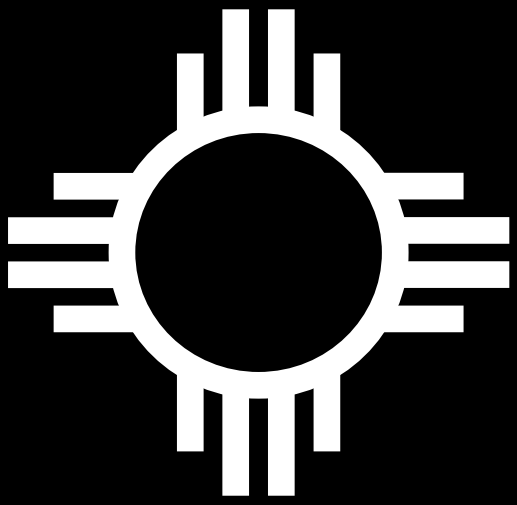
NEW MEXICO REGISTER



Volume XXII
Issue Number 4
February 28, 2011

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

The Commission of Public Records
Administrative Law Division
Santa Fe, New Mexico
2011

New Mexico Register

Volume XXII, Number 4
February 28, 2011

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A=***Amended***, E=***Emergency***, N=***New***, R=***Repealed***, Rn=***Renumbered***

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Notices of Rulemaking and Proposed Rules

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
NOTICE OF HEARING

On April 13, 2011, at 5:30 PM, the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM. The hearing will address:

Proposal to adopt amendments to 20.11.46 NMAC, *Sulfur Dioxide Emissions Inventory Requirements; Western Backstop Sulfur Dioxide Trading Program*, and to incorporate an amended 20.11.46 NMAC into the New Mexico State Implementation Plan (SIP) for air quality.

On November 12, 2003, the Albuquerque - Bernalillo County Air Quality Control Board (Air Board) adopted 20.11.46 NMAC, which implements the Western Backstop (WEB) Sulfur Dioxide (SO_2) Trading Program provisions as required by the federal Clean Air Act, the federal Regional Haze Rule, 40 CFR § 51.309 (Section 309), and the concomitant Albuquerque-Bernalillo County element of the State of New Mexico's regional haze implementation plan. Section 309 of the federal Regional Haze Rule establishes mandatory requirements that must be incorporated into the SIP, including regional SO_2 milestones, SO_2 emissions tracking requirements and a backstop regional cap-and-trade program for SO_2. 20.11.46 NMAC includes emissions inventory requirements for tracking compliance with the SO_2 milestones. The emissions inventory and tracking requirements for SO_2 were included as enforceable provisions in 20.11.46 NMAC. 20.11.46 NMAC contains the requirements that would apply to major industrial sources (i.e. 100 tons or more per year) of SO_2 emissions as a "backstop" regulatory program if specified SO_2 milestones were exceeded. If the milestones are exceeded, numerous mandatory requirements of 20.11.46 NMAC will be triggered, including the procedures and compliance requirements for sources in the trading program. However, the mandatory provisions that will be triggered by exceeding the milestones may never be implemented if the goal of meeting the regional SO_2 milestones through voluntary means is achieved.

Continued compliance with 40 CFR § 51.309 and associated legal challenges has necessitated revisions to the Regional Haze SIP and 20.11.46 NMAC. After first being adopted by the Air Board in 2003, 20.11.46 NMAC was subsequently amended on August 13, 2008, after a public review period and corresponding public hearings held on November 14, 2007 and August 13, 2008. These amendments became effective locally on September 15, 2008, but have not been approved by EPA. In order for the backstop trading rules to be approved by EPA, they must be consistent across all "309 states" (i.e. New Mexico, Utah, and Wyoming). Therefore, EPA is requiring that 20.11.46 NMAC be amended again, in order to bring it into alignment with the model rule language utilized by the other "309 states".

Therefore, the following amendments to 20.11.46 NMAC are being proposed:

1. Removing definitions for: "Allowance Tracking System"; "Allowance Tracking System Account"; and" Emissions Tracking Database";

2. Adding definitions for: "WEB Emissions and Allowance Tracking System" / "WEB EATS"; and "WEB EATS Account";

3. Clarifying that "retirement" of a source must be "permanent";

4. Modifying language at 20.11.46.14 NMAC, *Allowance Allocations*; 20.11.46.15 NMAC, *Establishment of Accounts*; 20.11.46.16 NMAC, *Monitoring, Record Keeping and Reporting*; 20.11.46.18 NMAC, *Use Of Allowances From A Previous Year;* and 20.11.46.20 NMAC, *Special Penalty Provisions For Year 2018 Milestone*; to align with Utah's trading rule (*Western Backstop Sulfur Dioxide Trading Program*, R307-250-6);

5. Modifying language at 20.11.46.21 NMAC, *SO_2 Monitoring of Fuel Gas Combustion Devices* and 20.11.46.22 NMAC, *Predictive Flow Monitoring Systems For Kilns With Positive Pressure Fabric Filter*, to align with Wyoming's trading rule (Appendix A: WEB Chapter 14, Section 2, Monitoring Protocols); and

6. Correcting cross-references, improving style, and increasing readability.

Following the hearing, the Air Board will hold its regular monthly meeting during which the Air Board is expected to consider adopting the aforementioned proposed amendments. Meetings of the Air Board are open to the public and all interested persons are encouraged to participate. All persons who wish to testify regarding the subject of the hearing may do so at the hearing and will be given a reasonable opportunity to submit relevant evidence, data, views, and arguments, orally or in writing, to introduce exhibits and to examine witnesses in accordance with the Joint Air Quality Control Board Ordinances, Section 9-5-1-6 ROA 1994 and Bernalillo County Ordinance 94-5, Section 6, and 20.11.82 NMAC, *Rulemaking Procedures -- Air Quality Control Board*.

Anyone intending to present technical testimony at this hearing is required by 20.11.82.20 NMAC to submit a written Notice Of Intent to testify (NOI) before 5:00pm on March 29, 2011, to: "Attn: Hearing Clerk, Ms. Janice Wright, Albuquerque Environmental Health Department, P.O. Box 1293, Albuquerque, NM 87103", or to deliver the NOI to the Environmental Health Department, Suite 3023, 3rd Floor, One Civic Plaza (400 Marquette Avenue NW), Albuquerque, NM 87102. The NOI shall: 1. identify the person for whom the witness or witnesses will testify; 2. identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background; 3. summarize or include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness; 4. include the text of any recommended modifications to the proposed regulatory change; and 5. list and describe, or attach, all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

In addition, written comments to be incorporated into the public record for this hearing should be received at the above P.O. Box, or Environmental Health Department office, before 5:00 pm on April 6, 2011. Comments shall include the name and address of the individual or organization submitting the statement. Written comments may also be submitted electronically to jcwright@cabq.gov and shall include the required name and address information. Interested persons may obtain a copy of the proposed regulation at the Environmental Health Department office, or by contacting Ms. Janice Wright electronically at jcwright@cabq.gov or by phone (505) 768-2601, or by downloading a copy from the City of Albuquerque Air Quality Division website http://www.cabq.gov/airquality/aqcb/public-review-drafts .

NOTICE FOR PERSONS WITH DISABILITIES: If you have a disability and/or require special assistance please call (505) 768-2600 [Voice] and special assistance will be made available to you to review any public meeting documents, including agendas and minutes. TTY users call the New Mexico Relay at 1-800-659-8331 and special assistance will be made available to you to review any public meeting documents, including agendas and minutes

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD
NOTICE OF RULEMAKING HEARING

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing on May 2, 2011 at 10:00 a.m. in Room 317 at the State Capital in Santa Fe, New Mexico. The purpose of the hearing is to consider the matter of EIB 10-14 (R), proposed revisions to Air Quality Control Regulations 20.2.74 New Mexico Administrative Code (NMAC) (Permits-Prevention of Significant Deterioration) and 20.2.79 NMAC (Permits- Nonattainment Areas).

The proponent of this regulatory adoption and revision is the New Mexico Environment Department ("NMED").

The purpose of the public hearing is to consider and take possible action on a petition from NMED regarding proposed revisions to 20.2.74 - *Permits - Prevention of Significant Deterioration*; and 20.2.79 - *Permits - Nonattainment Areas* to comply with Implementation Rules adopted by the U.S. Environmental Protection Agency (EPA) for the particulate matter 2.5 microns in size and less (PM2.5) National Ambient Air Quality Standards (NAAQS) and recordkeeping and reporting standards. Under Section 110(A)(2) of the Clean Air Act, states are required to update state implementation plans upon the promulgation of a new or revised NAAQS. The NMED will host an informational open house on the proposed revisions to 20.2.74, and 20.2.79 NMAC at the NMED Air Quality Bureau Office, 1301 Siler Rd, Building B, Santa Fe, New Mexico 87507, from 12:00p.m.-5:00p.m. on April 6, 2011.

The proposed revised regulations may be reviewed during regular business hours at the NMED Air Quality Bureau office, 1301 Siler Road, Building B, Santa Fe, New Mexico. Full text of NMED's proposed revised regulations are available on NMED's web site at www.nmenv.state.nm.us, or by contacting Gail Cooke at (505) 476-4319 or gail.cooke@state.nm.us.

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures - Environmental Improvement Board), the Environmental Improvement Act, Section 74-1-9 NMSA 1978, the Air Quality Control Act, Section 74-2-6 NMSA 1978, and other applicable procedures.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Board a written notice of intent to do so. The notice of intent shall:

(1) identify the person for whom the witness(es) will testify;
(2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
(3) summarize or include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;
(4) list and describe, or attach, each exhibit anticipated to be offered by that person at the hearing; and
(5) attach the text of any recommended modifications to the proposed new and revised regulations.

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 pm on April 15, 2011, and should reference the docket number, EIB 10-14 (R), and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Felicia Orth, Acting Board Administrator
Office of the Environmental Improvement Board
Harold Runnels Building
1190 St. Francis Dr., Room 3056-N
Santa Fe, NM 87502
Phone: (505) 827-0339, Fax (505) 827-2836

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is not unduly repetitious of the testimony.

A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing, or submit it at the hearing.

Persons having a disability and needing help in being a part of this hearing process should contact Judy Bentley by April 15, 2011 at the NMED, Personnel Services Bureau, P.O. Box 26110, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502, telephone 505-827-9872. TDY users please access her number via the New Mexico Relay Network at 1-800-659-8331.

The Board may make a decision on the proposed revised regulations at the conclusion of the hearing, or the Board may convene a meeting at a later date to consider action on the proposal.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

ENVIRONMENTAL IMPROVEMENT BOARD
NOTICE OF PUBLIC HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE SOLID WASTE RULES, 20.9.2 AND 20.9.3 NMAC.

The New Mexico Environmental Improvement Board ("Board" or "EIB") will hold a public hearing on May 2, 2011 at 10:00 a.m. and continuing thereafter as necessary in Room 317, State Capitol Building, 490 Old Santa Fe Trail, Santa Fe, New Mexico. The hearing time and location may change prior to May 2, 2011 and those interested in attending should check the EIB website: http://www.nmenv.state.nm.us/eib/ prior to the hearing. The purpose of the hearing is to consider proposed amendments to 20.9.2 and 20.9.3 NMAC of the Solid Waste Rules. The Solid Waste Bureau of the New Mexico Environment Department, the New Mexico Board of Pharmacy and New Mexico Attorney General Gary K. King are petitioning for the amendment of these rules.

The proposed amendments create a "permit by rule" for both single-event and long-term household pharmaceutical take-back programs. The proposed amendments also allow incinerators owned by law enforcement agencies to incinerate non-hazardous household pharmaceutical waste, as long as the incinerators meet certain specifications to ensure the proper destruction of these wastes.

Please note formatting and minor technical changes in the regulations may occur. In addition, the Board may make other amendments as necessary to accomplish the purpose of providing public health and safety

in response to public comments submitted to the Board and evidence presented at the hearing.

The proposed revisions to the rules may be reviewed during regular business hours at the office of the Environmental Improvement Board, Harold Runnels Building, 1190 St. Francis Drive, Room N-2153 Santa Fe, NM, 87505. Copies of the proposed rules may be obtained by contacting the Board Administrator at (505) 827-0339 or by email at felicia.orth@state.nm.us. Please refer to Docket No. EIB 10-13(R). Written comments regarding the revised rules may be addressed to the Board Administrator at the above address, and should reference Docket No. EIB 10-13(R).

The hearing will be conducted in accordance with the Environmental Improvement Board Rulemaking Procedures, 20.1.1 NMAC.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Any person who wishes to submit a non-technical written statement for the record in lieu of oral testimony shall file such statement prior to the close of the hearing.

Persons wishing to present technical testimony must file with the Board a written notice of intent to do so. The notice of intent shall:

identify the person or entity for whom the witness(es) will testify;

identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;

summarize or include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;

list and describe, or attach, each exhibit anticipated to be offered by that person at the hearing; and

attach the text of any recommended modifications to the proposed regulatory changes.

Notices of intent for the hearing must be received in the Office of the Environmental Improvement Board not later than 5:00 pm on April 15, 2011, and should reference the name of the regulation, the date of the hearing, and Docket No. EIB 10-13(R). Notices of intent to present technical testimony should be submitted to:

Board Administrator
NMED Boards and Commissions
Harold Runnels Building
1190 St. Francis Dr., Room N-2153
Santa Fe, NM 87502

If you are an individual with a disability and you require assistance or an auxiliary aid, e.g. sign language interpreter, to participate in any aspect of this process, please contact Judy Bentley at the Personnel Services Bureau by April 15, 2011. The Personnel Services Bureau can be reached at the New Mexico Environment Department, 1190 St. Francis Drive, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2844. TDD or TDY users may access this number via the New Mexico Relay Network (Albuquerque TDD users: (505) 275-7333; outside of Albuquerque: 1-800-659-1779).

