under Section 7-9-40 NMSA 1978:

(a) the receipts of vehicle or animal owners from winning purse money at races held in New Mexico are receipts from performing services in New Mexico and are subject to the gross receipts tax if any charge is made for attending, observing or broadcasting the race.

(b) receipts of vehicle drivers, animal riders and drivers and other persons from receiving a percentage of the owner's purse are receipts from performing services in New Mexico and are subject to the gross receipts tax, unless the person receiving the percentage of purse money is an employee, as that term is defined in Section 3.2.105.7 NMAC, of the owner.

(2) Where there is an agreement between the driver, rider or other person and the owner for distribution of the winning purse, then only the amount received pursuant to the agreement is gross receipts of the driver, rider or other person receiving the distribution.

M. Advertising receipts of a newspaper or broadcaster.

(1) The receipts of a New Mexico newspaper or a person engaged in the business of radio or television broadcasting from performing advertising services in New Mexico do not include the customary commission paid to or received by a nonemployee advertising agency or a nonemployee solicitation representative, when

said advertising services are performed pursuant to an allocation or apportionment agreement entered into between them prior to the date of payment.

(2) Receipts of a New Mexico newspaper or a person engaged in the business of radio or television broadcasting from the sale of advertising services to an advertising agency for resale may be deducted from gross receipts if the advertising agency delivers a nontaxable transaction certificate to the newspaper or the person engaged in the business of radio or television broadcasting. The subsequent sale must be in the ordinary course of business and subject to the gross receipts tax, or the advertising agency will be subject to the compensating tax on the value of the advertising service at the time it was rendered. This version of Paragraph (2) of Subsection M of Section 3.2.1.18 NMAC applies to transactions occurring on or after July 1, 2000.

N. Advertising space in pamphlets. Receipts from selling advertising service to New Mexico merchants in a pamphlet printed outside New Mexico and distributed wholly inside New Mexico are receipts from performing an advertising service in New Mexico. Such receipts are subject to the gross receipts tax.

O. Billboard advertising.

Receipts derived from contracts to place advertising on outdoor billboards located within the state of New Mexico are receipts from performing an advertising service in New Mexico. Such receipts are subject to the gross receipts tax, regardless of the location of the advertiser.

P. Day care centers.

(1) Receipts from providing day care are receipts from performing a service and are subject to the gross receipts tax.

(2) Receipts from providing day care for children in a situation where a commercial day care center provides day care for the children and the expenses of the care for some of these children is paid for by the state of New Mexico are subject to the gross receipts tax.

(3) Receipts from providing day care for children in a situation where a person provides day care for children in a residence and the care for all of these children is paid for by the state of New Mexico are subject to the gross receipts tax.

(4) Receipts from providing day care for children in a situation where a person provides day care for children in the children's home and the care for all of these children is paid for by the state of New Mexico are subject to the gross receipts tax.

Q. Child care.

(1) Receipts derived by a corporation for providing child care facilities for its employees are subject to the gross receipts

tax on the amount received from its employees.

(2) *Example:* The X Corporation operates a licensed child care facility to accommodate dependent children of its employees. In order to defray a portion of the cost of the facility, the corporation charges each employee two dollars (\$2.00) per child per week for the use of the facility. All receipts from the two-dollar charge per child per week are subject to the gross receipts tax.

R. Service charges; tips.

(1) Except for tips, receipts of hotels, motels, guest lodges, restaurants and other similar establishments from amounts determined by and added to the customer's bill by the establishment for employee services, whether or not such amounts are separately stated on the customer's bill, are gross receipts of the establishment.

(2) A tip is a gratuity offered to service personnel to acknowledge service given. An amount added to a bill by the customer as a tip is a tip. Because the tip is a gratuity, it is not gross receipts.

(3) Amounts denominated as a "tip" but determined by and added to the customer's bill by the establishment may or may not be gross receipts. If the customer is required to pay the added amount and the establishment retains the amount for general business purposes, clearly it is not a gratuity. Amounts retained by the establishment are gross receipts, even if labeled as "tips". If the customer is not required to pay the added amount and any such amounts are distributed entirely to the service personnel, the amounts are tips and not gross receipts of the establishment.

(4) *Examples:*

(a) Restaurant R has a policy of charging parties of six or more a set percentage of the bill for food and drink served as a tip. If a customer insists on another arrangement, however, the set amount will be removed. R places all amounts collected from the set tip percentage into a pool which is distributed to the service staff at the end of each shift. The amounts designated as tips and collected and distributed by R to the service staff, are tips and not gross receipts. If R retains any amounts derived from the set tip percentage, the amounts retained are gross receipts.

(b) Hotel H rents rooms for banquets and other functions. In addition to the rental fee for the room, H also charges amounts for set-up and post-function cleaning. H retains these amounts for use in its business. These amounts are gross receipts. They are gross receipts even if H denominates them as "tips".

S. Real estate brokers.

(1) Receipts of a person engaged in the construction business from the sale of

the completed construction project include amounts which the person has received and then paid to a real estate broker. The total receipts from the sale of the construction project are subject to the gross receipts tax.

(2) Receipts of a real estate broker from the performance of services for a person engaged in the construction business may not be deducted from gross receipts pursuant to Section 7-9-52 NMSA 1978.

T. Entertainers. The receipts of entertainers or performers of musical, theatrical or similar services are subject to the gross receipts tax when these services are performed in New Mexico.

U. Managers or agents of entertainers. Commissions received by managers or agents of entertainers for the managers' or agents' services in New Mexico are subject to the gross receipts tax.

V. Water utilities; installation of water taps and pipes. The receipts of a water utility from providing a "tap" to a water main and installing a pipe from the water main to a meter which it provides are subject to the gross receipts tax. However, if the utility is owned or operated by a county, municipality or other political subdivision of the state of New Mexico, its receipts from providing a "tap" to a water main and installing a pipe from a water main to a meter which it also provides are exempted from the gross receipts tax.

W. Utilities; installation charges.

(1) The receipts of a utility from installation charges are subject to the gross receipts tax. However, if the utility is owned or operated by a county, municipality or other political subdivision of the state of New Mexico, its receipts from installation charges are exempt from the gross receipts tax.

(2) The receipts of a private water utility from providing a "tap" to a water main and installing a pipe from the water main to a meter which it provides are subject to the gross receipts tax.

(3) Receipts of a private electric utility from fees for changing, connecting or disconnecting electricity of customers, whether or not these services are required because of nonpayment of bills by a customer, are subject to the gross receipts tax.

X. Construction on Indian reservations or pueblos. The receipts of a non-Indian from construction services, as defined in ~~Subsection C of Section 7-9-3~~ Section 7-9-3.4 NMSA 1978 and regulations thereunder, performed on an Indian reservation or pueblo are subject to the gross receipts tax unless the imposition of the gross receipts tax is preempted by federal law.

Y. Star route contractors. Receipts of a person holding a con-

tract for transportation of United States mail, as a "Star Route Contractor", from points within New Mexico to other points within New Mexico and to points outside of New Mexico, are subject to the gross receipts tax on that portion of the receipts from transportation from a point within New Mexico to a point within New Mexico. See Paragraph (2) of Subsection B of Section 3.2.55.10 NMAC for deducting receipts from the portion in interstate commerce.

Z. Racetrack operators. Receipts of operators of racetracks other than horse racetracks, from gate admission fees and entrance fees paid by drivers are subject to the gross receipts tax. Any portion of these fees paid out by the operator as prizes are not exempt or deductible since the payments are part of the operator's cost of doing business.

AA. Data access charges. Receipts from fees or charges made in connection with property owned, leased or provided by the person providing the service are subject to the gross receipts tax when the information or data accessed is utilized in this state.

BB. Specialty software package. [Repealed]

CC. Receipts from telephone or telegraph services. Receipts derived from telephone or telegraph services originating or terminating in New Mexico and billed to an account or number in this state are receipts from performing services in New Mexico and are subject to the gross receipts tax unless exempt under Section 7-9-38.1 NMSA 1978.

DD. Allied company underwriting automotive service contracts. When a New Mexico automotive dealer pays an entity which is allied or affiliated with that dealer (allied company) to undertake all of the dealer's obligations under automotive service contracts as that term is defined in Subsection C of Section 3.2.1.16 NMAC on which the dealer is promisor, the undertaking of the allied company does not involve the sale of property in New Mexico or the lease of property employed in New Mexico. The undertaking principally involves an obligation of the allied company to indemnify the dealer by paying the dealer for furnishing parts and labor to fulfill the dealer's obligation to furnish the parts and labor. However, the undertaking also involves the performance of services by the allied company for the dealer since the allied company undertakes to handle the claims of automotive service contract purchasers and otherwise perform the dealer's task under the contract. Absent a showing of a different value by the allied company or the department, 7.5 percent of the contract amount paid by the dealer to the

allied company will be treated as consideration received for services performed in New Mexico.

EE. Custom software.

(1) Except as otherwise provided in Subsection EE of Section 3.2.1.18 NMAC, receipts derived by a person from developing custom software are receipts from performing a service.

(2) When custom software is developed by a seller for a customer but the terms of the transaction restrict the customer's ability without the seller's consent to sell the software to another or to authorize another to use the software, the seller's receipts from the customer are receipts from the performance of a service. The seller's receipts from authorizing the customer's sublicensing of the software to another person are receipts from granting a license. The seller's receipts from authorizing the use by another person of the same software are receipts from granting a license to use the software.

FF. Check cashing is a service. Receipts from charges made for cashing checks, money orders and similar instruments by a person other than the person upon whom the check, money order or similar instrument is drawn are receipts from providing a service, not from originating, making or assuming a loan. Such charges are not interest.

GG. Receipts of collection agencies.

(1) The fee charged by a collection agency for collecting the accounts of others is gross receipts subject to the gross receipts tax, regardless of whether the receipts of the client are subject to gross receipts tax and regardless of whether the agency is prohibited by law from adding its gross receipts tax amount to the amount collected from the debtor.

(2) *Example 1:* X is a cash basis taxpayer utilizing the services of Z collection agency for the collection of delinquent accounts receivable. From its New Mexico offices, Z collects from X's New Mexico debtors in the name of X, retains a percentage for its services and turns over the balance to X. The percentage retained by Z is its fee for performing services in New Mexico. The fee is subject to the gross receipts tax. It makes no difference that federal law prohibits Z from passing the cost of the tax to the debtor by adding it to the amount to be collected. X's gross receipts include the full amount collected by Z.

(3) Amounts received by collection agencies from collecting accounts sold to the collection agency are not gross receipts.

(4) *Example 2:* X, a cash basis taxpayer, sells its delinquent accounts

receivable to Z, a collection agency, for a percentage of the face amount of the accounts. X's gross receipts include the full amount of the receivables, excluding any time-price differential. The amount subsequently collected by Z from those accounts, however, is not subject to gross receipts tax because the amount is not included within the definition of gross receipts. In this situation Z is buying and selling intangible property of a type not included within the definition of property in ~~Subsection F~~ Subsection J of Section 7-9-3 NMSA 1978.

HH. Commissions of independent contractors when another pays gross receipts tax on the receipts from the underlying transaction.

(1) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to the tangible or intangible personal property of other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the sale of the property. This situation involves two separate transactions. The first is the sale of the property by its owner to the customer and the second is the performance of a sales service by the independent contractor for the owner of the property. The receipts from the sale of the property are gross receipts of the person whose property was sold. Receipts, whether in the form of commissions or other remuneration, of the person performing a sales service in New Mexico are gross receipts of the person performing the sales service.

(2) *Example 1:* S is a national purveyor of tangible personal property. S has stores and employees in New Mexico. S also has catalogue stores in less populated parts of New Mexico. Catalogue stores maintain minimal inventories; their primary purpose is to make S's catalogues available to customers, to take orders of merchandise selected from the catalogues, to place the orders with S and to provide general customer service. The catalogue stores are operated by independent contractors and not by S. S pays the contractors commissions based on the orders placed. In charging its customers, S charges the amount shown in the catalogue and does not add any separate amount to cover the cost of the contractors' commissions. S pays gross receipts tax on its receipts from the sale of catalogue merchandise. The contractors contend that the cost of their selling services is included in the amount S charges for its merchandise and so their commissions are not gross receipts. The contention is erroneous. The contractors have receipts from performing a service in New Mexico; it is immaterial that S paid the amount of gross receipts tax S owed on S's receipts.

See, however, the deduction at Subsection B of Section 7-9-66 NMSA 1978.