The Board may make a decision on the proposed regulatory change at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

NEW MEXICO REAL ESTATE APPRAISERS BOARD

LEGAL NOTICE

The New Mexico Real Estate Appraisers Board will conduct a rule hearing on Wednesday, March 30, 2011, at 9 a.m. in the main conference room at the Albuquerque offices of the Regulation and Licensing Department, 5200 Oakland Avenue NE in Albuquerque, New Mexico.

The Board will be considering proposed changes to the Real Estate Appraisers Board Rules, including Parts 16.62.1 NMAC, General Provisions; 16.62.2 NMAC, Application for Apprentice; 16.62.8 NMAC Educational Programs/Continuing Education, and other parts affected by changes to the foregoing parts.

The Board will also be considering proposed changes to the Real Estate Appraisers Board Rules governing Real Estate Appraisal Management Companies, including Part 16.65.1 NMAC General Provisions; 16.65.2 NMAC Application for Registration, and other parts affected by changes to the foregoing parts.

Copies of the proposed changes to the rules can be obtained by contacting Wayne W. Ciddio, Board Administrator, Real Estate Appraisers Board, 5200 Oakland Avenue NE, Albuquerque, New Mexico 87113, Telephone Number (505) 222-9829, email wayne.ciddio@state.nm.us after March 1, 2011.

In order for the Board members to review the comments in their meeting packets prior to the meeting, persons wishing to make comments regarding the proposed rules must present them to the Board Office in writing no later than March 28, 2011.. Persons wishing to present their comments at the hearing will need (10) copies of any comments or proposed changes for distribution to the Board and staff.

The Board may enter into Executive Session pursuant to § 10-15-1 of the Open Meetings Act, to discuss matters related to the issuance, suspension, renewal or revocation of licenses.

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) 476-4860 at least two weeks prior to the meeting or as soon as possible.

End of Notices and Proposed Rules Section

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Adopted Rules

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

This is an amendment to 20.11.4 NMAC, amending Sections 1, 2, 3, 6, 7, 9, 10, and 11; reserving Sections 12-152; renumbering Sections 12-19; and adding Sections 161-165, effective March 14, 2011.

20.11.4.1 ISSUING AGENCY: Albuquerque - Bernalillo County Air Quality Control Board. P.O. Box 1293, Albuquerque, NM 87103. Telephone: (505) [~~768-2600~~] 768-2601.
[12/16/94. . .12/1/95; 20.11.4.1 NMAC – Rn, 20 NMAC 11.04.I.1, 10/1/02; A, 3/14/11]

20.11.4.2 SCOPE:

[~~**A.**~~] The provisions of [~~this Part~~] 20.11.4 NMAC shall apply in all nonattainment and maintenance areas of and within Bernalillo county.

A. Prohibition: Pursuant to 40 CFR 93.150:

(1) No department, agency or instrumentality of the federal government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity that does not conform to an applicable implementation plan or maintenance plan.

(2) A federal agency must make a determination that a federal action conforms to the applicable implementation plan or maintenance plan in accordance with the requirements of 20.11.4 NMAC before the action is taken.

(3) Reserved.

(4) Notwithstanding any provision of 20.11.4 NMAC, a determination that an action is in conformance with the applicable implementation plan or maintenance plan does not exempt the action from any other requirements of the applicable implementation plan or maintenance plan, the NEPA or the Clean Air Act (CAA).

(5) If an action would result in emissions originating in more than one nonattainment or maintenance area, the conformity must be evaluated for each area separately.

B. Exempt: [~~This Part~~] 20.11.4 NMAC does not apply to sources within Bernalillo county, which are located on Indian lands over which the Albuquerque - Bernalillo county air quality control board lacks jurisdiction.
[12/16/94. . .12/1/95; 20.11.4.2 NMAC – Rn, 20 NMAC 11.04.I.2, 10/1/02; A, 3/14/11]

20.11.4.3 S T A T U T O R Y AUTHORITY: [~~This Part~~] 20.11.4 NMAC is adopted pursuant to the authority provided in the New Mexico Air Quality Control Act, NMSA 1978 74-2-4, 74-2-5.C; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance 94-5 4; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994 9-5-1-4.
[12/16/94. . .12/1/95; 20.11.4.3 NMAC – Rn, 20 NMAC 11.04.I.3, 10/1/02; A, 3/14/11]

20.11.4.6 OBJECTIVE: [~~The objective of this Part is~~] To implement Section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.) and [~~regulations under 40 CFR Part 51 Subpart W~~] the related requirements of 23 U.S.C. 109(j), with respect to the conformity of [~~general federal actions to the applicable implementation plan~~] transportation plans, programs, and projects which are developed, funded, or approved by the United States department of transportation (DOT), and by metropolitan planning organizations (MPOs) or other recipients of funds under Title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53). This rule sets forth policy, criteria, and procedures for demonstrating and assuring conformity of [~~general federal actions~~] such activities to [~~the~~] an applicable implementation plan [~~Under these authorities:~~] developed pursuant to Section 110 and Part D of the CAA.

[~~A.~~ ~~No department, agency or instrumentality of the federal government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity, which does not conform to an applicable implementation plan.~~

~~**B.** A federal agency must make a determination that a federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.~~

~~**C.** Subsection B. of 20.11.4.6 NMAC does not include federal actions where either:~~

~~(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a:~~

~~(a) Final environmental assessment (EA);~~

~~(b) Environmental impact statement (EIS), or;~~

~~(c) Finding of no significant impact (FONSI) that was prepared prior to January 31, 1994;~~

~~(2) Or:~~

~~(a) Prior to January 31, 1994, an EA was commenced or a contract was awarded to develop the specific environmental analysis;~~

~~(b) Sufficient environmental analysis is completed by March 15, 1994 so that the federal agency may determine that the federal action is in conformity with the specific requirements and the purposes of the applicable state Implementation Plan (SIP) pursuant to the agency's affirmative obligation under section 176(c) of the Clean Air Act; and~~

~~(c) A written determination of conformity under section 176(c) of the CAA has been made by the federal agency responsible for the federal action by March 15, 1994.~~

~~**D.** Notwithstanding any provision of this Part, a determination that an action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the NEPA, or the CAA.~~]
[12/16/94. . .12/1/95; 20.11.4.6 NMAC – Rn, 20 NMAC 11.04.I.6, 10/1/02; A, 3/14/11]

20.11.4.7 DEFINITIONS: Terms used but not defined in [~~this Part~~] 20.11.4 NMAC shall have the meaning given them by the CAA and EPA's regulations, (40 CFR Chapter I), in that order of priority. In addition to the definitions in 20.11.4.7 NMAC the definitions in 20.11.1.7 NMAC apply unless there is a conflict between definitions, in which case the definition in [~~this Part~~] 20.11.4 NMAC shall govern.

A. "Affected federal land manager" means the federal agency or the federal official charged with direct responsibility for management of an area designated as Class I under the CAA (42 U.S.C. 7472) that is located within 100 km of the proposed federal action.

B. "Air agency" means the [~~Air Pollution Control Division (APCD)~~] Air Quality Division (AQD) of the city of Albuquerque environmental health department (EHD). The EHD, or its successor agency or authority, as represented by the department director or his/her designee, is the lead air quality planning agency for the Albuquerque - Bernalillo county nonattainment/maintenance area. The EHD serves as staff to the Albuquerque - Bernalillo county (ABC) air quality control board (AQCB), also referred to as the ABC/AQCB, and is responsible for implementing AQCB regulations.

C. "Applicability analysis" [~~means the early quantification and evaluation during the conformity process where yearly quantities of criteria pollutants are calculated to determine if the thresholds of 20.11.4.12 NMAC are met.~~] is the process of determining if a federal action must be supported by a conformity determination.

D. "Applicable implementation plan" or "applicable state implementation plan" or "applicable SIP" means the portion (or portions) of the SIP or most recent revision thereof, which has been approved under Section [~~110~~] 110(k) of the CAA, [~~or~~] a federal implementation plan (FIP) promulgated under Section 110(c) of the CAA [~~(federal implementation plan)~~], or a plan promulgated or approved pursuant to [~~regulations promulgated under~~] Section 301(d) of the CAA (tribal implementation plan or TIP) and which implements the relevant requirements of the CAA.

E. "Area-wide air quality [~~monitoring~~] modeling analysis" means an assessment on a scale that includes the entire nonattainment or maintenance area [~~which uses~~] using an air quality dispersion model or photochemical grid model to determine the effects of emissions on air quality, for example, an assessment using EPA's community multiscale air quality (CMAQ) modeling system.

F. "Cause or contribute to a new violation" means a federal action that:

(1) Causes a new violation of a national ambient air quality standard (NAAQS) at a location in a nonattainment or maintenance area which would otherwise not be in violation of the standard during the future period in question if the federal action were not taken; or

(2) Contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a NAAQS at a location in a nonattainment or maintenance area in a manner that would increase the frequency or severity of the new violation.

G. "Caused by" as used in the terms "direct emissions", and "indirect emissions" means emissions that would not otherwise occur in the absence of the federal action.

H. "Confidential business information" or "CBI" means information that has been determined by a federal agency, in accordance with its applicable regulations, to be a trade secret, or commercial or financial information obtained from a person and privileged or confidential and it is exempt from required disclosure under the Freedom of Information Act (5 U.S.C.552(b)(4)).

I. "Conformity determination" means the evaluation (made after an applicability analysis is completed) that a federal action conforms to the applicable implementation plan or maintenance plan and meets the requirements of 20.11.4 NMAC.

J. "Conformity evaluation" means the entire process from the applicability analysis through the conformity determination that is used to demonstrate that the federal action conforms to the requirements of 20.11.4 NMAC.

K. "Continuing program responsibility" means a federal agency has responsibility for emissions caused by:

(1) actions it takes itself; or

(2) actions of non-federal entities that the federal agency, in exercising its normal programs and authorities, approves, funds, licenses or permits, provided the agency can impose conditions on any portion of the action that could affect the emissions.

L. "Continuous program to implement" means that the federal agency has started the action identified in the plan and does not stop the actions for more than an 18-month period, unless it can demonstrate that such a stoppage was included in the original plan.

[~~H.~~]M. "Criteria pollutant or standard" means any pollutant for which there is established a NAAQS at 40 CFR Part 50.

[~~I.~~]N. "Direct emissions" means those emissions of a criteria pollutant or its precursors that are caused or initiated by the federal action and originate in a nonattainment or maintenance area and occur at the same time and place as the action and are reasonably foreseeable.

[~~J.~~]O. "Emergency" means a situation where extremely quick action on the part of the federal agencies involved is needed and where the timing of such federal activities makes it impractical to meet the requirements of [~~this Part~~] 20.11.4 NMAC, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist acts, and military mobilizations such as assembling and organizing troops and matériel for the defense of a nation in time of war or national emergency.

[~~K.~~]P. "Emissions budgets" are those portions of the applicable SIP's projected emissions inventories that describe the levels of emissions (mobile, stationary, area, etc.) that provide for meeting reasonable further progress milestones, attainment, [~~and/or~~] or maintenance for any criteria pollutant or its precursors.

Q. "Emissions inventory" means a listing of information on the location, type of source, type and quantity of pollutant emitted as well as other parameters of the emissions.

[~~L.~~]R. "Emissions offsets" for purposes of [~~20.11.4.5~~] 20.11.4.158 NMAC are emissions reductions which are quantifiable, consistent with the applicable SIP attainment and reasonable further progress demonstrations, surplus to reductions required by, and credited to, other applicable SIP provisions, enforceable at both the state and federal levels, and permanent within the timeframe specified by the program.

[~~M.~~]S. "Emissions that a federal agency has a continuing program responsibility for" means emissions that are specifically caused by an agency carrying out its authorities, and does not include emissions that occur due to subsequent activities, unless such activities are required by the federal agency. Where an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.

[~~N.~~]T. "Federal action" means any activity engaged in by a department, agency, or instrumentality of the federal government, or any activity that a department, agency or instrumentality of the federal government supports in any way, provides financial assistance for, licenses, permits, or approves, other than activities related to transportation plans, programs, and projects developed, funded, or approved under Title 23 U.S.C. or the federal Transit Act (49 U.S.C. 1601 *et seq*.). Where the federal action is a permit, license, or other approval for some aspect of a non-federal undertaking, the relevant activity is the part, portion, or phase or the non-federal undertaking that requires the federal permit, license, or approval.

[~~O.~~]U. "Federal agency" means a federal department, agency, or instrumentality of the federal government.

[~~P.~~]V. "Increase the frequency or severity of any existing violation of any standard in any area" means to cause a nonattainment area to exceed a standard more often or to cause a violation at a greater concentration than previously existed [~~and/or~~] or would otherwise exist during the future period in question, if the project were not implemented.

[~~Q.~~]W. "Indirect emissions"

(1) means those emissions of a criteria pollutant or its precursors: [~~that:~~]

[~~(1)~~] (a) that are caused or initiated by the federal action [~~but may occur later in time and/or may be farther removed in distance from the action itself but~~] and originate in the same nonattainment or maintenance area but occur at a different time or place as the action;

(b) that are [~~still~~] reasonably foreseeable; [~~and~~]

[~~(2)~~] (c) that the [~~federal~~] agency can practicably control; and [~~will maintain control over due to a continuing program responsibility of the federal agency including, but not limited to:~~

~~(a) traffic on or to, or stimulated by, a proposed facility which is related to increases or other changes in the scale or timing of operations of such facility;~~

~~(b) emissions related to the activities of employees of contractors or federal employees such as employee work trips;~~

~~(c) emissions related to employee commuting and similar programs to increase average occupancy imposed on all employers of a certain size in the locality;~~

~~(d) emissions related to the use of federal facilities under lease or temporary permit;~~

~~(e) emissions related to the activities of contractors or leaseholders that may be addressed by provisions that are usual and customary for contracts or leases or within the scope of contractual protection of the interests of the United States; and~~

~~(f) fugitive dust from dirt roads or disturbed soil.~~]

(d) for which the agency has continuing program responsibility.

(2) For the purposes of this definition, even if a federal licensing, rulemaking or other approving action is a required initial step for a subsequent activity that causes emissions, such initial steps do not mean that a federal agency can practically control any resulting emissions.

[~~R.~~]X. "Local air quality modeling analysis" means an assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested [~~roadway intersections and highways or transit terminals~~] roadways on a federal facility, which uses an air quality dispersion model, (e.g., industrial source complex model or emission and dispersion model system), to determine the effects of emissions on air quality.

[~~S.~~]Y. "Maintenance area" means an area [~~with~~] that was designated as nonattainment and has been re-designated in 40 CFR Part 81 to attainment, meeting the provisions of Section 107(d)(3)(E) of the CAA and has a maintenance plan approved under Section 175A of the CAA.

[~~T.~~]Z. "Maintenance plan" means a revision to the applicable SIP, meeting the requirements of Section 175A of the CAA.

[~~U.~~]AA. "Metropolitan planning organization" or "MPO" [~~is that organization designated as being responsible, together with the state, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. 1607~~] means the policy board of an organization created as a result of the designation process in 23 U.S.C. 134(d).

[~~V.~~]BB. "Milestone" has the meaning given in Sections 182(g)(1) and 189(c)(1) of the CAA. A milestone consists of an emissions level and date on which it is required to be achieved.

CC. "Mitigation measure" means any method of reducing emissions of the pollutant or its precursor taken at the location of the federal action and used to reduce the impact of the emissions of that pollutant caused by the action.

[~~W.~~]DD. "National ambient air quality standards" or "NAAQS" are those standards established pursuant to Section 109 of the CAA and include standards for carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO_2), ozone, particulate matter (PM_{10} and $PM_{2.5}$), and sulfur dioxide (SO_2).

[~~X.~~]EE. "NEPA" is the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.).

[~~Y.~~]FF. "Nonattainment Area" or "NAA" means an area designated as nonattainment under Section 107 of the CAA and described in 40 CFR Part 81.

[~~Z.~~]GG. "Precursors of a criteria pollutant" are:

(1) for ozone, nitrogen oxides (NO_X), unless an area is exempted from NO_X requirements under Section 182(f) of the CAA, and volatile organic compounds (VOC); and

(2) for PM_{10}, those pollutants described in the PM_{10} nonattainment area applicable SIP as significant contributors to the PM_{10} levels.

(3) For $PM_{2.5}$:

(a) sulfur dioxide (SO_2) in all $PM_{2.5}$ nonattainment and maintenance areas,

(b) nitrogen oxides in all $PM_{2.5}$ nonattainment and maintenance areas unless both the department and EPA determine that it is not a significant precursor, and

(c) volatile organic compounds (VOC) and ammonia (NH_3) only in $PM_{2.5}$ nonattainment or maintenance areas where either the department or EPA determines that they are significant precursors.

[~~AA.~~]HH. "Reasonably foreseeable emissions" are projected future direct and indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known and the emissions are quantifiable, as described and documented by the federal agency based on its own information and after reviewing any information presented to the federal agency.

[~~BB.~~]II. "Regional water [~~**and/or**~~] **or wastewater projects"** include construction, operation, and maintenance of water or wastewater conveyances, water or wastewater treatment facilities, and water storage reservoirs, which affect a large portion of a nonattainment or maintenance area.

[~~CC.~~]JJ. "Regionally significant action" means a federal action for which the direct and indirect emissions of any pollutant represent 10 percent or more of a nonattainment or maintenance area's emissions inventory for that pollutant.

KK. "Restricted information" means information that is privileged or that is otherwise protected from disclosure pursuant to applicable statutes, executive orders, or regulations. Such information includes, but is not limited to: Classified national security information, protected critical infrastructure information, sensitive security information, and proprietary business information.

LL. "Smoke management program" or "SMP" establishes a basic framework of procedures and requirements for managing smoke from fires that are managed for resource benefits. The purposes of SMPs are to mitigate the nuisance and public safety hazards (e.g., on roadways and at airports) posed by smoke intrusions into populated areas; to prevent deterioration of air quality and NAAQS violations; and to address visibility impacts in mandatory Class I federal areas in accordance with the regional haze rules.

MM. "Take or start the federal action" means the date that the federal agency signs or approves the permit, license, grant or contract or otherwise physically begins the federal action that requires a conformity evaluation under 20.11.4 NMAC.

[~~DD.~~]NN. "Total of direct and indirect emissions" means the sum of direct and indirect emissions increases and decreases caused by the federal action (i.e., the "net" emissions considering all direct and indirect emissions). The portion of emissions which are exempt or presumed to conform under Subsections C, D, [~~or~~] E or F of [~~20.11.4.12~~] 20.11.4.153 NMAC are not included in the "total of direct and indirect emissions." The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of precursors of criteria pollutants. [~~The segmentation of projects for conformity analyses when emissions are reasonably foreseeable is not permitted by this regulation. In many cases, the overall set of activities described within an environmental document (e.g. environmental assessment, environmental impact statement), a master plan, site plan, land or facility management plan, or similar planning document will constitute the action(s) to be evaluated. Where phasing is anticipated, analyses may need to evaluate key logical steps in the implementation of the project or proposal.~~]

OO. "Tribal implementation plan" or "TIP" means a plan to implement the national ambient air quality standards adopted and submitted by a federally recognized indian tribal government determined to be eligible under 40 CFR 49.9 and the plan has been approved by the EPA.

[12/16/94. . .12/1/95; 20.11.4.7 NMAC – Rn, 20 NMAC 11.04.I.7, 10/1/02; A, 3/14/11]

20.11.4.9 SAVINGS CLAUSE: Any amendment to 20.11.4 NMAC, which is filed, with the state records center shall not affect actions pending for violation of a city or county ordinance[~~, Air Quality Control~~

~~Board Regulation 43, or Part 04~~] 20.11.4 NMAC. Prosecution for a violation under prior regulation wording shall be governed and prosecuted under the statute, ordinance, part, or regulation section in effect at the time the violation was committed.
[12/16/94. . .12/1/95; 20.11.4.9 NMAC – Rn, 20 NMAC 11.04.I.9, 10/1/02; A, 3/14/11]

20.11.4.10 SEVERABILITY: If any section, paragraph, sentence, clause, or word of [~~this Part~~] 20.11.4 NMAC is for any reason held to be unconstitutional or otherwise invalid by any court, the decision shall not affect the validity of remaining provisions of [~~this Part~~] 20.11.4 NMAC.
[12/16/94. . .12/1/95; 20.11.4.10 NMAC – Rn, 20 NMAC 11.04.I.10, 10/1/02; A, 3/14/11]

20.11.4.11 DOCUMENTS: Documents incorporated and cited in [~~this Part~~] 20.11.4 NMAC may be viewed at the Albuquerque Environmental Health Department, 400 Marquette Ave. NW, Albuquerque, NM.
[12/1/95; 20.11.4.11 NMAC – Rn, 20 NMAC 11.04.I.11 & A, 10/1/02; A, 3/14/11]

20.11.4.12 to 20.11.4.152 [Reserved]

[~~20.11.4.12~~]20.11.4.153 [~~DETERMINATIONS FOR CONFORMITY~~] APPLICABILITY ANALYSIS:

A. Conformity determinations for federal actions related to transportation plans, programs, and projects developed, funded, or approved under Title 23 U.S.C. or [~~the federal Transit Act (49 U.S.C. 1601 et seq.)~~] 49 U.S.C. Chapter 53 must meet the procedures and criteria of [~~20.11.3 NMAC *Transportation Conformity*~~] 40 CFR Part 51, Subpart T, in lieu of the procedures set forth in [~~this Part~~] 20.11.4 NMAC.

B. For federal actions not covered by Subsection A of [~~20.11.4.12~~] 20.11.4.153 NMAC, a conformity determination is required for each criteria pollutant or precursor where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a federal action would equal or exceed any of the rates in Paragraph (1) or (2) of Subsection B of [~~20.11.4.12~~] 20.11.4.153 NMAC. [~~An applicability analysis shall be used to determine if an action meets these thresholds for actions, which are not otherwise exempted. In the event the requirements of in Paragraph (1) and (2), of Subsection B, of 20.11.4.12 NMAC are not met, a complete conformity determination will not be necessary. Agencies are nevertheless encouraged to coordinate with the air agency during the applicability analysis phase, especially when proposed actions are likely to produce meaningful levels of pollution even though the amount calculated may be below the identified thresholds. Awareness by the air agency of the many actions below the thresholds will assist the air agency in overall planning efforts (e.g. emission inventories).~~]

(1) For purposes of Subsection B of [~~20.11.4.12~~] 20.11.4.153 NMAC, the following rates apply in **nonattainment areas**:

Criteria Pollutant or Precursor [~~NONATTAINMENT AREAS~~]			**Rate (Tons/Year)**
Ozone (VOC's or NOx):			
	Serious NAA's		50
	Severe NAA's		25
	Extreme NAA's		10
	Other ozone NAA's outside an ozone transport region		100
	[~~Marginal and moderate~~] Other ozone NAA's inside an ozone transport region:		
		VOC	50
		NO_x	100
Carbon monoxide:			
	All NAA's		100
SO_2 or NO_2:			
	All NAA's		100
PM_{10}:			
	Moderate NAA's		100
	Serious NAA's		70
PM 2.5:			
	Direct emissions		100
	SO_2		100
	NO_x (unless determined not to be significant precursors)		100
	VOC or ammonia (if determined to be significant precursors)		100
Pb:			
	All NAA's		25

(2) For the purposes of Subsection B of [~~20.11.4.12~~] 20.11.4.153 NMAC, the following rates apply in **maintenance areas**:

Criteria Pollutant or Precursor [~~MAINTENANCE AREAS~~]		**Rate (Tons/Year)**
Ozone (NO_x, SO_2 or NO_2):		
	All maintenance areas	100
Ozone (VOC's):		
	Maintenance areas inside an ozone transport region	50
	Maintenance areas outside an ozone transport region	100
Carbon monoxide:		
	All maintenance areas	100
PM_{10}:		
	All maintenance areas	100
PM 2.5:		
	Direct emissions	100
	SO_2	100
	NO_x (unless determined not to be significant precursors)	100
	VOC or ammonia (if determined to be significant precursors)	100
Pb:		
	All maintenance areas	25

C. The requirements of [~~this Part~~] **20.11.4 NMAC shall not apply to the following federal actions:**

(1) actions where the total of direct and indirect emissions are below the emissions levels specified in Subsection B of [~~20.11.4.12~~] 20.11.4.153 NMAC.

(2) the following actions which would result in no emissions increase or an increase in emissions that is clearly de minimis:

(a) Judicial and legislative proceedings.

(b) Continuing and recurring activities such as permit renewals where activities conducted will be similar in scope and operation to activities currently being conducted.

(c) Rulemaking and policy development and issuance.

(d) Routine maintenance and repair activities including repair and maintenance of administrative sites, roads, trails, and facilities.

(e) Civil and criminal enforcement activities, such as investigations, audits, inspections, examinations, prosecutions, and the training of law enforcement personnel.

(f) Administrative actions such as personnel actions, organizational changes, debt management or collection, cash management, internal agency audits, program budget proposals, and matters relating to the administration and collection of taxes, duties and fees.

(g) The routine, recurring transportation of [~~material~~] matériel and personnel.

(h) Routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups [~~and/or~~] or for repair or overhaul.

(i) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site.

(j) Actions, such as the following, with respect to existing structures, properties, facilities and lands where future activities conducted will be similar in scope and operation to activities currently being conducted at the existing structures, properties, facilities, and lands; for example, relocation of personnel, disposition of federally-owned existing structures, properties, facilities, and lands, rent subsidies, operation and maintenance cost subsidies, the exercise of receivership or conservatorship authority, assistance in purchasing structures, and the production of coins and currency.

(k) The granting of leases, licenses such as for exports and trade, permits, and easements where activities conducted will be similar in scope and operation to activities currently being conducted.

(l) Planning, studies, and provision of technical assistance.

(m) Routine operation of facilities, mobile assets and equipment.

(n) Transfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer.

(o) The designation of empowerment zones, enterprise communities, or viticultural areas.

(p) Actions by any of the federal banking agencies or the federal reserve banks, including actions regarding charters, applications, notices, licenses, the supervision or examination of depository institutions or depository institution holding companies, access to the discount window, or the provision of financial services to banking organizations or to any department, agency or instrumentality of the United States.

(q) Actions by the board of governors of the federal reserve system or any federal reserve bank to effect monetary or exchange rate policy.

(r) Actions that implement a foreign affairs function of the United States.

(s) Actions (or portions thereof) associated with transfers of land, facilities, title, and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and where the federal agency does not retain continuing authority to control emissions associated with the lands, facilities, title, or real properties.

(t) Transfers of real property, including land, facilities, and related personal property from a federal entity to another federal entity and assignments of real property, including land, facilities, and related personal property from a federal entity, to another federal entity for subsequent deeding to eligible applicants.