(3) *Example 2:* M is a nationwide, multi-level sales company with presence in New Mexico. M sells products to households mainly through a network of individual, independent contractors. The network of sellers is controlled by one or more sets of individuals, also independent contractors, who train and supervise the individuals selling the merchandise; these supervisory contractors may also sell merchandise. The sellers display, promote and take orders for M's products. Payment for orders are sent to M along with the orders. M ships the merchandise directly to the final customers. M has agreed to, and does, pay the gross receipts tax on the retail value of the merchandise sold, whether sold by M or one of the independent contractors. Based on the volume and value of merchandise sold, M pays both the selling and supervisory independent contractors a commission. The commissions received by the independent contractors engaging in business in New Mexico with respect to merchandise sold in New Mexico are gross receipts subject to the gross receipts tax. The commissions are receipts from performing a service in New Mexico. The fact that M pays gross receipts tax on M's receipts from the sale of the property is immaterial in determining the liability of the independent contractors.

(4) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to a service to be performed by other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the performance of the underlying service. This situation involves two transactions. The first is the performance of the underlying service by the other person for the customer and the second is the performance of the sales service by the independent contractor for the performer of the underlying service. The receipts from the performance of the underlying service for the customer are gross receipts of the person performing that service. Receipts, whether in the form of commissions or other remuneration, of the person performing the sales service are gross receipts of the person performing the sales service.

(5) *Example 3:* P is the publisher of a magazine published in New Mexico. P enters into arrangements with independent contractors to solicit ads to be placed in P's publication. P pays each contractor a percentage of the billings for the ads placed by the contractor as a commission. The independent contractors claim that they owe no gross receipts tax with respect to ads solicited in New Mexico because P has paid gross

receipts tax on P's advertising revenues. The contractors are incorrect. There are two transactions in this situation, P's service of publishing advertisements and the contractors' service of soliciting ads for P. The fact that P paid the amount of gross receipts tax due on P's advertising revenues is immaterial regarding the contractors' gross receipts tax obligations on their receipts.

(6) If the receipts from the underlying sale of the tangible property are exempt or deductible, the commission received by an independent contractor from selling the tangible property of another may be subject to the deduction provided by Section 7-9-66 NMSA 1978.

II. Receipts from winning contest.

(1) Receipts of a contestant from winning purse money in a rodeo or an athletic game, match or tournament held in New Mexico are gross receipts from performing services if any charge is made for attending, observing or broadcasting the event. Such receipts are subject to the gross receipts tax unless an exemption or deduction applies. Where the contestant is a team and there is an agreement among the team members governing distribution of the purse money, then only the amount received by each team member pursuant to the agreement is gross receipts of the team member.

(2) Subsection II of 3.2.1.18 NMAC does not apply to receipts exempt under Section 7-9-40 NMSA 1978 nor does it apply to activities that are primarily or solely gambling.

3.2.1.19 GROSS RECEIPTS; RECEIPTS OF AGENTS.

A. Nonemployee agents.

(1) The receipts of nonemployee agents are subject to the gross receipts tax to the extent the deduction provided by Section 7-9-66 NMSA 1978 is not applicable. The indicia outlined in Section 3.2.105.7 NMAC will be considered in determining whether a person is an employee or a nonemployee agent.

(2) *Example 1:* S is a nonemployee salesperson for Z Corporation, an out-of-state business. Z Corporation arranges for S to sell securities belonging to corporation shareholders. Z accepts payment from the purchasers of the security, deposits this payment in a trust account, pays S the commission and then distributes the balance to the seller of the securities. Z does not incur gross receipts tax liability as the result of its activity because it is not selling property or performing services in New Mexico for a consideration. The commissions received by S for selling securities in New Mexico are receipts for performing services in New Mexico and are subject to the gross receipts tax.

(3) *Example 2:* The receipts of a nonemployee agent or sub-agent derived from commissions received from (a) correspondence schools for enrolling persons in those schools, (b) freight companies, bus transportation firms, and similar business concerns for rendering services, and (c) the owner of trailers and/or trucks for leasing those trailers or trucks, are subject to gross receipts tax.

B. Receipts of condominium and other real property owners associations.

(1) As of March 8, 1988, the provisions of this subsection do not apply to receipts which are exempt under the provisions of Section 7-9-20 NMSA 1978.

(2) Associations in which common areas are owned by unit owners.

(a) Amounts received by this type of association from unit owners (owners of homes, offices, apartments or other real property) for accumulation in a trust account owned by the unit owners and expended to provide insurance and pay taxes on the common areas, elements or facilities are not taxable gross receipts since such amounts are not receipts of the association.

(b) Amounts received by an association of this type from unit owners for accumulation in a trust account owned by the unit owners for current or future expenditures for the improvement, maintenance or rehabilitation of the common areas, elements or facilities are not taxable gross receipts since such amounts are not receipts of the association. However, with respect to receipts not exempt under Section 7-9-20 NMSA 1978, when payments are made from the trust account to the association or its employees, officers or representatives for the improvement, maintenance or rehabilitation, these payments are taxable gross receipts of the association under ~~Subsection F of Section 7-9-3~~ Section 7-9-3.5 NMSA 1978. When payments are made directly from the account to third parties, those third parties will be liable for the gross receipts tax on those receipts.

(c) With respect to receipts which are not exempt under Section 7-9-20 NMSA 1978, associations of this type which bill unit owners may issue nontaxable transaction certificates (NTTCs) when appropriate under Section 7-9-48 NMSA 1978 (sale of a service for resale) to suppliers of these services, unless the service is deductible by the association under the Internal Revenue Code as an ordinary and necessary business expense. The association must report and pay gross receipts taxes on all its receipts for services, including those for which NTTCs are given. This version of Paragraph (2) of Subsection B of Section 3.2.1.19 NMAC applies to transactions

occurring on or after July 1, 2000.

(3) *Example A 1:* Property Owners Association A receives monthly payments from each individual owner of property located in XYZ condominiums. The funds are held in a separate trust account by Association A for the XYZ unit owners to pay, on behalf of themselves, the property tax accruing to the common areas, insurance covering the common areas, maintenance and repair of the common areas and future improvements and additions to the common areas. On November 10, Association A, as trustee of such funds, issues a check directly from the trust account to the county treasurer for payment of property taxes on the common areas. This payment goes from the trust account directly to the county treasurer with Association A acting as agent for the actual owners of property; therefore, these funds do not become a part of Association A's gross receipts.

(4) *Example A 2:* Association A employs a maintenance person to maintain and clean the common areas. The maintenance person is responsible for mowing lawns, maintaining the landscape, cleaning halls, lobbies and other common areas and making minor repairs to common facilities. Funds received by Association A from the trust account to pay the maintenance person's wages and to pay various payroll taxes and employee benefits are gross receipts for the performance of service on which Association A is required to pay tax.

(5) *Example A 3:* NMO Construction Co. contracts to paint and remodel the halls, lobbies and other common areas of the condominiums. Association A, acting as agent, draws funds from the trust account which are paid directly to NMO Construction Co. Since such funds do not become receipts of Association A, the association is not liable for tax on these funds. The funds pass directly to NMO Construction Co. who becomes liable for the gross receipts tax on its receipts for performing construction services.

(6) *Example A 4:* For the last ten years, funds have accumulated in the trust for construction of a swimming pool. A Pool Co. builds the pool and is paid directly from the trust account. A Pool Co. is subject to gross receipts tax on the receipts from the construction of the pool. Association A, acting as agent for the property owners, has no receipts and pays no tax on this transaction.

(7) *Example A 5:* Association A purchases, with its own funds, chemicals which its employee will use to maintain the new swimming pool. To recover this expense, Association A increases the amount it charges the property owners each month and draws funds from the trust

account which it places with its own funds. These receipts of Association A are subject to the tax since Association A is performing services for the property owners. This treatment of receipts applies to purchases of other maintenance or cleaning supplies which Association A consumes in the performance of maintenance and cleaning services. Association A may not execute a non-taxable transaction certificate for the purchase of these chemicals or other cleaning supplies, because the chemicals and supplies are consumed in the performance of services by the association.

(8) Associations in which common areas are owned by the association with long-term real property rights held by individual unit owners.

(a) An association of unit owners in a real estate development in which the common elements, areas or facilities are owned by the association but subject to long-term (10 or more years) real property rights of the unit owners (as defined in Paragraph (2) of Subsection B of Section 3.2.1.19 NMAC) granted by deed or covenant, appurtenant to and inseparable from unit ownership, transferable only by the unit owner or upon acceptance of deed, and not extinguishable by the association shall be subject to tax in the same manner as associations described in Subsection B of this section (3.2.1.19 NMAC). If the unit owners cease to hold or possess such real property rights, the association shall become subject to tax in the same manner as associations described in 3.2.1.19B(9) NMAC.

(b) All examples in Paragraphs (3) through (7) of Subsection B of Section 3.2.1.19 NMAC also apply to associations of unit owners identified in Paragraph (8) of Subsection B of Section 3.2.1.19 NMAC.

(9) Associations in which common areas are owned by association. Different treatment is required for an association of unit owners in a real estate development in which the common elements, areas or facilities are owned by the association and the unit owners (as defined in Subparagraph (a) of Paragraph (2) of Subsection B of Section 3.2.1.19 NMAC) do not possess the real property rights to the common elements described in Paragraphs (2) and (8) of Subsection B of Section 3.2.1.19 NMAC. All receipts of this type of association (e.g., payments by unit owners for maintenance and use of the common areas) are fully taxable and no NTTCs may be issued for services purchased. Because of the association's status as owner and the absence of real property rights of the unit owners in the common areas, the association is not acting as the unit owners' agent, nor is it reselling a service.

(10) Example C 1: Association C

holds title to all common areas of a development which includes a clubhouse, golf course, swimming pool and tennis courts. Each owner of property within the development is a member of Association C and pays a membership fee. In consideration for the fees received, Association C grants each member a license to use facilities owned by the association. Association C is liable for gross receipts tax on its receipts from granting the licenses to use the facilities.

(11) *Example C 2:* Association C contracts with a security services company to provide a security officer to patrol the facilities which the association owns. Association C does not resell these services provided by the security services company and may not execute a non-taxable transaction certificate to purchase these services.

(12) *Example C 3:* Association A, Association B and Association C maintain vending machines from which soft drinks, snacks and other items of tangible personal property are sold. The associations are deriving gross receipts from the sale of tangible personal property and must pay gross receipts tax on these receipts. However, they may also execute a non-taxable transaction certificate when purchasing the soft drinks, snacks and other tangibles, since these items are resold by the associations.

(13) Repealed.

C. Reimbursed expenditures.

(1) The receipts of any person received as a reimbursement of expenditures incurred in connection with the performance of a service or the sale or lease of property are gross receipts as defined by ~~Subsection F of Section 7-9-3~~ Section 7-9-3.5 NMSA 1978, unless that person incurs such expense as agent on behalf of a principal while acting in a disclosed agency capacity. An agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal.

(2) Receipts from the reimbursement of expenses incurred as agent on behalf of a principal while acting in a disclosed agency capacity are not included in the agent's gross receipts if:

(a) the agent accounts for such receipts in the agent's books and records as a reduction of the expense and not as revenue; and

(b) the expenses are separately stated on the agent's billing to the client and are identified in the agent's books and records as reimbursements of expenses incurred on behalf of the principal party.

(3) If these requirements are not met, the reimbursement of expenses are included in the agent's gross receipts.

(4) *Example 1:* A, an accountant,

whose office location is in Albuquerque is engaged to audit the financial statements of C, A's client. To facilitate the audit A must travel to Deming to examine the operations and records of C's business location in Deming. In addition to the normal fee for A's service, A charges C for A's expenses for travel, meals and lodging which A incurred in traveling to Deming. A's gross receipts include the total amount of consideration received from C, including amounts received to cover A's expense of travel.

(5) *Example 2:* L, an attorney, pays a filing fee to the clerk of the district court on behalf of C, L's client. In billing for the professional services rendered, L separately states on the billing the amount of the filing fee which was paid to the court clerk. L is an agent for C in the instance of filing documents with the court. When L paid the filing fee, L was acting within the terms of a disclosed agency relationship. L should exclude the amount received for reimbursement for L's expenditure in paying the court filing fee.

(6) *Example 3:* R, an architect, whose office is located in Santa Fe, is engaged by C to design and oversee the construction of a project in Albuquerque. In the course of performing those services for C, R incurs charges for long distance telephone calls. R charges C for the long distance telephone calls under the terms of R's contract with C. R's gross receipts include the amounts it collects from C for long distance calls. No disclosed agency relationship exists which would enable the telephone company to hold C liable for the long distance charges incurred by R.

(7) All receipts or fees for services provided by an agent are subject to the gross receipts tax.

D. Reimbursement of expenditures made to volunteers.

(1) A volunteer who contributes time, effort or talent without expectation of consideration or remuneration is not selling the services performed. When a volunteer receives reimbursement for out-of-pocket expenses incurred in the performance of a service as a volunteer which were directly related to the work volunteered, reimbursement of those expenses is not gross receipts.

(2) For purposes of Paragraph (1) of Subsection D of Section 3.2.1.19 NMAC, the term "volunteer" means any person who contributes time, effort or talent for the direct benefit of an organization which is exempt from taxation under the Internal Revenue Code. The term also extends to any person who contributes time, effort or talent without the receipt of consideration or remuneration to the state of New Mexico or any agency or any political subdivision of the state, or to the United States or any agency of the United States. "Volunteer"

further includes any elected official serving without consideration or remuneration and any appointive non-employee member of any public commission or board serving without consideration or remuneration, whether the appointment was made by the governor, any other elected official or a public body.

(3) For purposes of Paragraph (1) of Subsection D of Section 3.2.1.19 NMAC, "reimbursement" includes per diem amounts set by statute to reimburse uncompensated elected and appointed governmental officials for the expense of carrying out official duties.

E. Employee leasing.

(1) A person who engages in the leased employee business in New Mexico is performing services in New Mexico. The person's receipts from performing the employee leasing services in New Mexico are subject to the gross receipts tax, except as provided otherwise in Paragraph (2) of Subsection E of Section 3.2.1.19 NMAC.

(2) When a person engaging in the leased employee business is a "joint employer", as that term is used by the United States department of labor for purposes of enforcing federal labor law, then the person's receipts of amounts comprising wages, taxes withheld with respect to the wages, Federal Insurance Contributions Act payments, unemployment compensation payments and the like with respect to the joint employees of the client and the person engaging in the leased employee business are not receipts from performing employee leasing services and are not subject to the gross receipts tax. Such receipts instead are receipts of a disclosed agent on behalf of others.

(3) *Example:* X engages in the leased employee business in New Mexico. Under the terms of its contracts, X is primarily responsible and liable for payment of employee wages, all payroll taxes, employer contributions required under the Federal Insurance Contributions Act and for providing an employee benefits package which includes health insurance and other benefits as specified in each contract. If X fails to properly pay the payroll, payroll taxes or unemployment insurance or if X fails to comply with other administrative functions, X's client, as joint employer, is responsible for such compliance or payment. X has determined itself to be a "joint employer" as that term is used by the United States department of labor for the purpose of enforcing federal labor law. The client is also required to place a cash deposit to guarantee payment of the client's obligations under the contract. Every week each of X's clients is required to pay X the client's payroll obligation for the week plus an additional two percent (2%) as X's fee. X has no

gross receipts from the amount representing the payroll obligation; this amount is not subject to the gross receipts tax. The additional two percent (2%), however is X's fee for performing employee leasing services and is subject to tax.

3.2.1.25 MANUFACTURING - GENERAL EXAMPLES.

A. For purposes of ~~Subsection G~~ Subsection H of Section 7-9-3 NMSA 1978, combining means assembling two or more pieces of tangible personal property to create another piece of personal property. Processing means to convert tangible personal property into a marketable form. A person is engaged in the business of manufacturing only if:

(1) that person combines or processes components or materials;

(2) the value of the tangible personal property which has been combined with other tangibles or which has been processed has increased as a direct result of the manufacturing process; and

(3) the person manufacturing sells the same or similar type of manufactured products in the ordinary course of business.

B. The following examples illustrate the application of ~~Subsection G~~ Subsection H of Section 7-9-3 NMSA 1978.

C. *Example 1:* Y sells parts and bodies for automobiles to X. X, who owns a used car lot and garage, places the parts and bodies in and on used cars from his lot. X then resells the renovated cars to the general public in the ordinary course of business. X is manufacturing because X is assembling and fabricating the cars to increase their value and is selling them in the ordinary course of business.

D. *Example 2:* Y, a machine tool firm, assembles three machine tools solely for its own use in producing components. Y does not sell any of these three machine tools. Assembling the machine tools is not "manufacturing" because Y is not assembling the tools to increase their value for sale in the ordinary course of business.

E. *Example 3:* S, who is in the business of building custom boats, purchases fiberglass and other supplies from F, a fiberglass manufacturer. S is furnished blueprints by customers and all the materials that are to be purchased are specified in those blueprints. After S obtains all the materials from F, S builds the boats to the specifications set out in the blueprints and then sells the boats to customers in the ordinary course of business. S is manufacturing boats. S may therefore give F a nontaxable transaction certificate.

F. *Example 4:* R is in the business of retreading and recapping pneu-

matic tires. If R retreads and recaps a tire carcass which R owns in order to increase its value for sale in the ordinary course of business and that tire carcass becomes a component part of a recapped tire, then R is "manufacturing".

G. *Example 5:* P is in the business of printing and silk screening. If P uses only printing supplies which P owns as an ingredient or component part of the end product which P sells in the ordinary course of business, then P is "manufacturing". If P uses printing supplies such as paper, ink, staples, glue, binding, chemicals, and dyes provided by the customer, then even though such supplies become ingredient or component parts of an end product which P sells in the ordinary course of business, P is "performing a service" and not "manufacturing".

H. *Example 6:* Y is a newspaper publishing company located outside New Mexico with no business location, salespersons or other presence in New Mexico. Z is a printing company inside New Mexico. Y arranges to have Z print the newspapers which it publishes. Z is required to provide newsprint (paper), ink, and all the materials required for the production of newspapers. Z is manufacturing printed material. Z, in the given fact situation, does not have receipts from either publishing a newspaper or selling a newspaper; therefore, the deductions provided by Section 7-9-63 NMSA 1978 and Section 7-9-64 NMSA 1978 do not apply. Z may deduct from its gross receipts its receipts from selling printed material to Y if the printed material is delivered to Y outside New Mexico.

I. *Example 7:* A is in the business of painting oil and water color pictures for sale in the ordinary course of business. A is a manufacturer of tangible personal property. A combines oils, color pigments, fixing agents, canvas, frames and glass in a painting as components and properly issues a nontaxable transaction certificate to the seller of the components. A cannot properly issue a nontaxable transaction certificate to the seller of brushes, palettes, knives, cleaners, erasers and easels since these items of property are not components for purposes of ~~Subsection G~~ Subsection H of Section 7-9-3 NMSA 1978.

3.2.1.30 USE.

A. Storage:

(1) The term "using" includes storage in New Mexico except where the storage is for subsequent sale of the property in the ordinary course of the seller's business or for use solely outside New Mexico.

(2) *Example 1:* D, a resident of Utah, buys pipe in Texas to be used solely in Utah. The pipe is shipped into New

Mexico, unloaded, and stored for three days. It is then reloaded and shipped to Utah. There is no use of the pipe in New Mexico within the meaning of ~~[Subsection L]~~ Subsection N of Section 7-9-3 NMSA 1978. The transaction which occurred was merely storage for use solely outside New Mexico.

(3) Example 2: X Construction Company purchases a bulldozer in Illinois intending to use it in its construction business. The bulldozer is then delivered to X in New Mexico. X does not have any immediate use for the bulldozer so it is stored in the back lot of the construction company with other equipment. Two months later X changes plans and sells the bulldozer to Y Construction Company who needs it for a job. The bulldozer remained in storage from the day X received it until the day it was sold. Since the storage of the tractor was not for subsequent sale in the ordinary course of X's business, the storage of the tractor is a "use" within the meaning of ~~[Subsection L]~~ Subsection N of Section 7-9-3 NMSA 1978. Therefore, X Construction Company will be subject to the compensating tax on the value of the tractor because it has used the property in New Mexico.

B. Use - general example:

The following example illustrates the application of ~~[Subsection L]~~ Subsection N of Section 7-9-3 NMSA 1978. Example: D purchases a juke box in Texas for use in a coin-operated music business in New Mexico. D maintains that the machine is not being used in New Mexico within the meaning of the law. D says that the machine is being held for sale in the ordinary course of business since the machine is paid for by people playing records on it. D is not holding the machine for resale but is merely granting a license to use the machine.

3.2.2.11

REPORTING OF

PROGRESS PAYMENTS: A contractor who receives progress payments or other consideration for services performed on and materials provided for a construction project as defined in ~~[Subsection C of Section 7-9-3]~~ Section 7-9-3.4 NMSA 1978 must report such payments or other consideration as gross receipts. If the contractor is a cash-basis taxpayer, the contractor must report any such payments or other consideration actually received in a particular month as receipts for that month. If the contractor is an accrual basis taxpayer, any amounts which the contractor earned or billed or to which the contractor became entitled during a particular month must be reported as receipts for that month as required by Section 7-9-11 NMSA 1978.

3.2.215.12

[GENERAL EXAM-

PLES: For transactions occurring on or after July 1, 1989, the following statements illustrate circumstances which:

A. ~~contravene the requirements necessary for deducting the sale of a service for initial use out of state under Section 7-9-57 NMSA 1978 and, therefore, eliminate the deduction and cause the transaction to be taxable:~~

~~(1) the product of the service is delivered in New Mexico to the purchaser or to an employee, agent or authorized representative of the purchaser; or~~

~~(2) the purchaser's initial use of the product of the service occurs in New Mexico;~~

B. ~~do not contravene the conditions set forth in Section 7-9-57 NMSA 1978, thereby allowing the deduction for the receipts from the transaction:~~

~~(1) the purchaser has a person or persons assigned in this state to oversee the performance of the service in New Mexico by the contractor but the product of the service is delivered to the purchaser outside of this state and the purchaser initially uses the product of the service outside of this state;~~

~~(2) the purchaser has a person or persons in New Mexico assigned to the project who work in conjunction with employees of the seller on the product or the service required by the contract but the product of the service is delivered to the purchaser outside of this state and the purchaser initially uses the product of the service outside of this state;~~

~~(3) the purchaser or employees, agents or authorized representatives of the purchaser exercise administrative control from within New Mexico over the performance of the service by the contractor but the product of the service is delivered to the purchaser outside of this state and the purchaser initially uses the product of the service outside of this state; or~~

~~(4) the purchaser maintains a place of business in New Mexico and is performing work in this state related to the subject matter of the contract but the product of the service is delivered to the purchaser outside of this state and the purchaser initially uses the product of the service outside of this state.] [RESERVED]~~

**End of Notices and
Proposed Rules Section**

Adopted Rules and Regulations

NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT FAMILY SERVICES DIVISION

Notice of Repeal

8.8.3 NMAC, Governing Criminal Records Checks and Employment History Verification, is repealed effective 10/30/03 and repromulgated at 8.8.3 NMAC effective 10/30/03.

NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT FAMILY SERVICES DIVISION

TITLE 8 SOCIAL SERVICES CHAPTER 8 CHILDREN, YOUTH AND FAMILIES GENERAL PROVI- SIONS PART 3 G O V E R N I N G BACKGROUND CHECKS AND EMPLOYMENT HISTORY VERIFI- CATION

8.8.3.1 ISSUING AGENCY:
Children, Youth and Families Department
[8.8.3.1 NMAC - Rp 8.8.3.1 NMAC,
10/30/03]

8.8.3.2 SCOPE: This rule has general applicability to operators, staff and employees, and prospective operators, staff and employees, of child-care facilities, including every facility or program having primary custody of children for twenty hours or more per week, juvenile treatment facilities, and direct providers of care for children in the following settings: Children's behavioral health services and licensed and registered child care, including shelter care.
[8.8.3.2 NMAC - Rp 8.8.3.2 NMAC,
10/30/03]

**8.8.3.3 S T A T U T O R Y
AUTHORITY:** The statutory authority for these regulations is contained in the Criminal Offender Employment Act, Section 28-2-1 to 28-2-6 NMSA and in the New Mexico Children's and Juvenile Facility Criminal Records Screening Act, Section 32A-15-1 to 32A-15-4 NMSA 1978 Amended.
[8.8.3.3 NMAC - Rp 8.8.3.3 NMAC,
10/30/03]

8.8.3.4 D U R A T I O N :
Permanent
[8.8.3.4 NMAC - Rp 8.8.3.4 NMAC,

10/30/03]

8.8.3.5 EFFECTIVE DATE:
October 30, 2003, unless a later date is cited at the end of a section.
[8.8.3.5 NMAC - Rp 8.8.3.5 NMAC,
10/30/03]

8.8.3.6 OBJECTIVE:
A. The purpose of these regulations is to set out general provisions regarding criminal records checks and employment history verification required by the prevention and intervention division of the children, youth and families department.