(u) Actions by the department of the treasury to effect fiscal policy and to exercise the borrowing authority of the United States.

(v) Air traffic control activities and adopting approach, departure and enroute procedures for aircraft operations above the mixing height specified in the applicable SIP or TIP. Where the applicable SIP or TIP does not specify a mixing height, the federal agency can use the 3,000 feet above ground level as a default mixing height, unless the agency demonstrates that use of a different mixing height is appropriate because the change in emissions at and above that height caused by the federal action is *de minimis*.

(3) Actions where the emissions are not reasonably foreseeable, such as the following:

(a) Initial outer continental shelf lease sales which are made on a broad scale and are followed by exploration and development plans on a project level.

(b) Electric power marketing activities that involve the acquisition, sale and transmission of electric energy.

(4) Actions which implement a decision to conduct or carry out a conforming program such as prescribed burning actions which are consistent with a conforming land management plan.

D. Notwithstanding the other requirements of [~~this Part~~] 20.11.4 NMAC, a conformity determination is not required for the following federal actions (or portion thereof):

(1) The portion of an action that includes major or minor new or modified stationary sources that require a permit under the new source review (NSR) program (Section 110(a)(2)(c) and Section 173 of the CAA) or the prevention of significant deterioration (PSD) program (Title I, Part C of the CAA).

(2) Actions in response to emergencies [~~or natural disasters such as hurricanes, earthquakes, etc.,~~] which are typically commenced on the order of hours or days after the emergency [~~or disaster~~] and, if applicable, which meet the requirements of Subsection E of [~~20.11.4.12~~] 20.11.4.153 NMAC.

(3) Research, investigations, studies, demonstrations, or training (other than those exempted under Paragraph (2) of Subsection C of [~~20.11.4.12~~] 20.11.4.153 NMAC), where no environmental detriment is incurred [~~and/or~~] or, the particular action furthers air quality research, as determined by the air agency primarily responsible for the applicable SIP.

(4) Alteration and additions of existing structures as specifically required by new or existing applicable environmental legislation or environmental regulations (e.g., hush houses for aircraft engines and scrubbers for air emissions).

(5) Direct emissions from remedial and removal actions carried out under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and associated regulations to the extent such emissions either comply with the substantive requirements of the PSD/NSR permitting program or are exempted from other environmental regulation under the provisions of CERCLA and applicable regulations issued under CERCLA.

E. Federal actions which are part of a continuing response to an emergency or disaster under Paragraph (2) of Subsection D of [~~20.11.4.12~~] 20.11.4.153 NMAC and which are to be taken more than [~~6~~] six months after the commencement of the response to the emergency or disaster under Paragraph (2) of Subsection D of [~~20.11.4.12~~] 20.11.4.153 NMAC are exempt from the requirements of this regulation only if:

(1) the federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional 6 months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests and foreign policy commitments, or

(2) for actions which are to be taken after those actions covered by Paragraph (1) of Subsection E of [~~20.11.4.12~~] 20.11.4.153 NMAC, the federal agency makes a new determination as provided in Paragraph (1) of Subsection E of [~~20.11.4.12~~] 20.11.4.153 NMAC and:

(a) provides a draft copy of the written determinations required to affected EPA regional office(s), the affected state(s) or air pollution control agencies, and any federal recognized indian tribal government in the nonattainment or maintenance area; those organizations must be allowed 15 days from the beginning of the extension period to comment on the draft determination; and

(b) within 30 days after making the determination, publish a notice of the determination by placing a prominent advertisement in a daily newspaper of general circulation in the area affected by the action.

(3) If additional actions are necessary in response to an emergency or disaster under Paragraph (2), of Subsection D of 20.11.4.153 NMAC beyond the specified time period in Paragraph (2) of Subsection E of 20.11.4.153 NMAC, a federal agency can make a new written determination as described in Paragraph (2), of Subsection E of 20.11.4.153 NMAC for as many 6-month periods as needed, but in no case shall this exemption extend beyond three 6-month periods except where an agency:

(a) provides information to EPA and the state or tribe stating that the conditions that gave rise to the emergency exemption continue to exist and how such conditions effectively prevent the agency from conducting a conformity evaluation.

(b) Reserved.

F. Notwithstanding other requirements of [~~this Part~~] 20.11.4 NMAC, actions specified by individual federal agencies that have met the criteria set forth in either [~~Paragraph (1) or (2),~~] Paragraphs (1) (2) or (3) of Subsection G of [~~20.11.4.12~~] 20.11.4.153 NMAC and the procedures set forth in Subsection H of [~~20.11.4.12~~] 20.11.4.153 NMAC are "presumed to conform", except as provided in Subsection J of [~~20.11.4.12~~] 20.11.4.153 NMAC. Actions specified by individual federal agencies as "presumed to conform" may not be used in combination with one another when the total direct and indirect emissions from the combination of actions would equal or exceed any of the rates specified in Paragraphs (1) or (2) of Subsection B of 20.11.4.153 NMAC.

G. The federal agency must meet the criteria for establishing activities that are "presumed to conform" by fulfilling the requirements set forth in either [~~Paragraph (1) or (2), of Subsection A, of 20.11.4.12 NMAC~~] Paragraphs (1), (2) or (3) of Subsection G of 20.11.4.153 NMAC:

(1) The federal agency must clearly demonstrate using methods consistent with 20.11.4 NMAC that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not:

(a) cause or contribute to any new violation of any standard in any area;

(b) interfere with provisions in the applicable SIP for maintenance of any standard;

(c) increase the frequency or severity of any existing violation of any standard in any area; or

(d) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area including, where applicable, emission levels specified in the applicable SIP for purposes of:

(i) a demonstration of reasonable further progress;

(ii) a demonstration of attainment; or

(iii) a maintenance plan;

or

(2) The federal agency must provide documentation that the total of direct and indirect emissions from such future actions would be below the emission rates for a conformity determination that are established in Subsection B of [~~20.11.4.12~~] 20.11.4.153 NMAC, based, for example, on similar actions taken over recent years.

(3) The federal agency must clearly demonstrate that the emissions from the type or category of actions and the amount of emissions from the action are included in the applicable SIP or maintenance plan, and the state, local or tribal air quality agencies responsible for the SIP(s) or TIP(s) provide written concurrence that the emissions from the actions along with all other expected emissions in the area will not exceed the emission budget in the SIP.

H. In addition to meeting the criteria for establishing exemptions set forth in Paragraphs (1), [~~or~~] (2) or (3) of Subsection G of [~~20.11.4.12~~] 20.11.4.153 NMAC, the following procedures must also be complied with to presume that activities will conform:

(1) the federal agency must identify through publication in the federal register its list of proposed activities that are "presumed to conform" and the basis for the presumptions; the notice must clearly identify the type and size of the action that would be "presumed to conform" and provide criteria for determining if the type and size action qualifies it for the presumption;

(2) the federal agency must notify the EPA region VI office, [~~the air agency~~] state, local and tribal air agencies, and, where applicable, the agency designated under Section 174 of the CAA and the MPO and provide at least 30 days for the public to comment on the list of proposed activities "presumed to conform"; If the "presumed to conform" action has regional or national application (e.g., the action will cause emission increases in excess of the *de minimis* levels identified in Subsection B of 20.11.4.153 NMAC in more than one of EPA's regions), the federal agency, as an alternative to sending it to the EPA Region VI Office, can send the draft conformity determination to U.S. EPA, office of air quality planning and standards (OAQPS);

(3) the federal agency must document its response to all the comments received and make the comments, response, and final list of activities available to the public upon request; and

(4) the federal agency must publish the final list of such activities in the federal register.

I. [~~Notwithstanding the other requirements of 20.1.4 NMAC, when the total of direct and indirect emissions of any pollutant from a federal action does not equal or exceed the rates specified in Subsection B, of 20.11.4.12 NMAC, but represents 10 percent or more of a nonattainment or maintenance area's total emissions of that pollutant, the action is defined as a regionally significant action and the requirements of 20.11.4.6 NMAC and Sections 20.11.4.14 through 20.11.4.19 NMAC shall apply for the federal action.~~] Emissions from the following actions are "presumed to conform":

(1) Actions at installations with facility-wide emission budgets meeting the requirements in Section 93.161 provided that the state or tribe has included the emission budget in the EPA-approved SIP or maintenance plan and the emissions from the action along with all other emissions from the installation will not exceed the facility-wide emission budget.

(2) Prescribed fires conducted in accordance with a smoke management program (SMP) which meets the requirements of EPA's *interim air quality policy on wildland and prescribed fires* or, an equivalent replacement EPA policy.

(3) Emissions for actions that the state or tribe identifies in the EPA approved SIP or TIP as "presumed to conform".

J. [~~Where an action otherwise presumed to conform under Subsection F of 20.11.4.12 NMAC is a regionally significant action or does not in fact meet one of the criteria in Paragraph (1), of Subsection G. of 20.11.4.12 NMAC, that action shall not be presumed to conform and the requirements of 20.11.4.6 NMAC and Sections 20.11.4.14 through 20.11.4.19 NMAC shall apply for the federal action.~~] Even though an action would otherwise be "presumed to conform" under Subsection F or I of 20.11.4.153 NMAC, an action shall not be "presumed to conform" and the requirements of Section 40 CFR 93.151, Subsection A of 20.11.4.2 NMAC, Sections 13 through 19 and Sections 21 through 23 of 20.11.4 NMAC shall apply to the action if EPA or a third party shows that the action would:

(1) cause or contribute to any new violation of any standard in any area;

(2) interfere with provisions in the applicable SIP or TIP for maintenance of any standard;

(3) increase the frequency or severity of any existing violation of any standard in any area; or

(4) delay timely attainment of any standard or any required interim emissions reductions or other milestones in any area including, where applicable, emission levels specified in the applicable SIP or TIP for purposes of:

(a) a demonstration of reasonable further progress;

(b) a demonstration of attainment; or

(c) a maintenance plan.

K. The provisions of 20.11.4 NMAC shall apply in all nonattainment and maintenance areas except conformity requirements for newly designated nonattainment areas are not applicable until one year after the effective date of the final nonattainment designation for each NAAQS and pollutant in accordance with Section 176(c)(6) of the act.

[20.11.4.153 NMAC - Rn & A, 20.11.4.12 NMAC, 3/14/11]

[~~20.11.4.13~~]20.11.4.154 [~~CONFORMITY ANALYSIS~~] FEDERAL AGENCY CONFORMITY RESPONSIBILITY: Any [~~federal~~] department, agency, or instrumentality of the federal government taking an action subject to [~~this regulation~~] 20.11.4 NMAC must make its own conformity determination consistent with the requirements of [~~this regulation~~] 20.11.4 NMAC. In making its conformity determination, a federal agency must follow the requirements in Sections 14 through 19 and 21 through 24 of 20.11.4 NMAC and must consider comments from any interested parties. Where multiple federal agencies have jurisdiction for various aspects of a project, a federal agency may choose to adopt the analysis of another federal agency (to the extent the proposed action and impacts analyzed are the same as the project for which a conformity determination is required) or develop its own analysis in order to make its conformity determination.

[20.11.4.154 NMAC - Rn & A, 20.11.4.13 NMAC, 3/14/11]

[~~20.11.4.14~~]20.11.4.155 REPORTING REQUIREMENTS:

A. A federal agency making a conformity determination under [~~20.11.4.17 NMAC~~] Sections 13 through 19 and 21 through 23 of 20.11.4 NMAC must provide to the EPA Region VI Office, [~~the air agency~~] state and local air agencies, any federally-recognized indian tribal government in the nonattainment or maintenance area, and, where applicable, affected federal land managers, the agency designated under Section 174 of the CAA and the MPO a 30-day notice which describes the proposed action and the federal agency's draft conformity determination on the action. [~~Draft conformity determinations~~

~~shall describe the magnitude of the increase for relevant pollutants and the sources (including locations) for those pollutants as they relate to the proposed action.~~] If the action has multi-regional or national impacts (e.g., the action will cause emission increases in excess of the *de minimis* levels identified in Subsection B of 20.11.4.153 NMAC in three or more of EPA's regions), the federal agency, as an alternative to sending it to EPA regional offices, can provide the notice to EPA's office of air quality planning and standards.

B. A federal agency must notify the EPA Region VI office, state and local air agencies, any federally-recognized indian tribal government in the nonattainment or maintenance area, and, where applicable, affected federal land managers, the agency designated under Section 174 of the CAA and the MPO, within 30 days after making a final conformity determination under 20.11.4 NMAC.

C. The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business information shall be controlled by the applicable laws, regulations, security manuals, or executive orders concerning the use, access, and release of such materials. Subject to applicable procedures to protect restricted information from public disclosure, any information or materials excluded from the draft or final conformity determination or supporting materials may be made available in a restricted information annex to the determination for review by federal and state representatives who have received appropriate clearances to review the information.

[20.11.4.155 NMAC - Rn & A, 20.11.4.14 NMAC, 3/14/11]

[~~20.11.4.15~~]20.11.4.156 PUBLIC PARTICIPATION:

A. Upon request by any person regarding a specific federal action, a federal agency must make available, subject to the limitation in Subsection E of 20.11.4.156 NMAC, for review its draft conformity determination under [~~20.11.4.17 NMAC~~] 20.11.4.154 NMAC with supporting materials which describe the analytical methods and conclusions relied upon in making the applicability analysis and draft conformity determination. [~~It is advisable for agencies to maintain sufficiently detailed records of the actual assumptions, technical data, and analyses which lead to the conformity determination in order for interested parties to clearly understand the basis for the conformity determination. These shall be made available for review by the air agency and other interested parties where appropriate.~~]

B. A federal agency must make public its draft conformity determination under [~~20.11.4.17 NMAC~~] 20.11.4.154 NMAC by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the NEPA process. If the action has multi-regional or national impacts (e.g., the action will cause emission increases in excess of the *de minimis* levels identified in Subsection B of 20.11.4.153 NMAC in three or more of EPA's regions), the federal agency, as an alternative to publishing separate notices, can publish a notice in the federal register.