B. Criminal records checks are conducted in order to identify those adults who have relevant felony and/or misdemeanor convictions and/or arrests as defined in these regulations that operate as a disqualification to provide services to children.

C. Child abuse and neglect screens are conducted through the protective services division in order to identify those persons who pose a continuing threat of abuse and/or neglect to minors or adults in their care.

[8.8.3.6 NMAC - Rp 8.8.3.6 NMAC,
10/30/03]

8.8.3.7 DEFINITIONS:
A. **ADMINISTRATIVE REVIEW** means an informal process of reviewing a decision that may include an informal conference and/or hearing and/or a review of written records.

B. **ADMINISTRATOR** means the adult in charge of the day-to-day operation of a facility. The administrator may be the licensee or an authorized representative of the licensee.

C. **ADULT** means a person who has a chronological age of 18 years or older, except for persons under medicaid certification as set forth in Subsection I below.

D. **APPEAL** means a review of a determination made by the children, youth and families department, which may include an administrative review.

E. **APPLICANT** means any person who is required to obtain background check clearance under these rules and NMSA 1978, Section 32A-15-3 (1999).

F. **ARREST** means notice from a law enforcement agency about an alleged violation of law.

G. **BACKGROUND CHECK CLEARANCE** means; (1) a determination made by the children, youth and families department, based on the results of a criminal records check, that no relevant

conviction exists to operate as a bar to employment, licensure or registration; and (2) based upon a child abuse and neglect screen through the protective services division, that the applicant has not been the subject of a substantiated case of abuse or neglect of a child or adult, and that the applicant does not otherwise pose a threat of abuse and/or neglect to a child or adult in the applicant's care. The applicant must clear all parts of these regulations in order to received background check clearance.

H. **CARE RECIPIENT** means any person under the care of a licensee.

I. **CHILD** means a person who has a chronological age of less than 18 years, and persons under applicable medicaid certification up to the age of 21 years.

J. **CONDITIONAL EMPLOYMENT** means a period of employment which is contingent upon receipt of notice from the children, youth and families department that the direct provider of care's criminal records check indicates no relevant conviction and/or the period of employment allowed during which the direct provider of care is responsible for providing the disposition of an arrest record.

K. **CRIMINAL HISTORY** means information possessed by law enforcement agencies of an adult's arrests, indictments, or other formal charges, as well as dispositions arising from these charges.

L. **CRIMINAL RECORDS CHECK** means the process of submitting FBI approved fingerprint cards for the purpose of determining whether or not an applicant has state or federal convictions on record and, when applicable, obtaining a criminal history. It may also refer to a request made by the children, youth and families department for a criminal history contained in local law enforcement records.

M. **DIRECT, PHYSICAL SUPERVISION** means continuous visual contact or live video observation by a cleared direct provider of care of a non-cleared direct provider of care during periods when the non-cleared direct provider of care is in immediate physical proximity to care recipients. This requirement applies only to settings licensed by the child care services bureau or certified by the children's behavioral health and community services bureau.

N. **DIRECT PROVIDER OF CARE** means any adult who, as a result of employment, contractual service or volunteer service has direct care responsibilities or routine and unsupervised physical

access to any care recipient in the settings to which these regulations apply.

O. **EMPLOYMENT HISTORY** means a written summary of the most recent three-year period of employment with names, addresses and telephone numbers of employers, including dates of employment, stated reasons for leaving employment, and dates of all periods of unemployment with stated reasons for periods of unemployment, and verifying references.

P. **LICENSED** means authorized to operate by the children, youth and families department by issuance of an operator's license or certification certificate.

Q. **LICENSEE** means the holder of, or applicant for, a license, certification, or registration pursuant to 7.20.11 NMAC, 7.20.12 NMAC, 8.16.2 NMAC, 7.8.3 NMAC; 8.17.2 NMAC.

R. **LICENSING AUTHORITY** means the children, youth and families department.

S. **RELATIVE CARE PROVIDER**: A direct provider of care for children who are related to him/her within the third degree of consanguinity.

T. **RELEVANT CONVICTION** means a plea, judgment or verdict of guilty, no contest, nolo contendere, conditional plea of guilty, or any other plea that would result in a conviction for a crime in a court of law in New Mexico or any other state that is grounds for denial of background check clearance under these regulations. This also includes juveniles who are adjudicated as serious youthful offenders, youthful offenders, or who are tried as adults for their offenses. Except in cases of sexual offenses or crimes against children, successful or pending completion of a deferred sentence under NMSA 1978, Section 31-20-9 (1977), or a conditional discharge under NMSA 1978, 31-20-13 (1994), or NMSA 1978, Section 30-31-28 (1972), or a comparable provision of another state's law, is not a relevant conviction for purposes of these regulations, unless or until such time as the deferred sentence or conditional discharge is revoked or rescinded by the issuing court. Additionally, if a relevant conviction is overturned on appeal and does not result in conviction after retrial, and no further criminal proceedings are pending relating to that crime, that former conviction is not a relevant conviction under these regulations. The burden is on the applicant to show after background check clearance denial that the applicant has successfully completed a deferred sentence or conditional discharge, or that the relevant conviction has been overturned on appeal.

U. **SERIOUS PHYSICAL ABUSE** means any substantiated referral,

regardless of whether an abuse and/or neglect petition was filed, in which the protective services division investigative file, the information contained in the FACTS database, or information from any other source indicates that a child or adult in the applicant's care suffered bodily injury as a result of abuse serious enough to require medical attention or hospitalization, or if the abuse was perpetrated in a manner that placed the child or adult in the applicant's care in jeopardy of serious bodily injury or death.

V. **SEVERE NEGLECT** means any substantiated referral, regardless of whether an abuse and/or neglect petition was filed, in which the protective services division investigative file, the information contained in the FACTS database, or information from any other source indicates that a child or adult in the applicant's care suffered bodily injury as a result of physical or emotional neglect serious enough to require medical attention or hospitalization, if the neglect caused severe emotional trauma, or if the neglect placed the child or adult in the applicant's care in jeopardy of serious bodily injury or death.

W. **SEXUAL ABUSE** means any substantiated referral, regardless of whether an abuse and/or neglect petition was filed, in which the protective services division investigative file, the information contained in the FACTS database, or information from any other source indicates that the applicant was either the perpetrator of sexual abuse against a child or adult or failed to protect a child or adult from sexual abuse by another while the child or adult was in the applicant's care or custody.

[8.8.3.7 NMAC – Rp 8.8.3.7 NMAC, 10/30/03]

8.8.3.8 APPLICABILITY: These regulations apply to all licensees and direct providers of care in the following settings:

- A. behavior management skills development;
- B. care management services;
- C. group home services;
- D. home-based services;
- E. day treatment services;
- F. residential treatment services;
- G. treatment foster care services agency staff;
- H. licensed child care homes;
- I. licensed child care centers;
- J. registered child care homes;
- K. licensed shelter care;
- L. licensed before and after school care.

[8.8.3.8 NMAC – Rp 8.8.3.8 NMAC, 10/30/03]

8.8.3.9 NON-APPLICABILITY:

A. These regulations do not apply to the following settings, except when otherwise required by applicable Certification Requirements for Child and Adolescent Mental Health Services 7.20.11 NMAC:

- (1) hospitals or infirmaries;
- (2) intermediate care facilities;
- (3) children's psychiatric centers;
- (4) home health agencies;
- (5) diagnostic and treatment centers;

(6) unlicensed and/or unregistered child care homes

B. These regulations do not apply to the following adults:

- (1) treatment foster care parents;
- (2) relative care providers;
- (3) non-caregiver adults residing in registered child care homes;
- (4) foster grandparent volunteers;
- (5) screened and monitored volunteers of official programs, such as work/study students, providing the program is waived by the licensing authority from the criminal records check requirement;

(6) volunteers working less than eight (8) hours per week, except in settings licensed or certified by the children's behavioral health and community services bureau, where more restrictive requirements apply in accordance with 7.20.11 NMAC or 7.20.12 NMAC.

[8.8.3.9 NMAC – Rp 8.8.3.9 NMAC, 10/30/03]

8.8.3.10 COMPLIANCE:

A. Compliance with these regulations and issuance of background check clearance is a condition of licensure, registration, certification and/or renewal, and/or continuation of same.

B. The licensee is required to:

(1) submit two completed FBI-approved fingerprint cards for all direct providers of care within five working days of commencement of service, whether employment, contractual, or volunteer. **EXCEPTION:** In the case of licensed child care homes, the licensee must submit fingerprint cards, within five working days, for any adult who resides in the home or any persons residing in the home who reaches 18 years of age.

(2) submit the FBI-approved fingerprint cards to CYFD along with the specified fee;

(3) submit the name, address, date of birth and any aliases of the direct care provider for a child abuse and neglect

screen;

(4) verify the employment history of any potential direct provider of care. The verification shall include contacting references and prior employers/agencies to elicit information regarding the reason for leaving prior employment or service. The verification shall be documented and available for review by the licensing authority. EXCEPTION: Verification of employment history is not required for registered home providers, child care homes licensed for six (6) or fewer children, or relative care providers.

(5) in settings licensed by children's behavioral health services, provide for direct physical supervision of direct providers of care who have not received a background check clearance from the children, youth and families department. [8.8.3.10 NMAC – Rp 8.8.3.10 NMAC, 10/30/03]

8.8.3.11 COMPLIANCE EXCEPTIONS:

A. If a direct provider of care is to be employed, contracted or volunteering in a setting licensed by children's behavior health and community services bureau, he/she is not required to undergo an additional background check clearance if he/she began employment, contractual services, or volunteer service with another licensee within 180 days of departure from a prior licensee, and it has been less than three years since the last background check has been completed. In all other settings, a direct provider of care is not required to undergo an additional background check clearance if he/she begins employment, contractual services, or volunteer service with another licensee within one calendar year of departure from employment, contract, or volunteer service with a prior licensee, and it has been less than three years since the last background check has been completed. If the direct provider of care has not had a background check within the previous three years, a new background check must be completed. The direct provider of care is responsible for providing proof of his/her prior background check clearance (or CRC clearance under prior regulations) within the previous three years. The direct provider of care must certify that he/she has not been arrested or convicted of any offense during the interim period.

B. If a direct provider of care who has not resided in the United States for a minimum of five years is employed, contracted or volunteering in a setting licensed by children's behavior health and community services bureau, he/she must provide the equivalent of a background check clearance from any country in which he/she has resided within the

past five years, for a period of longer than one year.

[8.8.3.11 NMAC – Rp 8.8.3.11 NMAC, 10/30/03]

8.8.3.12 PROHIBITIONS:

A. Any licensee who violates these regulations is subject to revocation, suspension, sanctions, or denial of licensure, certification, or registration.

B. Licensure, certification, or registration is subject to receipt by the licensing authority of a background check clearance for the licensee and/or the licensee's administrator.

C. Except as provided in Section 8.8.3.13 NMAC below, licensure, certification or registration may not be granted by the licensing authority if a criminal records check of the licensee and/or the licensee's administrator reveals a relevant conviction.

D. Except as provided in Section 8.8.3.14 NMAC below, licensure, certification, or registration may not be granted by the licensing authority if a screen from the protective services division or an employment history verification of the licensee and/or the licensee's administrator reveals information which indicates abuse or neglect of children.

E. Except as provided in Sections 8.8.3.13 NMAC, 8.8.3.14 NMAC and Subsection C of 8.8.3.15 NMAC below, a licensee may not retain employment, volunteer service or contract with any direct provider of care:

(1) for whom a criminal records check reveals a relevant conviction;

(2) for whom an employment history verification reveals evidence which indicates that a potential for the abuse or neglect of children exists;

(3) for whom a child abuse and neglect screen indicates a substantiated case of abuse or neglect of a child or adult.

F. Except as provided in Subsection C of 8.8.3.15 NMAC below, a licensee shall be in violation of these regulations if it retains a direct provider of care for more than fifteen working days following the mailing of a notice verifying relevant convictions by the licensing authority. The notice shall be mailed certified return receipt requested.