C. A federal agency must document its response to all the comments received on its draft conformity determination under [~~20.11.4.17 NMAC~~] 20.11.4.154 NMAC and make the comments and responses available, subject to the limitation in Subsection E of 20.11.4.156 NMAC, upon request by any person regarding a specific federal action, within 30 days of the final conformity determination.

D. A federal agency must make public its final conformity determination under [~~20.11.4.17 NMAC~~] 20.11.4.154 NMAC for a federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination. If the action would have multi-regional or national impacts, the federal agency, as an alternative, can publish the notice in the federal register.

E. The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business information shall be controlled by the applicable laws, regulations or executive orders concerning the release of such materials.

[20.11.4.156 NMAC - Rn & A, 20.11.4.15 NMAC, 3/14/11]

[~~20.11.4.16~~]20.11.4.157 [~~FREQUENCY OF CONFORMITY DETERMINATIONS~~] REEVALUATION OF CONFORMITY:

A. Once a conformity evaluation is completed by a federal agency, that determination is not required to be reevaluated if the agency has maintained a continuous program to implement the action; the determination has not lapsed as specified in Subsection B of 20.11.4.157 NMAC; or any modification to the action does not result in an increase in emissions above the levels specified in Subsection B of 20.11.4.153 NMAC. If a conformity determination is not required for the action at the time NEPA analysis is completed, the date of the finding of no significant impact (FONSI) for an environmental assessment, a record of decision (ROD) for an environmental impact statement, or a categorical exclusion determination can be used as a substitute date for the conformity determination date.

[~~A.~~]B. The conformity status of a federal action automatically lapses [5] five years from the date a final conformity determination is reported under [~~20.11.4.14~~] 20.11.4.155 NMAC, unless the federal action has been completed or a continuous program [~~has been commenced~~] to implement [~~that~~] the federal action [~~within a reasonable time~~] has been commenced.

[~~B.~~]C. Ongoing federal activities at a given site showing continuous progress are not new actions and do not require periodic re-determination so long as such activities are within the scope of the final conformity determination reported under [~~20.11.4.14~~] 20.11.4.155 NMAC.

[~~C.~~ ~~If, after the conformity determination is made, the federal action is changed so that there is an increase in the total of direct and indirect emissions above the levels in Subsection B. of 20.11.4.12 NMAC, a new conformity determination is required.~~]

D. If the federal agency originally determined through the applicability analysis that a conformity determination was not necessary because the emissions for the action were below the limits in Subsection B of 20.11.4.153 NMAC and changes to the action would result in the total emissions from the action being above the limits in Subsection B of 20.11.4.153 NMAC, then the federal agency must make a conformity determination.

[20.11.4.157 NMAC - Rn & A, 20.11.4.16 NMAC, 3/14/11]

[~~20.11.4.17~~]20.11.4.158 CRITERIA FOR DETERMINING CONFORMITY OF GENERAL FEDERAL ACTIONS:

A. An action required under [~~20.11.4.12~~] 20.11.4.153 NMAC to have a conformity determination for a specific pollutant, will be determined to conform to the applicable SIP if, for each pollutant that exceeds the rates in Subsection B of [~~20.11.4.12~~] 20.11.4.153 NMAC, or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of Subsection C of [~~20.11.4.17~~] 20.11.4.158 NMAC, and meets any of the following requirements:

(1) for any criteria pollutant or precursor, the total of direct and indirect emissions from the action are specifically identified and accounted for in the applicable SIP's attainment or maintenance

demonstration or reasonable further progress milestone or in a facility-wide emission budget included in a SIP accordance with 20.11.4.161 NMAC;

(2) for precursors of ozone, or nitrogen dioxide, or PM, the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area (or nearby area of equal or higher classification provided the emissions from that area contribute to the violations, or have contributed to violations in the past, in the area with the federal action) through a revision to the applicable SIP or a similarly enforceable measure that effects emission reductions so that there is no net increase in emissions of that pollutant;

(3) for any directly-emitted criteria pollutant, [~~except ozone and nitrogen dioxide,~~] the total of direct and indirect emissions from the action meet the requirements:

(a) specified in Subsection B of [~~20.11.4.17~~] 20.11.4.158 NMAC, based on area-wide air quality modeling analysis and local air quality modeling analysis; or

(b) meet the requirements of Paragraph (5) of Subsection A of [~~20.11.4.17~~] 20.11.4.158 NMAC and, for local air quality modeling analysis, the requirement of Subsection B of [~~20.11.4.17~~] 20.11.4.158 NMAC.

(4) For CO or [~~PM_{10}~~] directly emitted PM:

(a) where the air agency primarily responsible for the applicable SIP determines that an area-wide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in Subsection B of [~~20.11.4.17~~] 20.11.4.158 NMAC, based on local air quality modeling analysis; or

(b) where the air agency primarily responsible for the applicable SIP determines that an area-wide air quality modeling analysis is appropriate and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in Subsection B of [~~20.11.4.17~~] 20.11.4.158 NMAC, based on area-wide modeling, or meet the requirements of Paragraph (5) of Subsection A of [~~20.11.4.17~~] 20.11.4.158 NMAC or

(5) For ozone or nitrogen dioxide, and for purposes of Subparagraph (b) of Paragraph (3) of Subsection A of [~~20.11.4.17~~] 20.11.4.158 NMAC and Subparagraph (b) of Paragraph (4) of Subsection A of [~~20.11.4.12~~] 20.11.4.158 NMAC, each portion of the action or the action as a whole meets any of the following requirements:

(a) Where EPA has approved a revision to [~~an area's attainment or maintenance demonstration after 1990~~] the applicable implementation plan after the area was designated as nonattainment and the state or tribe makes a determination as provided in Item (i) of Subparagraph (a) of Paragraph (5) of Subsection A of [~~20.11.4.17~~] 20.11.4.158 NMAC or where the state or tribe makes a commitment as provided in Item (ii) of Subparagraph [~~(b)~~] (a) of Paragraph (5) of Subsection A of [~~20.11.4.17~~] 20.11.4.158 NMAC:

(i) the total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the air agency primarily responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would not exceed the emissions budgets specified in the applicable SIP;

(ii) the total of direct and indirect emissions from the action (or portion thereof) is determined by the air agency responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would exceed an emissions budget specified in the applicable SIP and the state governor or the governor's designee for SIP actions makes a written commitment to EPA which includes the following: 1. A specific schedule for adoption and submittal of a revision to the SIP which would achieve the needed emission reductions prior to the time emissions from the federal action would occur; 2. Identification of specific measures for incorporation into the SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable SIP; 3. A demonstration that all existing applicable SIP requirements are being implemented in the area for the pollutants affected by the federal action, and that local authority to implement additional requirements has been fully pursued; 4. A determination that the responsible federal agencies have required all reasonable mitigation measures associated with their action; and 5. Written documentation including all air quality analyses supporting the conformity determination;

(iii) Where a federal agency made a conformity determination based on a [~~state~~] state's or tribe's commitment under Item (i) of Subparagraph (a) of Paragraph (5) of Subsection A of [~~20.11.4.17~~] 20.11.4.158 NMAC, and the state has submitted a SIP or TIP to EPA covering the time period during which the emissions will occur or is scheduled to submit such a SIP or TIP within 18 months of the conformity determination, [~~such a~~] the state commitment is automatically deemed a call for a SIP or TIP revision by EPA under Section 110(k)(5) of the CAA, effective on the date of the federal conformity determination and requiring response within 18 months or any shorter time within which [~~a commitment is made~~] the state or tribe commits to revise the applicable SIP;

(iv) Where a federal agency made a conformity determination based on a state or tribal commitment under Item (ii) of Subparagraph (a) of Paragraph (5) of Subsection A of 20.11.4.158 NMAC and the state or tribe has not submitted a SIP covering the time period when the emissions will occur or is not scheduled to submit such a SIP within 18 months of the conformity determination, the state or tribe must, within 18 months, submit to EPA a revision to the existing SIP committing to include the emissions in the future SIP revision.

(b) The action (or portion thereof), as determined by the MPO, is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the applicable SIP under [~~20.11.3 NMAC, *Transportation Conformity*~~] 40 CFR Part 51, Subpart T, or 40 CFR Part 93, Subpart A;

(c) The action (or portion thereof) fully offsets its emissions within the same nonattainment or maintenance area (or nearby area of equal or higher classification provided the emissions from that area contribute to the violations, or have contributed to violation in the past, in the area with the federal action) through a revision to the applicable SIP or an equally enforceable measure that effects emission reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;

(d) Where EPA has not approved a revision to the relevant SIP [~~attainment or maintenance demonstration since 1990,~~] since the area was designated or reclassified, the total of direct and indirect emissions from the action for the future years (described in Subsection D of [~~20.11.4.18~~] 20.11.4.159 NMAC) do not increase emissions with respect to the baseline emissions:

(i) the baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed federal action during: 1. [~~Calendar year 1990~~] The most current calendar year with a complete emission inventory available before an area is designated unless EPA sets another year, or; 2. [~~The calendar year that is the basis for the classification (or, where the classification is based on multiple years, the most representative year), if a classification is promulgated in 40 CFR Part 81~~] The emission budget in the applicable SIP; or 3. The year of the baseline inventory in the PM_{10} applicable SIP;

(ii) the baseline emissions are the total of direct and indirect emissions calculated for the future years

(described in Subsection D of [~~20.11.4.18~~] 20.11.4.159 NMAC) using the historic activity levels (described in Item (i) of Subparagraph (d) of Paragraph (5) of Subsection A of [~~20.11.4.17~~] 20.11.4.158 NMAC) and appropriate emission factors for the future years; or

(e) Where the action involves regional water [~~and/or~~] or wastewater projects, such projects are sized to meet only the needs of population projections that are in the applicable SIP.

B. The area-wide [~~and/or~~] or local air quality modeling analyses must:

(1) meet the requirements in [~~20.11.4.18~~] 20.11.4.159 NMAC; and

(2) show that the action does not:

(a) cause or contribute to any new violation of any standard in any area, or

(b) increase the frequency or severity of any existing violation of any standard in any area.

C. Notwithstanding any other requirements of [~~this section~~] 20.11.4.158 NMAC, an action subject to this regulation may not be determined to conform to the applicable SIP unless the total of direct and indirect emissions from the action is in compliance or consistent with all relevant requirements and milestones contained in the applicable SIP, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements.

D. Any analyses required under [~~this section~~] 20.11.4.158 NMAC must be completed, and any mitigation requirements necessary for a finding of conformity must be identified before the determination of conformity is made.

[20.11.4.158 NMAC - Rn & A, 20.11.4.17 NMAC, 3/14/11]

[~~20.11.4.18~~]20.11.4.159 PROCEDURES FOR CONFORMITY [~~DETERMINATIONS~~] DETERMINATION OF FEDERAL ACTIONS:

A. The analyses required under [~~this regulation~~] 20.11.4 NMAC must be based on the latest planning assumptions.

(1) All planning assumptions (such as per capita water and sewer use, vehicle miles traveled per capita or per household, trip generation per household, vehicle occupancy, household size, vehicle fleet mix, vehicle ownership, woodstoves per household, and the geographic distribution of population growth) must be derived from the estimates of population, employment, travel, and congestion most recently approved by the MPO, or other agency authorized to make such estimates, where available.

(2) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, must be approved by the MPO or other agency authorized to make such estimates for the urban area.

B. The analyses required under [~~this Part~~] 20.11.4 NMAC must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate, [~~and~~] the federal agency may obtain written approval [~~of~~] from the [~~EPA~~] regional administrator [~~is obtained~~] for EPA region VI for [~~any~~] a modification or substitution, [~~they may be modified or~~] of another technique [~~substituted~~] on a case-by-case basis or, where appropriate, on a generic basis for a specific federal agency program.

(1) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA and available for use in the preparation or revision of the applicable SIP must be used for the conformity analysis as specified in Subparagraph (a) and (b) of Paragraph (1) of Subsection B of [~~20.11.4.18~~] 20.11.4.159 NMAC:

(a) the EPA must publish in the federal Register a notice of availability of any new motor vehicle emissions model; and

(b) a grace period of three months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used unless EPA announces a longer grace period in the federal register. Conformity analyses for which the analysis was begun during the grace period or no more than [~~3 years~~] three months before the federal register notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA.

(2) For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the *Compilation of Air Pollutant Emission Factors* (AP-42, http://www.epa.gov/ttn/chiefs/efpac) must be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from stationary sources which are part of the conformity analysis.

C. The air quality modeling analyses required under [~~this regulation~~] 20.11.4 NMAC must be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the *Guideline on Air Quality Models* [~~(Revised)" (1986), including supplements (EPA publication no. 450/2-78-027R),~~] (Appendix W to 40 CFR Part 51),unless:

(1) the guideline techniques are inappropriate, in which case the model may be modified or another model substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific federal agency program; and

(2) written approval of the EPA regional administrator is obtained for any modification or substitution.