G. A licensee shall be in violation of these regulations if it retains any direct provider of care beyond 180 days for whom a background check clearance has not been received. At the discretion of the children, youth and families department, this time frame may be extended.

H. Except as provided in Section 8.8.3.14 NMAC below, a licensee shall be in violation of these regulations if it hires, contracts with, uses in volunteer serv-

ice, or retains any direct provider of care for whom an employment history verification, or other information received from any source including the direct provider of care, reveals information which indicates the abuse or neglect of children or adults, including a substantiated case of abuse or neglect of a child or adult that occurred after background check clearance has been granted.

[8.8.3.12 NMAC – Rp 8.8.3.12 NMAC, 10/30/03]

8.8.3.13 ARRESTS AND CONVICTIONS:

A. For the purpose of these regulations, the following relevant convictions shall result in a denial of background check clearance.

(1) Convictions for child abuse, trafficking in controlled substances, and rape or criminal sexual penetration, automatically result in denial of background check clearance regardless of rehabilitation and regardless of whether the conviction is for a felony or a misdemeanor, pursuant to NMSA 1978, Section 28-2-4(A)(3) (1997). Therefore, any applicant who has such a conviction is denied background check clearance. This applies to any conviction at any time in either New Mexico or any other state, or in any court of competent jurisdiction in any other country.

(2) Convictions involving any crime against a child, including, but not limited to: criminal sexual contact of a minor; child pornography; false imprisonment; kidnapping; endangering a minor; or contributing to the delinquency of a minor, are considered child abuse for purposes of these regulations in accordance with NMSA 1978, Sections 28-2-4(A)(1) and 28-2-4(A)(3) (1997), and result in the denial of background check clearance regardless of rehabilitation and regardless of whether the conviction is for a felony or misdemeanor. This applies to any conviction at any time in either New Mexico or any other state, or in any court of competent jurisdiction in any other country.

(3) Convictions involving any felony offense, including, but not limited to felony convictions for: homicide, murder or manslaughter in any manner or degree; family or domestic abuse or violence; adult abuse; driving under the influence of intoxicating liquors; assault or battery; arson; drug possession; kidnapping; false imprisonment; criminal sexual contact; or any other felony offense, are directly related to an applicant's ability to provide a safe, responsible and morally positive setting for children, and result in the denial of background check clearance regardless of rehabilitation in accordance with NMSA 1978, Section 28-2-4(A)(1) (1997), subject to the

following subsections:

(a) If such felony conviction or convictions have occurred within the past three (3) years background check clearance is denied regardless of rehabilitation. This applies to any conviction at any time in either New Mexico or any other state, or in any court of competent jurisdiction in any other country.

(b) If such felony conviction or convictions were for non-violent offenses, for offenses not set forth in Paragraphs (1) and (2) of Subsection A above, and occurred more than three (3) years prior to the time of application for background check clearance, and if the applicant is not otherwise disqualified from background check clearance and no other conviction for any other misdemeanor or felony offense has occurred within the past three (3) years, the applicant shall be given the opportunity to petition in writing to the licensing authority prior to denial setting forth the applicant's claim that the applicant has been sufficiently rehabilitated to be able to provide a safe, responsible and morally positive setting for children. Such petition shall specifically state the actions that have been taken by the applicant since the conviction that show rehabilitation and, where applicable, shall include a letter of recommendation from the applicant's supervisor. Such petition shall be received by the division or bureau which issued the denial within fifteen (15) days of the mailing of a notice from the licensing authority to the applicant or provider that the conviction will result in denial of background check clearance. The burden of proof shall be on the applicant to show rehabilitation by clear and convincing evidence, and the decision of the licensing authority shall be considered final, subject to the applicant's rights to appeal under Section 8.8.3.15 NMAC and to the district court pursuant to state statute. This subsection does not apply to any conviction for family or domestic violence or abuse, or for any conviction specified in Paragraphs (1) and (2) of Subsection A above.

(4) Misdemeanor convictions involving moral turpitude, including prostitution or solicitation, and any other crimes of moral turpitude which a reasonable person would believe would effect a person's ability to provide a safe, responsible and morally positive setting for children, including, but not limited to: criminal sexual contact, indecent exposure; family or domestic violence or abuse; abuse, neglect or financial exploitation of an adult or elder person; theft; receiving or disposing of stolen property; auto theft or unlawful taking of a motor vehicle; larceny; burglary, auto burglary, aggravated burglary or breaking and entering; embezzlement; fraud; credit card fraud or improper use of a credit card;

shoplifting; writing bad checks; or arson are directly related to an applicant's ability to provide a safe, responsible and morally positive setting for children, and result in the denial of background check clearance regardless of rehabilitation in accordance with NMSA 1978, Section 28-2-4(A)(1) (1997), subject to the following subsections:

(a) If such conviction or convictions for misdemeanors of moral turpitude have occurred within the past three (3) years, or if any such conviction is for family or domestic violence or abuse, background check clearance is denied regardless of rehabilitation. This applies to any conviction at any time in either New Mexico or any other state, or in any court of competent jurisdiction in any other country.

(b) If such conviction or convictions for misdemeanors of moral turpitude have occurred later than seven (7) years prior to the time of application for background check clearance, and no arrest or conviction for any crime has occurred within the past seven (7) years, it is presumed that rehabilitation has occurred and background check clearance may be approved under this section, subject to approval under all other background check clearance requirements. Applicants who would have been presumed to be rehabilitated under this subsection but have an arrest without a conviction within the past seven (7) years are subject to subsection (c.) below. This subsection does not apply to any conviction for family or domestic violence or abuse, or to any felony conviction.

(c) If such conviction or convictions for misdemeanors of moral turpitude occurred more than three (3) years but less than seven (7) years prior to the time of application for background check clearance, and if the applicant is not otherwise disqualified from background check clearance and no other conviction for any other misdemeanor or felony offense has occurred within the past three (3) years, the applicant shall be given the opportunity to petition in writing to the licensing authority prior to denial setting forth the applicant's claim that the applicant has been sufficiently rehabilitated to be able to provide a safe, responsible and morally positive setting for children. Such petition shall be received by the division or bureau which issued the denial within fifteen (15) days of the mailing of a notice from the licensing authority to the applicant or provider that the conviction will result in denial of background check clearance. The burden of proof shall be on the applicant to show rehabilitation by clear and convincing evidence, and the decision of the licensing authority shall be considered final, subject to the applicant's rights to appeal under Section 8.8.3.14 NMAC and

to the district court pursuant to state statute. This subsection does not apply to any conviction for family or domestic violence or abuse, or to any felony conviction.

B. A disqualifying conviction may be proven by:

(1) a copy of the judgment of conviction from the court;

(2) a copy of a plea agreement filed in court in which a defendant admits guilt;

(3) a copy of a report from the federal bureau of investigation, criminal information services division, or the national criminal information center, indicating a conviction;

(4) a copy of a report from the state of New Mexico, department of public safety, or any other agency of any state or the federal government indicating a conviction;

(5) any writing by the applicant indicating that such person has been convicted of the disqualifying offense, provided, however, that if this is the sole basis for denial, the applicant shall be given an opportunity to show that the applicant has successfully completed a deferred sentence or conditional discharge for the disqualifying conviction.

C. If a criminal records check shows pending charges for a felony offense, or for any misdemeanor offense involving domestic violence or child abuse, or an arrest but no disposition for any such crime, background check clearance shall be denied. If background check clearance has already been granted, an arrest for any felony offense or for any misdemeanor offense involving domestic violence or child abuse shall result in the immediate suspension of the applicant's background check clearance until such time as the charges are disposed of. It is the duty of the administrator of a facility or the licensee, upon learning of any such arrest, to notify the licensing authority immediately. A suspension of background check clearance shall have the same effect as a denial of background check clearance until the charges are disposed of. If an arrest results in a conviction, the applicant shall be subject to all of the criminal records check provisions set forth in Subsections A, B, and C above and, if the conviction would result in a background check clearance denial, the applicant's criminal records clearance shall be revoked. If an arrest results in an acquittal, conditional discharge, or dismissal of the charges, or any other disposition that is not a criminal conviction, the applicant shall thereafter again be eligible for background check clearance. The applicant shall have the right to appeal a denial or revocation pursuant to Section 8.8.3.14 NMAC below.

D. If a criminal records check shows that an applicant is wanted for any offense by any law enforcement agency due to a warrant having been issued, or if the applicant is shown to have failed to appear for any pending criminal court proceeding, background check clearance shall be denied. If such information shall be reported to the licensing authority after background check clearance, the applicant's background check clearance shall be suspended until such time as the matter is disposed of. If the case results in a conviction, the applicant shall be subject to all of the criminal records check provisions set forth in Subsections A, B, and C above and, if the conviction would result in a background check clearance denial, background check clearance shall be denied or the applicant's background check clearance shall be revoked. If the charges are dismissed or otherwise result in a conviction for an offense that would not warrant a background check clearance denial, the applicant will thereafter be eligible for background check clearance. The applicant shall have the right to appeal a denial or revocation pursuant to Section 8.8.3.15 NMAC below.

E. If a criminal record check reveals the applicant was adjudicated a youthful offender or serious youthful offender, that offense shall be treated a relevant conviction for purposes of these regulations. If the applicant was adjudicated a delinquent child for any offense that was committed as a juvenile, the licensing authority may deny background check clearance if the nature of the offense indicates that the applicant poses a threat of abuse or neglect to adults or children in the applicant's care. This includes, but is not limited to, crimes against children and crimes of violence.

[8.8.3.13 NMAC – Rp 8.8.3.13 NMAC, 10/30/03]

8.8.3.14 SUBSTANTIATED ABUSE AND NEGLECT REFERRALS:

An applicant for whom a child abuse and neglect screen through the protective services division indicates a substantiated referral for adult or child abuse and/or neglect is denied background check clearance, subject to the following subsections:

A. Background check clearance may be granted by the licensing authority to an applicant with a substantiated referral to the protective services division for which the incident or incidents leading to the substantiated referral occurred prior to January 1, 1998, if all of the following conditions apply:

(1) the applicant has had only one (1) substantiated referral to the protective services division for abuse and/or neglect;

(2) the substantiated referral was not for sexual abuse, serious physical abuse or severe neglect;

(3) the licensing authority has received no information from any source indicating that the applicant has failed to cooperate with the protective services division relating to the substantiated referral;

(4) the applicant has had no convictions for any criminal offense within the past three (3) years, and the applicant would not otherwise be disqualified under the criminal records check portion of the background check; and

(5) the licensing authority discovers no information from any source indicating that the applicant continues to be a threat of abuse and/or neglect to either children or adults in the applicant's care. If deemed necessary, the licensing authority may review the information in the protective services division investigative file and may consider any additional information received from any past or present employee of the protective services division who was involved in the investigation of the substantiated referral.

B. Background check clearance may be granted by the licensing authority to an applicant with a substantiated referral to the protective services division for which the incident or incidents leading to the substantiated referral occurred on or after January 1, 1998, or to an applicant with more than one (1) substantiated referral to the protective services division for abuse and/or neglect occurring at any time, if all of the following conditions apply:

(1) a minimum of three (3) years have passed since the incident or incidents leading to any of the substantiated referrals have occurred;

(2) no substantiated referral was for sexual abuse, serious physical abuse or severe neglect;

(3) the licensing authority has received no information from any source indicating that the applicant has failed to cooperate with the protective services division relating to the substantiated referral;

(4) the applicant has had no convictions for any criminal offense within the past three (3) years, and the applicant would not otherwise be disqualified under the criminal records check portion of the background check;

(5) the applicant provides the licensing authority with a written statement and any other relevant evidence addressing the steps that the applicant has taken to correct the causes of the substantiated referral or referrals and the steps that the applicant has taken to insure that there are no additional substantiated referrals in the future;

(6) a review of the information in

the protective services division investigative files for all of the substantiated referrals indicates that the applicant does not continue to be a threat of abuse and/or neglect to children or adults in the applicant's care. If any of the substantiated referrals occurred on or after January 1, 1998, a review of the information in the FACTS database will be used for this determination as to those cases. If any of the substantiated referrals occurred prior to January 1, 1998, or if the information in the FACTS database is incomplete or appears to be unreliable, a review of the information in the protective services division investigative file may be initiated to make the determination; and

(7) In making the determination as to whether the applicant continues to be a threat of abuse and/or neglect to children or adults in the applicant's care under Paragraph (6) above, the licensing authority may take into account the following information: (a) the total number of substantiated referrals; (b) the time elapsed since the last substantiated referral to the protective services division; (c) the applicant's statement submitted pursuant to Paragraph (5) above; (d) the harm caused to the child or adult who was in the applicant's care; and (e) any information received from any past or present employee of the protective services division who was involved in the investigation of the substantiated referrals or referrals.