D. The analyses required under [~~this regulation except Paragraph (1), of Subsection A, of 20.11.4.17 NMAC,~~] 20.11.4 NMAC, must be based on the total of direct and indirect emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases:

(1) [~~the CAA mandated attainment year or, if applicable, the farthest year for which emissions are projected in the maintenance plan~~] The attainment year specified in the SIP, or if the SIP does not specify an attainment year, the latest attainment year possible under the act; or

(2) the last year for which emissions are projected in the maintenance plan;

[~~(2)~~](3) the year during which the total of direct and indirect emissions from the action is expected to be the greatest on an annual basis; and

[~~(3)~~](4) any year for which the applicable SIP specifies an emissions budget.

[20.11.4.159 NMAC - Rn & A, 20.11.4.18 NMAC, 3/14/11]

[~~20.11.4.19~~]20.11.4.160 MITIGATION OF AIR QUALITY IMPACTS:

A. Any measures that are intended to mitigate air quality impacts must be identified (such as the identification and quantification of all emission reductions claimed) and the process for implementation (such as any necessary funding of such measures and tracking of such emission reductions) and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation.

B. Prior to determining that a federal action is in conformity, the federal agency making the conformity determination must obtain written commitments from the appropriate persons or agencies to implement any mitigation measures, which are identified as conditions for making conformity determinations. [~~Written commitments shall describe such mitigation measures and the nature of the commitments, in a manner consistent with Subsection A of 20.11.4.20 NMAC.~~]

C. Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

D. In instances where the federal agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by

the federal agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination.

E. When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination. Any proposed change in the mitigation measures is subject to the reporting requirements of [~~20.11.4.14~~] 20.11.4.155 NMAC and the public participation requirements of [~~20.11.4.15~~] 20.11.4.157 NMAC.

F. Written commitments to mitigation measures must be obtained prior to a positive conformity determination and such commitments must be fulfilled.

G. After a state or tribe revises its SIP or TIP and EPA approves that SIP revision, any agreements, including mitigation measures, necessary for a conformity determination will be both state or tribal and federally enforceable. Enforceability through the applicable SIP or TIP will apply to all persons who agree to mitigate direct and indirect emissions associated with a federal action for a conformity determination.

[20.11.4.160 NMAC - Rn & A, 20.11.4.19 NMAC, 3/14/11]

20.11.4.161 CONFORMITY EVALUATION FOR FEDERAL INSTALLATIONS WITH FACILITY-WIDE EMISSION BUDGETS:

A. The state, local or tribal agency responsible for implementing and enforcing the SIP or TIP can in cooperation with federal agencies or third parties authorized by the agency that operate installations subject to federal oversight develop and adopt a facility-wide emission budget to be used for demonstrating conformity under Paragraph (1) of Subsection A of 20.11.4.158 NMAC. The facility-wide budget must meet the following criteria.

(1) Be for a set time period.

(2) Cover the pollutants or precursors of the pollutants for which the area is designated nonattainment or maintenance.

(3) Include specific quantities allowed to be emitted on an annual or seasonal basis.

(4) The emissions from the facility along with all other emissions in the area will not exceed the emission budget for the area.

(5) Include specific measures to ensure compliance with the budget, such as periodic reporting requirements or compliance demonstration, when the federal agency is taking an action that would otherwise require a conformity determination.

(6) Be submitted to EPA as a SIP revision.

(7) The SIP revision must be approved by EPA.

B. The facility-wide budget developed and adopted in accordance with Subsection A of 20.11.4.161 NMAC can be revised by following the requirements in Subsection A of 20.11.4.161 NMAC.

C. Total direct and indirect emissions from federal actions in conjunction with all other emissions subject to general conformity from the facility that do not exceed the facility budget adopted pursuant to Subsection A of 20.11.4.161 NMAC are "presumed to conform" to the SIP and do not require a conformity analysis.

D. If the total direct and indirect emissions from the federal actions in conjunction with the other emissions subject to general conformity from the facility exceed the budget adopted pursuant to Subsection A of 20.11.4.161 NMAC, the action must be evaluated for conformity. A federal agency can use the compliance with the facility-wide emissions budget as part of the demonstration of conformity, i.e., the agency would have to mitigate or offset the emissions that exceed the emission budget.

E. If the SIP for the area includes a category for construction emissions, the negotiated budget can exempt construction emissions from further conformity analysis.

[20.11.4.161 NMAC - N, 3/14/11]

20.11.4.162 EMISSIONS BEYOND THE TIME PERIOD COVERED BY THE SIP: If a federal action would result in total direct and indirect emissions above the applicable thresholds which would be emitted beyond the time period covered by the SIP, the federal agency can:

A. demonstrate conformity with the last emission budget in the SIP; or

B. request the state or tribe to adopt an emissions budget for the action for inclusion in the SIP. The state or tribe must submit a SIP or TIP revision to EPA within 18 months either including the emissions in the existing SIP or establishing an enforceable commitment to include the emissions in future SIP revisions based on the latest planning assumptions at the time of the SIP revision; no such commitment by a state or tribe shall restrict a state's or tribe's ability to require RACT, RACM or any other control measures within the state's or tribe's authority to ensure timely attainment of the NAAQS.

[20.11.4.162 NMAC - N, 3/14/11]

20.11.4.163 TIMING OF OFFSETS AND MITIGATION MEASURES:

A. The emissions reductions from an offset or mitigation measure used to demonstrate conformity must occur during the same calendar year as the emission increases from the action except, as provided in Subsection B of 20.11.4.163 NMAC.

B. The state or tribe may approve emissions reductions in other years provided:

(1) The reductions are greater than the emission increases by the following ratios:

(a) extreme nonattainment areas: 1.5:1

(b) severe nonattainment areas: 1.3:1

(c) serious nonattainment areas: 1.2:1

(d) moderate nonattainment areas: 1.15:1

(e) all other areas: 1.1:1.

(2) The time period for completing the emissions reductions must not exceed twice the period of the emissions.

(3) The offset or mitigation measure with emissions reductions in another year will not:

(a) cause or contribute to a new violation of any air quality standard;

(b) increase the frequency or severity of any existing violation of any air quality standard; or

(c) delay the timely attainment of any standard or any interim emissions reductions or other milestones in any area.

C. The approval by the state or tribe of an offset or mitigation measure with emissions reductions in another year does not relieve the state or tribe of any obligation to meet any SIP or CAA milestone or deadline. The approval of an alternate schedule for mitigation measures is at the discretion of the state or tribe, and they are not required to approve an alternate schedule.

[20.11.4.163 NMAC - N, 3/14/11]

20.11.4.164 INTER-PRECURSOR MITIGATION MEASURES AND OFFSETS: Federal agencies must reduce the same type pollutant as being increased by the federal action except the state or tribe may approve offsets or mitigation measures of different precursors of the same criteria pollutant, if such trades are allowed by a state or tribe in a SIP or TIP approved new source review regulation, is technically justified, and has a demonstrated environmental benefit.

[20.11.4.164 NMAC - N, 3/14/11]

20.11.4.165 EARLY EMISSION REDUCTION CREDIT PROGRAMS AT FEDERAL FACILITIES AND INSTALLATION SUBJECT TO FEDERAL OVERSIGHT:

A. Federal facilities and installations subject to federal oversight can,

with the approval of the state or tribal agency responsible for the SIP or TIP in that area, create an early emissions reductions credit program. The federal agency can create the emission reduction credits in accordance with the requirements in Subsection B of 20.11.4.165 NMAC and can used them in accordance with Subsection C of 20.11.4.165 NMAC.

B. Creation of emission reduction credits.

(1) Emissions reductions must be quantifiable through the use of standard emission factors or measurement techniques. If non-standard factors or techniques to quantify the emissions reductions are used, the federal agency must receive approval from the state or tribal agency responsible for the implementation of the SIP or TIP and from EPA's Region VI Office. The emission reduction credits do not have to be quantified before the reduction strategy is implemented, but must be quantified before the credits are used in the general conformity evaluation.

(2) The emission reduction methods must be consistent with the applicable SIP or TIP attainment and reasonable further progress demonstrations.

(3) The emissions reductions cannot be required by or credited to other applicable SIP or TIP provisions.

(4) Both the state or tribe and federal air quality agencies must be able to take legal action to ensure continued implementation of the emission reduction strategy. In addition, private citizens must also be able to initiate action to ensure compliance with the control requirement.

(5) The emissions reductions must be permanent or the timeframe for the reductions must be specified.

(6) The federal agency must document the emissions reductions and provide a copy of the document to the state or tribal air quality agency and the EPA region VI office for review. The documentation must include a detailed description of the emission reduction strategy and a discussion of how it meets the requirements of Paragraphs (1) through (5) of Subsection B of 20.11.4.165 NMAC.

C. Use of emission reduction credits. The emission reduction credits created in accordance with Subsection B of 20.11.4.165 NMAC can be used, subject to the following limitations, to reduce the emissions increase from a federal action at the facility for the conformity evaluation.

(1) If the technique used to create the emission reduction is implemented at the same facility as the federal action and could have occurred in conjunction with the federal action, then the credits can be used to reduce the total direct and indirect emissions used to determine the applicability of the regulation as required in 20.11.4.153 NMAC and as offsets or mitigation measures required by 20.11.4.158 NMAC.

(2) If the technique used to create the emission reduction is not implemented at the same facility as the federal action or could not have occurred in conjunction with the federal action, then the credits cannot be used to reduce the total direct and indirect emissions used to determine the applicability of the regulation as required in 20.11.4.153 NMAC, but can be used to offset or mitigate the emissions as required by 20.11.4.158 NMAC.

(3) Emissions reductions credits must be used in the same year in which they are generated.

(4) Once the emission reduction credits are used, they cannot be used as credits for another conformity evaluation. However, unused credits from a strategy used for one conformity evaluation can be used for another conformity evaluation as long as the reduction credits are not double counted.

(5) Federal agencies must notify the state or tribal air quality agency responsible for the implementation of the SIP or TIP and the EPA region VI office when the emission reduction credits are being used.

[20.11.4.165 NMAC - N, 3/14/11]

NEW MEXICO OFFICE OF THE STATE AUDITOR

NOTICE:

The Office of the State Auditor is repealing 2.2.2 NMAC, *Requirements for Contracting and Conducting Audits of Agencies* effective February 28, 2011. It will be replaced with 2.2.2 NMAC, *Requirements for Contracting and Conducting Audit of Agencies*, which will become effective February 28, 2011.

NEW MEXICO OFFICE OF THE STATE AUDITOR

TITLE 2 PUBLIC FINANCE
CHAPTER 2 AUDITS OF GOVERNMENTAL ENTITIES
PART 2 REQUIREMENTS FOR CONTRACTING AND CONDUCTING AUDITS OF AGENCIES

2.2.2.1 ISSUING AGENCY: Office of the State Auditor
[2.2.2.1 NMAC - Rp, 2.2.2.1 NMAC, 2-28-11]

2.2.2.2 SCOPE: Agencies as defined by the Audit Act and independent public accountants (IPAs) interested in contracting to perform audit services for those agencies.
[2.2.2.2 NMAC - Rp, 2.2.2.2 NMAC, 2-28-11]

2.2.2.3 STATUTORY AUTHORITY: The Audit Act, Section 12-6-12 NMSA 1978, requires the state auditor to promulgate reasonable regulations necessary to carry out the duties of his office, including regulations required for conducting audits in accordance with auditing standards generally accepted in the United States of America. The regulations become effective upon filing in accordance with the State Rules Act, Chapter 14, Article 4 NMSA 1978. The Audit Act, Chapter 12, Article 6 NMSA 1978, requires the state auditor to conduct financial and compliance audits of every agency in accordance with governmental auditing, accounting and financial reporting standards, and local, state and federal laws, rules, and regulations. The Audit Act further establishes a tiered system of financial reporting for local public bodies in which the amount of a local public body's annual revenue determines whether the local public body is subject to an agreed upon procedures engagement. The Audit Act also gives the state auditor the authority to cause the financial affairs and transactions of an agency to be audited in whole or in part, in addition to the annual audit.
[2.2.2.3 NMAC - Rp, 2.2.2.3 NMAC, 2-28-11]

2.2.2.4 DURATION: Permanent
[2.2.2.4 NMAC - Rp, 2.2.2.4 NMAC, 2-28-11]

2.2.2.5 EFFECTIVE DATE: February 28, 2011, unless a later date is cited at the end of a section.
[2.2.2.5 NMAC - Rp, 2.2.2.5 NMAC, 2-28-11]

2.2.2.6 OBJECTIVE: The objective is to establish policies, procedures, rules and requirements for contracting and conducting audits and certain agreed upon procedures engagements of governmental agencies of the state of New Mexico
[2.2.2.6 NMAC - Rp, 2 2.2.6 NMAC, 2-28-11]

2.2.2.7 DEFINITIONS:

A. "Agency" means any department, institution, board, bureau, court, commission, district or committee of the government of the state, including district courts, magistrate or metropolitan courts, district attorneys and charitable institutions for which appropriations are made by the legislature; any political subdivision of the state, created under either general or special act, that receives or expends public money from whatever source derived, including counties, county institutions, boards, bureaus or commissions; municipalities; land grants; drainage, conservancy, irrigation, mutual domestic water consumer associations,

public improvements or other special districts; and school districts; any entity or instrumentality of the state specifically provided for by law, including the New Mexico finance authority, the New Mexico mortgage finance authority, the New Mexico lottery authority and every office or officer of any entity listed in Subsections A through C of Section 12-6-2, NMSA 1978.