[8.8.3.14 NMAC – Rp 8.8.3.15 NMAC, 10/30/03]

8.8.3.15 APPEAL RIGHTS:

A. Any licensee who is denied licensure, certification, or registration or is sanctioned pursuant to these regulations may appeal that decision to the children, youth and families department.

B. Any direct provider of care who is disqualified from service due to denial of background check clearance may request a hearing from the children, youth and families department. The request for hearing shall be made as soon as possible, but not more than fifteen days from notice.

C. Applicants who are denied background check clearance may be allowed by the licensing authority to continue to operate as an employee or a licensed or register provider while his/her appeal is pending unless the denial was based upon a conviction or a substantiated referral involving sexual abuse, violent crimes, drug trafficking, serious physical abuse or serious neglect. The determination of whether to allow the applicant to continue to operate during the appeal rests within the sole discretion of the licensing authority, and the applicant has no right to appeal the licensing authority's decision.

D. The appeal under this

section shall be completed by a review of the record by a hearing officer designated by the cabinet secretary. The hearing officer's review is limited to: (1) whether the licensing authority's denial of background check clearance is supported by any section of these regulations; and (2) whether the applicant has been erroneously identified as a person with a relevant conviction or substantiated referral. The review will be completed on the record presented to the hearing officer. A live hearing will not be conducted without the consent of the hearing officer, but the applicant may submit a written statement and any other relevant evidence within ten (10) days of the filing of the appeal. The written statement and relevant evidence are considered by the hearing officer. The hearing officer submits a recommendation to the cabinet secretary on the appeal within thirty (30) days of the hearing officer's receipt of the appeal.

[8.8.3.15 NMAC – Rp 8.8.3.14 NMAC, 10/30/03]

HISTORY OF 8.8.3 NMAC:

HED 85-6 (HSD), Regulations Governing Criminal Records Check And Employment History Of Licensees And Staff Of Child Care Facilities, 08/30/85.

HISTORY OF REPEALED MATERIAL:

HED 85-6 (HSD), Regulations Governing Criminal Records Check And Employment History Of Licensees And Staff Of Child Care Facilities - Repealed, 07/30/01.

8.8.3 NMAC, Governing Criminal Records Checks and Employment History Verification – Repealed, 03/29/02

8.8.3 NMAC, Governing Criminal Records Checks and Employment History Verification – Repealed, 10/30/03

NEW MEXICO BOARD OF EDUCATION

Explanatory Paragraph: This is an amendment to Sections 3 and 10 of 6.30.2 NMAC (STANDARDS FOR EXCELLENCE). Section 3 is amended to add a new subsection D reflecting the statutory authority to establish mandatory training of local school board members. Paragraph 4 of Subsection A of Section 10 is amended to include training requirements for local school board members.

6.30.2.3 STATUTORY AUTHORITY:

A. Subsections J and V of Section 22-2-2 NMSA 1978, grants the authority and responsibility for the assessment and evaluation of public schools,

including charter schools, and state supported educational institutions.

B. Subsections J and V of Section 22-2-2 NMSA 1978, directs the state board of education to set graduation expectations and hold schools accountable. Section 22-2-8.6 NMSA 1978, further directs the state board of education to identify measurable essential competencies and determine criteria for mastery.

C. Subsection E of Section 22-2-8.4 NMSA 1978 grants the authority to the state board of education to establish policy, to provide for administrative interpretation, and to clarify curricular and testing provisions of the Public School Code.

D. Section 22-5-13 NMSA 1978, amended by Laws 2003, Chapter 153, Section 22-5-13, grants authority to the state department of public education to develop mandatory training of local school board members.

[10-31-96, 02-14-00; 6.30.2.3 NMAC - Rn, 6 NMAC 3.2.3 & A, 11-14-00; A, 10-30-03]

6.30.2.10 PROCEDURAL REQUIREMENTS

A. The local board of education shall:

(1) exercise powers and duties pursuant to the Public School Code and public school regulations, Section 22-1-1 et seq. NMSA 1978, and other applicable regulations;

(2) approve and support the district's EPSS and each school site-level EPSS action plan;

(3) employ and evaluate the local superintendent on an annual basis in accordance with Section 22-10-3.1 NMSA 1978;

(4) ensure that each member of the board participates in a planned program of training which will assist in the performance of specified duties[?]. All local school board members must receive a total of five hours of annual training.

(a) For newly elected or appointed local school board members who are in office for less than a year, they shall receive three of the five hours from attending a training course developed by the SDE and sponsored by the New Mexico school boards association. This course shall be offered no later than three months after a local school board election. The SDE will periodically announce the dates of these courses which will cover numerous topics including SDE policies and procedures, statutory powers and duties of local boards, legal concepts pertaining to public schools, finance and budget. For the additional two hours of annual training for these new board members, these board members shall attend sessions sponsored by the NMSBA, approved by the SDE.

(b) For all existing local school

board members, they shall attend five hours of annual training sponsored by the NMSBA, approved by the SDE.

(c) In order to be credited with attendance at these courses, each attendee must comply with written attendance procedures established by the SDE. Prior to September 1st, the NMSBA shall provide each local superintendent with a list of training hours earned annually by each local school board member.

(5) delegate administrative and supervisory functions to the local superintendent;

(6) refrain from involvement in delegated administrative functions;

(7) review, revise as needed, and submit policies to SDE on an annual basis;

(8) award diplomas to students who have successfully completed graduation requirements;

(9) ensure the alignment of district curricula with Content Standards with Benchmarks;

(10) ensure that district funds are appropriately managed and disbursed;

(11) be responsible for oversight of revenue and expenditures within the district budget;

(12) accept responsibility for ensuring the success of each school in the district.

[10-31-96, 12-31-98; 6.30.2.10 NMAC - Rn, 6 NMAC 3.2.9 & A, 11-14-00; A, 08-15-03; A, 10-30-03]

NEW MEXICO HUMAN SERVICES DEPARTMENT MEDICAL ASSISTANCE DIVISION

This is an amendment to 8.325.7 NMAC, sections 10 through 15, which will be effective November 1, 2003. The Medical Assistance Division amended the Part to show that the inclusions to pregnancy termination services have expanded the scope of eligible providers to include behavioral health practitioners to render counseling services, expanded coverage to include oral medications for pregnancy termination, reinstated coverage for medically necessary pregnancy termination procedures and reinstated the requirement for a voluntary informed consent.

This rule was also renumbered and reformatted from 8 NMAC 4.MAD.766 to comply with NMAC requirements.

8.325.7.10 ELIGIBLE PROVIDERS:

A. Upon approval of New Mexico medical assistance program provider participation [applications] agreements by the New Mexico medical assistance division (MAD), the following

providers are eligible to be reimbursed for furnishing services to terminate pregnancy or counseling and mental health services.

~~(1) individuals licensed as doctors of medicine or osteopathy;~~

~~(2) hospitals or clinics;~~

B. Clinical providers:

(1) individuals licensed in New Mexico as physicians by the board of medical examiners or board of osteopathy;

(2) hospitals or clinics; and

(3) individuals licensed in New Mexico as physicians by the board of medical examiners or board of osteopathy and who are board certified in psychiatry, and/or the groups they form.

C. Once enrolled, approved providers receive a packet of information, including medicaid program policies, billing instructions, utilization review instructions and other pertinent material from MAD. Providers are responsible for ensuring that they receive and maintain these materials.

[5/1/95; 8.325.7.10 NMAC - Rn, 8 NMAC 4.MAD.766.1 & A, 11/1/03]

8.325.7.11 PROVIDER RESPONSIBILITIES:

A. Providers of pregnancy termination services must submit with their billing, the written certification of a physician that the procedure was necessary to save the life of the mother. In the case of rape or incest, the provider must submit with the billing, a certification by the treating physician and/or appropriate reporting agency as to the cause of the pregnancy, or a certification that the patient is not physically or emotionally able to report the incident.

B. Providers who furnish services to medicaid recipients must comply with all specified medicaid participation requirements. See 8.302.1 NMAC, *General Provider Policies*.

C. Providers must verify that individuals are eligible for medicaid at the time services are furnished and determine if medicaid recipients have other health insurance coverage.

D. Providers must maintain records ~~[which]~~ that are sufficient to fully disclose the extent and nature of the services provided to recipients. See 8.302.1 NMAC, *General Provider Policies*.

[5/1/95; 8.325.7.11 NMAC - Rn, 8 NMAC 4.MAD.766.2 & A, 11/1/03]

8.325.7.12 COVERED SERVICES AND SERVICE LIMITATIONS:

A. Medicaid covers services to terminate pregnancy ~~[under the following conditions]~~ when the treating physician certifies that in their best medical judg-

ment:

(1) the procedure is necessary to save the life of the mother as certified in writing by a physician;

(2) the pregnancy is a result of rape or incest, as certified by the treating physician and/or the appropriate reporting agency, or if not reported, the patient is not physically or emotionally able to report the incident; or

(3) the procedure is necessary to terminate an ectopic pregnancy; or

(4) the procedure is necessary because the pregnancy aggravates a pre-existing condition, makes treatment of a condition impossible, interferes with or hampers a diagnosis, or has a profound negative impact upon the physical or mental health of an individual.

B. Psychological services: Medicaid covers mental health services for pregnant women and for any other medical condition that may complicate the pregnancy. For information about mental health professional services, see 8.310.8 NMAC [MAD-717], *Mental Health Professional Services*. For information about other mental health services, see 8.310.3 NMAC [MAD-712], *Rural Health Clinic Services*; 8.310.4 NMAC [MAD-713], *Federally Qualified Health Center Services*; 8.311.4 NMAC [MAD-722], *Outpatient Psychiatric Services and Partial Hospitalization*; 8.315.3 NMAC [MAD-737], *Psychosocial Rehabilitation Services*; 8.320.2 NMAC [MAD-740], *Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services*; 8.320.3 NMAC [MAD-741], *Tot to Teen Healthcheck*; 8.321 NMAC [MAD-742], *Enhanced EPSDT-Residential Services*; 8.322 NMAC [MAD-745], *Enhanced EPSDT-Community Mental Health Services*; and 8.320.6 NMAC [MAD-747], *School Based Services for Recipients Under Twenty-One Years of Age*.

C. Oral medications: Medicaid covers oral medications approved by the food and drug administration (FDA) that have been determined a benefit by MAD for pregnancy termination. Medicaid will cover oral medications when administered by a physician, or by another licensed health care professional acting within the scope of their practice under New Mexico law. Oral medications will be covered for individuals meeting the coverage for termination procedures as defined in this part.

[5/1/95; 8.325.7.12 NMAC - Rn, 8 NMAC 4.MAD.766.3 & A, 11/1/03]

8.325.7.13 NONCOVERED SERVICES: Services to terminate a pregnancy are subject to the limitations and coverage of services which exist for other medicaid services. See 8.301.3 NMAC [MAD-602], *General Noncovered Services*. ~~[Once~~

~~enrolled, providers receive instructions and documentation forms necessary for prior approval and claims processing.] Medicaid does not cover the performance of 'elective' termination procedures.~~

[5/1/95; 8.325.7.13 NMAC - Rn, 8 NMAC 4.MAD.766.4 & A, 11/1/03]

8.325.7.14 PRIOR [APPROVAL] AUTHORIZATION AND UTILIZATION REVIEW:

All medicaid services are subject to utilization review for medical necessity and program compliance. Reviews may be performed before services are furnished, after services are furnished and before payment is made, or after payment is made. See 8.302.5 NMAC [MAD-705], *Prior Approval and Utilization Review*. Once enrolled, providers receive instructions and documentation forms necessary for prior approval and claims processing.

A. Prior [approval] authorization: Services to terminate pregnancy do not require prior [approval] authorization from MAD or its designee.

B. Eligibility determination: Providers must verify that individuals are eligible for medicaid at the time services are furnished and determine if medicaid recipients have other health insurance.

C. Reconsideration: Providers who disagree with review decisions can request a re-review and [a] reconsideration. See 8.350.2 NMAC [MAD-953], *Reconsideration of Utilization Review Decisions*.

[5/1/95; 8.325.7.14 NMAC - Rn, 8 NMAC 4.MAD.766.5 & A, 11/1/03]

8.325.7.15 INFORMED CONSENT:

A. The provider may not require any individual to undergo any medical service, diagnosis, or treatment or to accept any other health service provided under the plan if the individual objects, or in the case of a child, a parent or guardian objects, on religious grounds. Voluntary, informed consent by an adult or emancipated minor recipient must be given to the provider prior to the procedure to terminate pregnancy, except in the following circumstances:

(1) in instances where a medical emergency exists. A 'medical emergency' exists in situations where the attending physician certifies that, based on the facts of the case presented, in his/her best clinical judgment, the life or the health of the recipient is endangered by the pregnancy so as to require an immediate pregnancy termination procedure;

(2) in instances where the recipient is unconscious, incapacitated, or otherwise incapable of giving consent. In such

circumstances, the consent shall be obtained as prescribed by New Mexico law; or

(3) in instances where pregnancy results from rape or incest or the continuation of the pregnancy endangers the life of the recipient;

(4) consent is valid for thirty (30) days from the date of signature, unless withdrawn by the recipient prior to the procedure.

B. Required acknowledgements: In signing the consent, the recipient must acknowledge that she has received, at least, the following information:

(1) alternatives to pregnancy termination;

(2) medical procedure(s) to be used;

(3) possibility of physical and/or mental side effects from the performance of the procedure;

(4) right to receive abortion counseling services from an independent medicaid provider; and

(5) right to withdraw consent up until the time the procedure is going to be performed.

C. Record retention: A dated and signed copy of the consent, with counseling referral information, if requested, must be given to the recipient. The provider must keep the original signed consent with the recipient's medical records.

D. Consent for minors in instances not involving life endangerment, rape or incest: Informed written consent for an un-emancipated minor to terminate a pregnancy must be obtained, dated and signed by a parent, legal guardian, or other acting 'in loco parentis' to the minor. An exception is when the minor objects to parental involvement for personal reasons or the parent, guardian or adult acting 'in loco parentis' is not available. The treating physician shall note the minor's objections or the unavailability of the parent in the minor's chart, and:

(1) certify in his/her best clinical judgment, the minor is mature enough and well enough informed to make the decision about the procedure; or, in the circumstance where sufficient maturity and information are not present or apparent, that the procedure is in the minor's best interests on the information provided to the treating physician by the minor; or

(2) refer the minor to an independent medicaid counselor in circumstances where the treating physician believes counseling is necessary before a clinical judgment can be rendered on the criteria established in Paragraph (1) above. Referrals shall be made on the same day of the visit between the minor and the treating physician where consent is discussed. The

independent medicaid counselor shall meet with the minor and confirm in writing to the treating physician whether or not the minor is mature enough and sufficiently informed to make the decision about the procedure. Or, in the circumstance where sufficient maturity and information are not present or apparent, that the procedure is in the minor's best interests based on the information provided to the counselor by the minor. The counselor's written report is due to the treating physician within 72 hours of initial referral.

(3) a minor shall not be required to obtain the counseling referenced in Paragraph (2) above. However, if the treating physician is unable or unwilling to independently certify the requirements established in Paragraph (1) above, the minor must be informed by the treating physician that written consent must be obtained by the parent, legal guardian or parent 'in loco parentis' prior to performing the procedure; or, that the minor must obtain a court order allowing the procedure without parental consent.

E. Reimbursement: Medical providers must submit claims for reimbursement on the HCFA 1500 or UB92 claim forms or their successors, based on provider type. See 8.302.2 NMAC [MAD-702], *Billing for Medicaid Services*. ~~[The physician's certification must accompany the billing.]~~ A copy of the certification, and any other required documentation, must be retained by the provider in the recipient's medical record. Instructions on documentation, billing, and claims processing are sent to approved medicaid providers. Reimbursement for the performance of services to terminate pregnancy is made at the lesser of the following:

(1) the provider's billed charge; or

(2) the MAD fee schedule for the specific service or procedure.

(a) The provider's billed charge must be the usual and customary charge for services.

(b) "Usual and customary charge" refers to the amount which an individual provider charges the general public in the majority of cases for a specific procedure or service.

[5/1/95; 8.325.7.15 NMAC - Rn, 8 NMAC 4.MAD.766.6 & A, 11/1/03]

NEW MEXICO STATE PERSONNEL BOARD

This is an amendment of Subsection of JJ 1.7.1.7 NMAC, Relation by blood or marriage within the third degree, effective 10/30/2003.

1.7.1.7 DEFINITIONS:

A. "Agency" means any state department, bureau, division, branch or administrative group which is under the same employer.

B. "Agency Utilization" means agency-specific applications of a position that may determine where the position is classified in a technical occupation group (TOG) or a manager category (MC). Factors such as organizational structure, as well as agency-specific requirements, duties, and impact/liability issues affect the actual function, impact, and accountability of the TOG or MC at the agency level.

C. "Anniversary date" means the date of appointment or reemployment and is changed as of the date of promotion, demotion, reduction, or change to a different technical occupation group, technical occupation group role, or manager category in the same pay band or pay opportunity. The director shall resolve disputes over how an anniversary date is derived.

D. "Applicant" means any person, who has applied for a position in the classified service.

E. "Authorized agent" means a certified representative to whom the director has delegated specific approval and oversight authority for their specific agency and shares responsibility and accountability with the state personnel office for the overall integrity of the personnel system.

F. "Board" means the personnel board.

G. "Break in employment" means any period of separation of at least one workday of not being on the agency's payroll.

H. "Candidate" means any person who is on the employment list for a position.

I. "Classified service" means all positions in the executive branch of state government which are not exempt by law.

J. "Compa-ratio" means pay expressed as a percentage of the midpoint of a pay band or pay opportunity.

K. "Demotion" means an involuntary downward change for disciplinary reasons with a reduction in pay within an employee's pay band or pay opportunity or from a classified position in one pay band to a classified position in a lower pay band with a reduction in pay, or from a classified position in one manager category to a classified position in a lower manager category with a reduction in pay, or from a manager category to a technical occupation group and/or removal of supervisory responsibilities and pay for disciplinary reasons.

L. "Director" means the state personnel director.

M. "Dismissal" means the involuntary separation from employment for disciplinary reasons.

N. "Diversity in the workplace" means an acknowledgment of all people equally, regardless of their differences. Agencies' management of diversity will ensure that efforts are made to adapt to and accept the importance of all individuals who fall within a group identified for protection under equal employment laws and regulations.

O. "Employee" means a person in a position in the classified service. [note: For purposes of brevity and consistency, this definition differs from *NMSA 1978, Section 10-9-3-(I)* but in no way confers a greater right on certain persons than contemplated by *Section 10-9-3(I)*].

P. "Employer" means any authority having power to fill positions in an agency.

Q. "Employment list" means the list of names, certified by the director, from which a candidate may be selected for appointment.

R. "Established requirements" means a position's individual job related qualification standards established by the agency and the office in accordance with the specific requirements and/or needs of the position and are subject to review by the director.

S. "Examination" means quantitative competitive assessment of qualifications, knowledge, skills, fitness and abilities of an applicant including tests.

T. "Exempt service" means all positions in the executive branch of state government exempt from the classified service by law.

U. "Field of work" means the nature of work performed and the skills and competencies required for success. It is used to describe occupation groups for manager categories and for determination of pay opportunities.

V. "Filed" means received by the office or authorized agent.

W. "First line supervisor" means an employee in a technical occupation group who devotes a substantial amount of work time to supervisory duties, customarily and regularly directs the work of two or more other employees and has the authority in the interest of the employer to hire, promote, evaluate the performance of, or discipline other employees or to recommend such actions effectively but does not include an individual who performs merely routine, incidental or clerical duties, or who occasionally assumes supervisory or directory roles or whose duties are substantially similar to those of subordinates, and does not include lead employees, employees who participate in peer review or occasional

employee evaluation programs.

X. "Involuntary separation" means involuntary removal of an employee from the classified service without prejudice as provided for in *1.7.10.13 NMAC*.

Y. "Job size" means the levels of responsibility in relation to roles within the same technical occupation group, differences in know-how and accountability in the manager categories and agency utilization of the technical occupation group role or manager category. The job size continuum corresponds to the distinctions in relative worth made by the hay guide chart factor system. It also represents a continuum of career growth within a given occupation.

Z. "Manager" means an employee in a manager category that manages internal staff and/or external staff, and who plans, organizes, integrates, coordinates, and controls the activities of others. A manager also is held accountable for the performance of people, services, systems, programs and resources and can change their direction, objectives and assignments.

AA. "Manager category" means the five manager categories which encompass the full range of management jobs in the classified service.

BB. "Midpoint" means the salary midway between the minimum and maximum pay rates of a pay band or pay opportunity that represents the competitive market rate for jobs of the same relative worth in the relevant labor market(s). Midpoint represents a compa-ratio value of 1.00 or 100% percent.

CC. "Minimum qualifications" means statutory requirements as required by law, which shall be used to reject applicants.

DD. "Office" means the state personnel office.

EE. "Pay band" means the range of pay rates, from minimum to maximum for a technical occupation group role.

FF. "Pay opportunity" means the range of pay rates established for a field of work within a manager category.

GG. "Probationer" means an employee in the classified service who has not completed the one-year probationary period.

HH. "Promotion" means the change of an employee from a classified position in one pay band to a classified position in a higher pay band or from a classified position in one manager category to a classified position in a higher manager category or from a technical occupation group to a manager category.

II. "Reduction" means a voluntary change without prejudice, within an employee's pay band or pay opportunity,

or from a classified position in one pay band to a classified position in a lower pay band or from a classified position in one manager category to a classified position in a lower manager category or from a manager category to a technical occupation group, or voluntary removal of supervisory responsibilities and pay.

JJ. "Relation by blood or marriage within the third degree" includes spouse, domestic partner, parent, mother-in-law, father-in-law, step-parent, children, domestic partner children, son-in-law, daughter-in-law, step-child, brother, step-brother, brother-in-law, sister, step-sister, sister-in-law, grandparent, grandchild, uncle, aunt, nephew, niece, great-grandchild, and great-grandparent.

KK. "Resignation" means the voluntary separation of an employee from the classified service.

LL. "Rules" means the rules and regulations of the personnel board.

MM. "Status" means all of the rights and privileges of an appointment.

NN. "Suspension" means an involuntary leave of absence without pay for disciplinary reasons for a period not to exceed 30 calendar days or a temporary reduction in pay for a period not to exceed 160 consecutive work hours.

OO. "Technical occupation group" means (*based on the standard occupation classification system devised at the direction of congress by the federal bureau of labor statistics to describe and sort, by occupation, all work performed in the United States*) that each technical occupation group represents the continuum of non-managerial jobs within an occupation, from the most basic to the most advanced. It does not mean any given agency will have the full range of the technical occupation group for any given job.

PP. "Technical occupation group role" means a representation of the continuum of job levels within a technical occupation group that an agency utilizes to carry out a part of its mission and contains relative complexity (know-how, problem solving, and accountability) factors which are measured by the hay system to determine job size and relative worth.

QQ. "Transfer" means the movement of an employee from one position to another in the same pay band or pay opportunity without a break in employment.

RR. "Without prejudice" means a declaration that no rights or privileges of the employee concerned are to be considered as thereby waived or lost except in so far as may be expressly conceded or decided.

SS. "Writing or written" means in the written form and/or an alternative format, where deemed appropriate, and

when requested.

[1.7.1.7 NMAC - Rp, 1 NMAC 7.1.7, 07/07/01; A, 11/14/02; A 10/30/03]

NEW MEXICO STATE PERSONNEL BOARD

This is an amendment to Subsection of H 1.7.4.13 NMAC, Salary Upon Transfer, effective 10/30/2003.

1.7.4.13 ADMINISTRATION OF THE SALARY SCHEDULES:

A. Entrance Salary:

(1) Upon entrance to a technical occupation group role, a newly-appointed employee's salary, subject to budget availability, should reflect appropriate placement within the pay band. Any entrance salary in the principal contributor zone must receive approval from the director or authorized agent prior to appointment.

(2) Upon entrance to a manager category, a newly-appointed employee's salary, subject to budget availability, should reflect appropriate placement within the pay opportunity. Any entrance salary which exceeds a compa-ratio of 100.0% must receive approval from the director or authorized agent prior to appointment.