B. "Auditor" means state auditor or independent public accountant.

C. "AICPA" means American institute of certified public accountants.

D. "CFR" means code of federal regulations.

E. "CPE" means continuing professional education.

F. "COSO" means committee on sponsoring organizations of treadway commission.

G. "DFA" means the New Mexico department of finance and administration.

H. "FCD" means financial control division of the department of finance and administration.

I. "FDIC" means federal deposit insurance corporation.

J. "FDS" means financial data schedule.

K. "GAAP" means accounting principles generally accepted in the United States of America.

L. "GAGAS" means generally accepted government auditing standards.

M. "GASB" means governmental accounting standards board.

N. "GAAS" means auditing standards generally accepted in the United States of America.

O. "GSD" means the New Mexico general services department.

P. "HED" means the New Mexico higher education department.

Q. "HUD" means U.S. department of housing and urban development.

R. "IPA" means independent public accountant.

S. "IRC" means internal revenue code.

T. "Local public body" means a mutual domestic water consumers association, a land grant, an incorporated municipality or a special district.

U. "NCUSIF" means national credit union shares insurance fund.

V. "NMAC" means New Mexico administrative code.

W. "NMSA" means New Mexico statutes annotated.

X. "Office" means office of the state auditor.

Y. "OMB" means the United States office of management and budget.

Z. "PED" means the New Mexico public education department.

AA. "PHA" means public housing authority.

BB. "REAC" means real estate assessment center.

CC. "REC" means regional education cooperative.

DD. "RSI" means required supplemental information.

EE. "State auditor" means the elected state auditor of the state of New Mexico, personnel of his office designated by him, or independent auditors designated by him. However, not in every case does "state auditor" have this meaning.

FF. SAS" means the AICPA's statement on auditing standards.

GG. "Tier" refers to the certification process or which type of IPA procedures (if any) that a local public body is required to obtain pursuant to Subsection B of Section 12-6-3, NMSA 1978.

HH. "UFRS" means uniform financial reporting standards.

II. "U.S. GAO" means the United States government accountability office.

[2.2.2.7 NMAC - Rp, 2.2.2.7 NMAC, 2-28-11]

2.2.2.8 THE AUDIT CONTRACT:

A. Section 12-6-3 NMSA 1978 (Annual and Special Audits) mandates that: (1) the financial affairs of every agency be thoroughly examined and audited each year by the state auditor, personnel of his office designated by him, or by independent auditors approved by him; (2) the comprehensive annual financial report for the state be thoroughly examined and audited each year by the state auditor, personnel of his office designated by him or by independent auditors approved by him; and (3) the audits be conducted in accordance with generally accepted auditing standards and rules issued by the state auditor. Subsection B of Section 12-6-3 NMSA 1978 establishes a tiered system of financial reporting for local public bodies in which the amount of a local public body's annual revenue determines whether the local public body is subject to agreed upon procedures engagements. See 2.2.2.16 NMAC for information applicable to local public bodies. Section 12-6-14 NMSA 1978 (Contract Audits) states that "the state auditor shall notify each agency designated for audit by an independent auditor, and the agency shall enter into a contract with an independent auditor of its choice in accordance with procedures prescribed by rules of the state auditor; provided, however, that an agency subject to oversight by the state department of public education or the commission on higher education shall receive approval from its oversight agency prior to submitting a recommendation for an independent auditor of its choice. The state auditor may select the auditor for an agency that has not submitted a recommendation within sixty days of notification by the state auditor to contract for the year being audited, and the agency being audited shall pay the cost of the audit. Each contract for auditing entered into between an agency and an independent auditor shall be approved in writing by the state auditor. Payment of public funds may not be made to an independent auditor unless a contract is entered into and approved as provided in this section." Section 61-28B-13(B) of the 1999 Public Accountancy Act states that a firm with an office in New Mexico must hold a permit issued pursuant to this section of the 1999 Public Accountancy Act (61-28B-1 NMSA 1978) in order to provide attest services including audits of financial statements. A permit is also required for a firm that does not have an office in New Mexico but performs attest services for a client whose principal place of business is in New Mexico. Pursuant to Subsection A of 16.60.3.14 NMAC, a person whose principal place of business is not New Mexico and who has a valid certificate/license as a certified public accountant from another state shall be presumed to have qualifications substantially equivalent to New Mexico's requirements if the person meets the requirements of Section 26, Subsection A of the act. Except as otherwise provided in 2.2.2.16 NMAC, IPAs shall submit a firm profile to the state auditor. Firms are required to notify the state auditor of changes to the firm profile as information becomes available**.** The state auditor shall approve contracts only with IPAs who have **submitted a complete and correct** firm profile that has been approved by the office and who have complied with all the requirements of this rule including:

(1) 2.2.2.14 NMAC, continuing education and quality control requirements;

(2) Subsection H of 2.2.2.8 NMAC, independence requirements; and

(3) for IPAs who have previously audited agencies under this rule, they must have previously complied with:

(a) 2.2.2.9 NMAC, report due dates;

(b) 2.2.2.13 NMAC, review of audit reports and working papers; and

(c) Paragraph (6) of Subsection A of 2.2.2.9 NMAC, notifying the state auditor regarding why audit reports will be late.

B. If the audit is to be conducted by an IPA, the agency shall comply with the following procedures to obtain professional services from an IPA for an audit:

(1) Upon receipt of notification to proceed from the office, the agency shall identify all elements or services to be

solicited and request quotations or proposals for each applicable element of the annual financial audit as follows:

(a) financial statement audit;

(b) federal single audit (if applicable);

(c) financial statement preparation (if applicable and allowed by the current government auditing standards);

(d) other nonaudit services (if applicable and allowed by current government auditing standards); and

(e) other (i.e., audits of component units such as housing authorities, charter schools, foundations and other types of component units).

(2) IPA services that cost **no more than $50,000 excluding gross receipts tax** on each year's contract should be considered small purchases. The agency **may** procure audit services for one year only. The agency **is encouraged to** procure the audit services using a multiple year proposal (not to exceed three years) in which the cost of audit service is $50,000 or less in each year (excluding gross receipts taxes). The agency **is encouraged** to obtain no fewer than three written or oral quotations to be recorded and placed in the procurement file. Section 13-1-191.1 NMSA 1978 requires prospective contractors to complete a standard campaign contribution disclosure form and **file it with the state agency or local public body as part of the competitive sealed proposal, or in the case of a sole source or small purchase contract, on the date on which the contractor signs the contract**.

(3) For IPA services that cost **over $50,000 excluding gross receipts tax for each year of the contract,** the agency shall seek competitive sealed proposals and contract for audit services in accordance with the Procurement Code (Chapter 13, Article 1 NMSA 1978); GSD Rule 1.4.1 NMAC, ***Procurement Code Regulations***, if applicable; and DFA Rule 2.40.2 NMAC, ***Governing the Approval of Contracts for the Purchase of Professional Services***. Section 13-1-191.1 NMSA 1978 requires prospective contractors to complete a standard campaign contribution disclosure form and submit it to the agency as part of the competitive sealed proposal. In addition, if the agency intends to allocate a portion of the audit cost to federal funds as direct or indirect charges, the agency should comply with procurement requirements stated in the federal office of management and budget's ***Grants and Cooperative Agreements with State and Local Governments***, (OMB Circular A-102, Common Rule). Institutions of higher education and state and local hospitals should comply with procurement standards stated in OMB Circular A-110, ***Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations***.

(4) The agency may, and is strongly encouraged to, request a multiple year proposal to provide services not to exceed a term of three years, including all extensions and renewals. The term of the contract shall be one-year with the option to extend for two successive one-year terms at the **same price, terms and conditions as stated on the original proposal**. Exercising the option to extend must be by mutual agreement of the parties to the contract and with the approval of the state auditor. In the event that either of the parties to the contract elects not to extend, or the state auditor disapproves the recommendation for renewal, the agency shall use the procedures described above in Paragraphs (2) and (3) of Subsection B of 2.2.2.8 NMAC to solicit services.

(5) The agency shall evaluate all competitive sealed proposals or quotations received pursuant to Paragraphs (2) and (3) of Subsection B of 2.2.2.8 NMAC using an evaluation process, preferably executed by a selection committee. Members of component units such as charter schools, housing authorities, etc., are encouraged to be included in the IPA selection process. As part of their evaluation process, agencies may and are strongly encouraged to consider the following criteria when selecting an IPA:

(a) the capability of the IPA, including: (i) whether the IPA has the resources to perform the type and size of the audit required; (ii) the results of the IPA's most recent external quality control review (peer review); and (iii) the organization and completeness of the IPA's proposal or bid for audit services;

(b) the work requirements and audit approach of the IPA, including: (i) the IPA's knowledge of the agency's need and the product to be delivered; (ii) whether the IPA's proposal or bid contains a sound technical plan and realistic estimate of time to complete the audit; (iii) plans for using agency staff, including internal auditors; and (iv) if the proposal or bid is for a multiple year contract, the IPA's approach for planning and conducting the work efforts of subsequent years;

(c) the IPA's technical experience, including: (i) the governmental audit experience of the IPA and the specialization in the agency's type of government (e.g., state agencies, schools, hospitals, counties, cities, etc.), including component units (housing authorities, charter schools, foundations); and (ii) the IPA's attendance at continuing professional education seminars or meetings on auditing, accounting and regulations directly related to state and local government audits and the agency.

(6) After completing the evaluations for each IPA and making the IPA selection, each agency shall submit the completed IPA recommendation form for audits and the completed and signed audit contract to the state auditor by the deadline indicated in Subparagraph (c) below. In the event that the due date falls on a weekend or holiday the due date will be the next business day. Agencies with a fiscal year end other than June 30 must use a due date 30 days before the end of the fiscal year.

(a) Agencies shall complete the IPA recommendation form for audits (the form) provided at www.osanm.org. Agencies shall print the form on agency letterhead.

(b) Agencies shall complete the applicable audit contact form provided at www.osanm.org, obtain the IPA's signature on the contract, and submit the completed and signed audit contract to the office with the completed IPA recommendation form.

(c) The agency shall deliver the fully completed and signed IPA recommendation form for audits and the completed audit contract to the state auditor by the following deadline, depending on the type of agency: (i) regional education cooperatives, independent housing authorities, hospitals and special hospital districts on **April 15;** (ii) school districts, counties, and higher education on **May 1**; (iii) municipalities, special districts, mutual domestic water consumer associations, land grants (all local public bodies pursuant to Section 12-6-2 NMSA 1978) and local workforce investment boards on **May 15**; and (iv) councils of governments, district courts, district attorneys, and state agencies on **June 1**.

(d) Agencies that are subject to oversight by the state public education department (PED) or the higher education department (HED) have the additional requirement of submitting their IPA recommendation to PED or HED for approval prior to submitting the recommendation to the state auditor (Section 12-6-14(A) NMSA 1978).

(e) IPA recommendation forms for audits and the related audit contracts that are submitted to the office with errors or omissions will be rejected by the office. The office will return the rejected contract and IPA recommendation form for audits to the agency with a checklist indicating the reason(s) for the rejection. The office will first process the correct IPA recommendation forms and related contracts that were submitted timely. The office will then process any IPA recommendation forms and audit contracts that were submitted late or were rejected by the office and not resubmitted correctly by the deadline.

(f) In the event the agency's recommendation and related contract are not approved by the state auditor, the state auditor will promptly communicate the decision, including the reason(s) for disapproval, to the agency, at which

time the agency shall promptly submit a different recommendation. This process will continue until the state auditor approves a recommendation and related contract. During this process, whenever a recommendation and related contract are not approved by the state auditor, the agency may submit a written request to the state auditor for reconsideration of the disapproval. The agency shall submit its request no later than 15 days from the date of the disapproval and shall include documentation in support of its recommendation. If warranted, after review of the request, the state auditor may hold an informal meeting to discuss the request. The state auditor may set the meeting in a timely manner with consideration given to the agency's circumstances.

(7) If the agency fails to make a recommendation by the deadline, the state auditor may conduct the audit.

(8) Pursuant to Section 12-6-14(A) NMSA1978, "The state auditor may select the auditor for an agency that has not submitted a recommendation within sixty days of notification by the state auditor to contract for the year being audited, and the agency being audited shall pay the cost of the audit."

(9) The agency shall retain all procurement documentation, including completed evaluation forms, for **five** years and in accordance with applicable public records laws.