B. Pay for Performance Increase:

(1) Subject to specific statutory authorization for each state fiscal year and subject to agency budget availability, employees who fulfill established performance criteria shall be eligible for a salary increase within their assigned pay band or pay opportunity.

(2) Employees with a salary at or above the maximum of the position's pay band or pay opportunity shall not be eligible for an increase unless authorized by statute.

(3) Employees in a technical occupation group role or manager category with a higher pay band or pay opportunity than that assigned to the position shall not be eligible for a pay for performance increase unless the employee's technical occupation group role or manager category is adjusted to the technical occupation group role or manager category assigned to the position before the end of that state fiscal year. Thereafter, the employee shall be eligible for a pay for performance increase during the first full pay period following the adjustment provided that the employee's salary does not equal or exceed the maximum value of the new pay band or pay opportunity.

C. **Salary Upon In Pay Band or In Pay Opportunity Adjustment:** Upon in pay band adjustment or in pay opportunity adjustment, subject to budget

availability and reflective of appropriate placement, agencies may increase an employee's salary up to ten percent (10%) during a fiscal year. An employee may receive more than one adjustment within a fiscal year provided the salary increases do not exceed more than ten percent (10%) and the employee's base salary does not exceed the maximum of the assigned pay band or pay opportunity. An employee's salary being adjusted in accordance with **Subsection 1 of 1.7.4.13 NMAC** may be increased, subject to budget availability and board approval, greater than ten percent (10%) to bring the employee's salary to the minimum of the pay band or pay opportunity.

D. Salary Upon

Promotion: Upon promotion, an employee's salary, subject to budget availability, should reflect appropriate placement within the pay band or pay opportunity. A salary increase of less than five percent (5%) or greater than fifteen percent (15%) shall require approval of the director or authorized agent. A salary increase greater than fifteen percent (15%) to bring an employee's salary to the minimum of the pay band or pay opportunity or less than five percent (5%) to prevent an employee's salary from exceeding the maximum of the pay band or pay opportunity does not require the approval of the director or authorized agent. The salary of a promoted employee shall be in accordance with **Subsection B of 1.7.4.12 NMAC**.

E. Salary Upon

Demotion: Upon demotion, an employee's salary shall be decreased to an hourly rate of pay which does not result in more than a fifteen percent (15%) decrease from the previous salary unless a greater decrease is required to bring the salary to the maximum of the new pay band or pay opportunity or the decrease is being made in accordance with **Paragraph (2) of Subsection F of 1.7.4.13 NMAC**.

F. Pay Allowance for Performing First Line Supervisor Duties:

(1) An agency shall grant a pay allowance to an employee in a technical occupation group who accepts and consistently performs additional duties which are characteristic of a first line supervisor. The amount of the pay allowance shall reflect the supervisory responsibilities which transcend the technical responsibilities inherent in the technical occupation group role and shall be between 0% and 20% above the employee's base pay rate.

(2) When the first line supervisor duties are no longer being performed, the agency shall revert the employee to the hourly rate of pay held prior to granting the pay allowance, plus any authorized pay increases.

(3) Agencies shall require that a form, established by the director, be signed by all employees at the time of acceptance of a pay allowance evidencing their agreement to the terms and conditions of the pay allowance.

(4) The director shall submit to the board a quarterly report on pay allowance.

G. Salary Upon

Suspension: The salary of an employee who has been suspended in accordance with **1.7.11 NMAC** may be temporarily reduced by up to fifteen percent (15%) for a period not to exceed 160 consecutive work hours.

H. Salary Upon Transfer:

(1) The salary of employees who are transferring in accordance with the provisions of **Subsection QQ of 1.7.1.7 NMAC** shall remain the same unless the director approves a higher or lower value.

(2) Employees shall be compensated, in accordance with agency policy, for all accumulated leave, other than sick, annual, or personal leave, prior to inter-agency transfer.

I. Salary Upon Pay

Band or Pay Opportunity Change: When a change of pay band or pay opportunity is authorized in accordance with the provisions of **1.7.4.9 NMAC, 1.7.4.10 NMAC, 1.7.4.11 NMAC and/or 1.7.4.12 NMAC** the salaries of affected employees shall be determined in accordance with **Subsection C of 1.7.4.12 NMAC**. Employees whose pay band or pay opportunity is adjusted upward or downward shall retain their current salary in the new pay band or pay opportunity. Employees' salaries may be addressed through in pay band or in pay opportunity adjustment unless otherwise allowed by statute.

J. Salary Upon

Reduction: The salary of employees who take a reduction may be reduced by up to fifteen percent (15%) unless the reduction is made in accordance with **Paragraph (2) of Subsection F of 1.7.4.13 NMAC**. An employee's salary should reflect appropriate placement within the pay band or pay opportunity. The director or authorized agent may approve a salary reduction greater than fifteen percent (15%) due to special circumstances that are justified in writing.

K. Salary Upon Return

To Work Or Reemployment: The salary of former employees who are returned to work or re-employed in accordance with the provisions of **1.7.10.10 NMAC, 1.7.10.11 NMAC, 1.7.10.12 NMAC, or 1.7.10.14 NMAC** shall not exceed the hourly pay rate held at the time of separation.

L. Salary Upon

Temporary Promotion: Pay for a temporary promotion under **Subsection E of**

1.7.5.12 NMAC, will be administered in accordance with *Subsection D of 1.7.4.13 NMAC*. The agency shall discontinue the temporary promotion increase when the temporary conditions cease to exist or at the end of the 12 month period, whichever occurs first.

M. Temporary Salary Increase: An agency may, with the approval of the director or authorized agent, grant a temporary salary increase of up to fifteen (15%), for a period not to exceed 1 year, from the effective date of the salary increase, for temporarily accepting and consistently performing additional duties which are characteristic of a technical occupation group role assigned to a higher pay band or of a manager category assigned to a higher manager category span of pay, or of a manager category if employee holds a position assigned to a technical occupation group. The director may approve temporary salary increases above the maximum of the employee's current technical occupation group role/manager category, pay band or pay opportunity, provided that the increase does not exceed the maximum of the higher pay band or pay opportunity assigned to the additional duties of the technical occupation group /manager category characteristics or fifteen (15%). The agency shall discontinue the temporary salary increase when the temporary conditions cease to exist or at the end of the 12 month period, whichever occurs first.

N. Shift Pay: Employees shall be paid, in addition to their regular pay rate, no less than \$0.60 per hour for each hour of regularly scheduled work between 6:00 p.m. and 7:00 a.m. Agencies shall notify the director of any change in this rate. [1.7.4.13 NMAC – Rp, 1.7.4.11 NMAC, 11/14/02; A, 10/30/03]

End of Adopted Rules Section

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Other Material Related to Administrative Law

NEW MEXICO TRANSPORTATION COMMISSION

STATE OF NEW MEXICO
STATE TRANSPORTATION COMMISSION

RESOLUTION NO. 2003-5 (JULY)

ADOPTING THE MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, MILLENNIUM EDITION (DECEMBER 2000)

WHEREAS, the State Transportation Commission ("Commission") has been charged with the mandatory, non-discretionary duty, pursuant to NMSA 1978, Section 66-7-101 (1978), to adopt a manual on traffic control devices for use on all highways in New Mexico; and

WHEREAS, all local political subdivisions are required to use the manual so adopted in erecting or posting traffic control devices within their jurisdictions; and

WHEREAS, the manual to be herein adopted is subject to frequent revisions and various implementation timetables; and

WHEREAS, through a previous Resolution dated January 18, 1991, the State Highway Commission adopted the Manual on Uniform Traffic Control Devices ("MUTCD"), including all subsequent revisions, as published by the United States Department of Transportation ("USDOT"); and

WHEREAS, the USDOT Federal Highway Administration ("FHWA") has published an updated version of the MUTCD entitled MUTCD 2000, Manual on Uniform Traffic Control Devices, Millennium Edition (December 2000) ("MUTCD 2000"); and

WHEREAS, the New Mexico State Highway and Transportation Department ("Department") desires to implement the provisions of MUTCD 2000, except for certain exceptions which have been approved by FHWA; and

WHEREAS, the Commission wishes to adopt the provisions of MUTCD 2000, subject to the exceptions approved by FHWA.

NOW, THEREFORE, IT IS RESOLVED THAT THE NEW MEXICO STATE TRANSPORTATION COMMISSION adopts as the official traffic control devices manual of the State of New Mexico the

MUTCD 2000, including, after reasonable review by the Department, all subsequent revisions, as published by the FHWA, subject to the exceptions for New Mexico approved by FHWA pursuant to a letter to the Department dated January 23, 2003, a copy of which is attached hereto; and

IT IS FURTHER RESOLVED, that this Resolution shall be published in the New Mexico Register and this Resolution and a copy of MUTCD 2000 shall be filed with the State Library in accordance with the State Rules Act; and

IT IS FURTHER RESOLVED, that this Resolution shall supersede the Resolution of the State Highway Commission dated January 18, 1991 concerning adoption of the MUTCD.

ADOPTED IN OPEN MEETING BY THE STATE TRANSPORTATION COMMISSION ON JULY 17, 2003.

U.S. Department of Transportation
Federal Highway Administration
New Mexico Division
604 West San Mateo Road
Santa Fe, New Mexico 87505

January 23, 2003

In Reply Refer To: HDA-NM

SUBJECT: Adoption of the MUTCD - Millennium Edition with exceptions

Ms. Rhonda Faught
Traffic Technical Support Section
PO Box 1149
Santa Fe, New Mexico 87504

Attention: Dee Beingessner

Dear Ms. Faught:

In the January 17, 2003 letter from the New Mexico State Highway and Transportation Department (NMSHTD) regarding the adoption of the Manual on Uniform Traffic Control Devices (MUTCD) - Millennium Edition with exceptions, the Federal Highway Administration (FHWA) has been requested to concur that the exceptions are in substantial conformance with MUTCD.

The proposed exceptions are:

1. Modify Section 4C.02 to include a new Option statement after the second Standard statement to allow the use of 56% traffic volumes when considering the combination of warrants A and B together with the con-

ditions identified in the first Option statement.

2. Modify Section 4C.08 to include a new Option statement at the end of the section to permit the use of 56% traffic volumes when considering crash warrants at intersections where the posted, statutory or 85th percentile speed on the major street exceeds 40 mph or at intersections within a built-up area of an isolated community having a population of less than 10,000.

3. Modify Section 5A.01 Standard B. to remove the wording that disallows a road on a designated State highway system from qualifying as a low-volume road.

We find these exceptions along with the support statements to be in substantial conformance with the MUTCD.

Sincerely yours,

/s/ J. Don Martinez
Division Administrator

cc: Ernest Huckabee, FHWA, HOTO,
MUTCD Team Leader
Jim Grownney, FHWA, NY
Division Office, MUTCD Team Chairman
Max Valerio, NMSHTD,
Engineering Design Division

**End of Other Related
Material Section**

SUBMITTAL DEADLINES AND PUBLICATION DATES

2003

Volume XIV	Submittal Deadline	Publication Date
Issue Number 17	September 2	September 15
Issue Number 18	September 16	September 30
Issue Number 19	October 1	October 15
Issue Number 20	October 16	October 30
Issue Number 21	October 31	November 13
Issue Number 22	November 14	November 26
Issue Number 23	December 1	December 15
Issue Number 24	December 16	December 30

2004

Volume XV	Submittal Deadline	Publication Date
Issue Number 1	January 2	January 15
Issue Number 2	January 16	January 30
Issue Number 3	February 2	February 13
Issue Number 4	February 16	February 27
Issue Number 5	March 1	March 15
Issue Number 6	March 16	March 31
Issue Number 7	April 1	April 15
Issue Number 8	April 16	April 30
Issue Number 9	May 3	May 14
Issue Number 10	May 17	May 28
Issue Number 11	June 1	June 15
Issue Number 12	June 16	June 30
Issue Number 13	July 1	July 15
Issue Number 14	July 16	July 30
Issue Number 15	August 2	August 13
Issue Number 16	August 16	August 31
Issue Number 17	September 1	September 15
Issue Number 18	September 16	September 30
Issue Number 19	October 1	October 14
Issue Number 20	October 15	October 29
Issue Number 21	November 1	November 15
Issue Number 22	November 16	November 30
Issue Number 23	December 1	December 14
Issue Number 24	December 15	December 30

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