C. The state auditor will use **discretion** and may not approve:

(1) an audit recommendation or agreed upon procedures professional services contract recommendation under 2.2.2.16 NMAC that does not serve the best interests of the public or the agency or local public body because of one or more of the following reasons:

(a) lack of experience of the IPA;

(b) the following criteria for required auditor rotation apply: (i) the IPA is prohibited from conducting the agency audit or agreed upon procedures engagements for a period of two years because the IPA already conducted those services for that agency for a period of: (a) six consecutive years and for at least one of those years the audit fees exceeded $50,000, excluding gross receipts tax; or (b) twelve consecutive years and each year the audit fees did not exceed $50,000, excluding gross receipts tax; (ii) an IPA firm that has undergone a merger or acquisition will be determined (on an individual basis) to be a **new firm** for the purposes of the rotation requirement based on, but not limited to, the following criteria: (a) the firm is a newly registered business entity; and (b) at least 67% of the firm's ownership has changed; (iii) if the firm resulting from a merger or acquisition is determined to be the same firm, as before, and it is in the middle of multiple year award, there will be a mandatory rotation of the audit manager; (iv) if the firm resulting from a merger or acquisition is determined to be a new firm, the new firm must compete for audit services in accordance with the Procurement Code and this rule; and (v) any other consideration(s) that may be in the best interest of the public;

(c) lack of competence or staff availability;

(d) circumstances that may cause untimely delivery of the audit report or agreed upon procedures report;

(e) unreasonably high or low cost to the agency or local public body;

(f) terms in the proposed contract that the state auditor considers to be unfavorable, unfair, unreasonable, or unnecessary;

(g) lack of compliance with the Procurement Code or this rule; or

(h) any other reason determined by the state auditor to be in the best interests of the state of New Mexico;

(2) audit contract recommendations or agreed upon procedures contract recommendations of an IPA that has:

(a) breached a prior-year contract;

(b) failed to deliver an audit or agreed upon procedures report on time;

(c) failed to comply with state laws or regulations of the state auditor;

(d) performed nonaudit services (including services related to fraud) for an agency or local public body it is performing an audit or an agreed upon procedures for, without prior approval of the state auditor;

(e) performed nonaudit services under a separate contract for services that may be disallowed by GAGAS independence standards (see Subsection H of 2.2.2.8 of NMAC);

(f) failed to respond, in a timely and acceptable manner, to an audit or agreed upon procedures report review or working paper review;

(g) indicated a lack of independence in fact or appearance;

(h) failed to cooperate in providing prior-year working papers to successor IPAs;

(i) has not adhered to external quality control review standards as defined by GAGAS and Subsections A and B of 2.2.2.14 NMAC;

(j) has a history of excessive errors or omissions in audit or agreed upon procedures reports or working papers;

(k) released the audit report or agreed upon procedures report to the agency, local public body or the public before the audit release letter or the letter acknowledging receipt of the agreed upon procedure report, described in Subsection G of 2.2.2.16, was received from the office;

(l) failed to submit a completed signed contingency subcontractor form if required; or

(m) otherwise, in the opinion of the state auditor, the IPA was unfit to be awarded or continue in a contract;

(3) an audit or agreed upon procedures contract recommendation for any audit or agreed upon procedures services which the state auditor decides to perform himself or with contracted IPAs (consistent with the October 6, 1993 stipulated order Vigil v. King No. SF 92-1487(C)), and pursuant to Section 12-6-3, NMSA 1978 (Annual and Special Audits), even if the agency or local public body was previously designated for audit or agreed upon procedures services by an IPA.

D. The agency must use the appropriate audit contract form provided by the state auditor on the website at www.osanm.org. The state auditor may provide audit contract forms to the agency via U.S. mail if specifically requested by the agency. **Only** contract forms provided by the **state auditor** will be accepted and shall:

(1) be completed and returned with the number of required copies and the completed IPA recommendation form for audits by the deadline indicated above at Subparagraph (c) of Paragraph 6 of Subsection B of 2.2.2.8 NMAC;

(2) bear original signatures;

(3) have the IPA's combined reporting system (CRS) number verified by the taxation and revenue department (TRD) for all state agencies whose contracts are approved through DFA's contracts office, prior to submission to the state auditor; and

(4) in the compensation section of the contract, include the dollar amount that applies to each element of the contracted procedures that will be performed.

E. The IPA shall maintain professional liability insurance covering any error or omission committed during the term of the contract. The IPA shall provide proof of such insurance to the state auditor with the firm profile, or if performing an engagement pursuant to 2.2.2.16 NMAC. The amount maintained should be commensurate with risk assumed. The IPA must provide to the state auditor, prior to expiration, updated insurance information.

F. A breach of any terms of the contract shall be grounds for immediate termination of the contract. **The injured party may seek damages for such breach from the offending party.** Any IPA who knowingly makes false statements, assurances, or disclosures will be disqualified from conducting audits or agreed upon procedures engagements of agencies or local public bodies in New Mexico.

G. Subcontractor requirements:

(1) Audit firms that have only one individual qualified to supervise a GAGAS audit and issue the related audit report pursuant to Section 61-28B-17(B)

NMSA 1978, and GAGAS Paragraph 3.46 must submit a completed contingency subcontractor form with the firm profile. The form shall indicate which IPA on the state auditor's current list of approved IPA's will complete the IPA's audits in the event the one individual with the qualifications described above becomes incapacitated and unable to complete the audit. See the related contingency subcontractor form available at www.osanm.org. The office will not approve audit contracts for such a firm without the required contingency subcontractor form.

(2) In the event an IPA chooses to use a subcontractor to assist the IPA in working on an audit, then the IPA must obtain the **prior written approval** of the state auditor to subcontract a portion of the audit work. The IPA may subcontract only with IPAs who have submitted a completed and approved firm profile to the state auditor as required in Subsection A of 2.2.2.8 NMAC. The audit contract shall specify subcontractor responsibility, who will sign the report(s), and how the subcontractor will be paid. See the related subcontractor form available at www.osanm.org.

H. The GAGAS ***July 2007 Revision*** was issued by the United States government accountability office (GAO) on July 27, 2007. It is effective for financial audits and attestation engagements for periods beginning on or after January 1, 2008 (FY09). According to ***GAGAS 3.02***, *the* general standard on independence is: "In all matters relating to the audit work, the audit organization and the individual auditor, whether government or public, must be **free from personal, external, and organizational impairments to independence and must avoid the appearance of such impairments of independence.**" As required by GAGAS 3.03, "Auditors and audit organizations must maintain independence so that their opinions, conclusions, judgments, and recommendations will be impartial and will be viewed as impartial by objective third parties with knowledge of the relevant information." As required by GAGAS 3.22, the audit organization must apply the following two overarching independence principles when assessing the impact of performing a nonaudit service for an audited program or entity: "Audit organizations must not provide nonaudit services that involve performing management functions or making management decisions and audit organizations must not audit their own work or provide nonaudit services in situations in which the nonaudit services are significant or material to the subject matter of the audits. To ensure compliance with the independence standards, the following rules apply to the approval of professional service contracts for nonaudit services:

(1) An IPA who performs the agency's annual financial audit shall not enter into any special audit or nonaudit service contract without the prior written approval of the state auditor. The original professional services contract must be submitted to the state auditor for review and approval after it has been signed by the agency and the IPA. The contract must include the contract fee, start and completion date, and the specific scope of services to be performed by the IPA. Requests for approval of professional service contracts should be submitted to the office with the **original** version of the signed agreement by the 5th of each month. The office will review the requests and respond to the agency and the IPA by the 25th of each month. Upon completion of the nonaudit services, the IPA must provide the state auditor with a copy of any report submitted to the agency.

(2) Except as provided in Subsection E of 2.2.2.15 NMAC, an agency and an IPA who does not perform that agency's annual financial audit shall submit a copy to the state auditor of each professional services contract entered into between the agency and the IPA for a special audit, agreed upon procedures or any other nonaudit services. The contract shall not require approval by the state auditor but shall be submitted to the state auditor within 30 days of execution.

(3) The state auditor will not approve any contract for the following nonaudit services to be provided by the same IPA who performs the agency's annual financial audit: maintaining or preparing the audited agency's basic accounting records or taking responsibility for basic financial or other records that the audit organization will audit; posting transactions (whether coded or not coded) to the agency's financial records or to other records that subsequently provide data to the agency's financial records; determining account balances or determining capitalization criteria; designing, developing, installing, or operating the entity's accounting system or other information systems that are material or significant to the subject matter of the audit; providing payroll services that are material to the subject matter of the audit or the audit objectives or involve making management decisions; recommending a single individual for a specific position that is key to the entity or program under audit, ranking or influencing management's selection of the candidate, or conducting an executive search or a recruiting program for the audited entity; developing an entity's performance measurement system when that system is material or significant to the subject matter of the audit; developing an entity's policies, procedures, and internal controls; performing management's assessment of internal controls when those controls are significant to the subject matter of the audit; providing services that are intended to be used as management's primary basis for making decisions that are significant to the subject matter under audit; carrying out internal audit functions, when performed by external auditors; and serving as voting members of an entity's management committee or board of directors, making policy decisions that affect future direction and operation of an entity's programs, supervising entity employees, developing programmatic policy, authorizing an entity's transactions, or maintaining custody of an entity's assets (GAGAS 3.29).

(4) In the event the 2011 revision to **Government Auditing Standards** is issued and becomes effective during the 2011 audit season, the requirements of Subsection H of 2.2.2.8 NMAC above that are changed by the 2011 revision will be superseded by that revision.

I. The state auditor will approve progress and final payments for the annual audit contract as follows:

(1) Section 12-6-14(A) NMSA 1978 (Contract Audits) also provides that "payment of public funds may not be made to an independent auditor unless a contract is entered into and approved a provided in this section."

(2) Section 12-6-14(B) NMSA 1978 (Contract Audits) provides that the state auditor may authorize progress payments on the basis of evidence of the percentage of audit work completed as of the date of the request for partial payment.

(3) Progress payments up to 69% **do not** require state auditor approval provided that the agency certifies the receipt of services before any payments are made to the IPA. The **agency must monitor audit progress and make progress payments only up to the percentage that the audit is completed** prior to making the 69% payment. If requested by the state auditor, the agency shall provide a copy of the approved progress billing(s). Progress payments from 70% to 90% require state auditor approval after being approved by the agency.

(4) The state auditor may allow only the first 50% of progress payments to be made without state auditor approval for an IPA whose previous audits were submitted after the due date specified in Subsection A of 2.2.2.9 NMAC.

(5) Section 12-6-14(B) NMSA 1978 (Contract Audits), provides that final payment under an audit contract may be made by the agency to the IPA only after the state auditor has stated, in writing, that the audit has been made in a competent manner in accordance with contract provisions and this rule. The state auditor's determination with respect to final payment shall be stated in the letter accompanying the release of the report to the agency. Final payment

to the IPA by the agency prior to review and release of the audit report by the state auditor is considered a violation of Section 12-6-14(B) NMSA 1978 and this rule and must be reported as an audit finding in the audit report of the agency. If this statute is violated, the IPA may be removed from the list of approved auditors.

J. Preparation of financial statements:

(1) The financial statements presented in audit reports shall be prepared from the agency's books of record and contain amounts **rounded to the nearest dollar**.

(2) **The financial statements are the responsibility of the agency**. **The agency shall maintain adequate accounting records**, prepare financial statements in accordance with accounting principles generally accepted in the United States of America, and provide complete, accurate, and timely information to the IPA as requested to meet the audit report due date deadline imposed in Subsection A of 2.2.2.9 NMAC.

(3) If there are differences between the financial statements and the books, the IPA must provide the adjusting journal entries and the supporting documentation to the agency which reconciles the financial statements in the audit report to the books.

(4) If the IPA prepared the financial statements for management's review and approval, in conformance with Subsection H of 2.2.2.8 NMAC including documenting the safeguards as required by GAGAS 3.30, the fact that the auditor prepared the financial statements must be disclosed in the exit conference page of the audit report. If the IPA prepared the financial statements, **the auditor must determine whether a SAS 115 audit finding should be reported.** For examples of deficiencies see SAS 115 Exhibit B, examples of circumstances that may be deficiencies, significant deficiencies, or material weaknesses.

(5) In the event the 2011 revision to **Government Auditing Standards** is issued and becomes effective during the 2011 audit season, and the update considers auditor preparation of the financial statements an impairment of independence, then the requirements of Paragraph (4) of Subsection J of 2.2.2.8 NMAC above that are changed by the 2011 revision will be superseded by that revision.

K. Audit documentation:

(1) As required by SAS 103 Paragraph 32, the IPA's audit documentation must be retained for a minimum of five years from the date shown on the opinion letter of the audit report or longer if requested by the federal oversight agency, cognizant agency, or the state auditor. The state auditor shall have access to the audit documentation at the discretion of the state auditor.

(2) When requested by the state auditor, all of the audit documentation shall be delivered to the state auditor by the deadline indicated in the request.

(3) The audit documentation of a predecessor IPA must be made available to a successor IPA in accordance with SAS No. 84 and the predecessor auditor's contract. Any costs incurred will be borne by the requestor. If the successor IPA finds that the predecessor IPA's audit documentation does not comply with applicable auditing standards and this rule, or does not support the financial data presented in the audit report, the successor IPA shall notify the state auditor in writing specifying all deficiencies. If the state auditor determines that the nature of deficiencies indicate that the audit was not performed in accordance with auditing or accounting standards generally accepted in the United States of America and related laws, rules and regulations and this rule, any or all of the following actions may be taken:

(a) the state auditor may require the predecessor IPA firm to correct its working papers and reissue the audit report to the agency, federal oversight or cognizant agency and any others receiving copies;

(b) the state auditor may deny or limit the issuance of future audit contracts; and multiple year proposals take precedent over new contracts; or

(c) the state auditor may refer the predecessor IPA to the New Mexico public accountancy board for possible licensure action.

L. Auditor communication:

(1) GAGAS **(July 2007 Revision)** Sections 4.05 through 4.08 provide standards regarding auditor communication requirements in financial audits and broadens the parties with whom auditors must communicate during the planning stages of the audit. Section 4.06 states "auditors should communicate certain information in writing to management of the audited entity, those charged with governance, and to the individuals contracting for or requesting the audit." SAS 114, was effective for FY08, also requires this and additional information to be communicated to those charged with governance of the agency. Auditors should specifically communicate this information during the planning stages of a financial audit:

(a) any potential restriction of the auditors' reports; and

(b) the nature of planned work and level of assurance to be provided related to internal control over financial reporting and compliance with laws, regulations, and provisions of contracts or grant agreements including: (i) planned testing of compliance with applicable state and federal laws and regulations shown in Subsections G and H of 2.2.2.10 NMAC; (ii) planned tests of compliance with laws, regulations, and internal control related to single audit requirements that exceed the minimum GAGAS requirements (GAGAS 4.07); or (iii) any agreed upon procedures such as the HUD requirement for a SAS 29 opinion on the FDS schedule required in Subparagraph (a) of Paragraph (5) of Subsection B of 2.2.2.12 NMAC.

(2) The communication should explain whether the auditors are planning on providing opinions on compliance with laws and regulations and internal control over financial reporting. Such tests are not usually sufficient in scope to opine on compliance or internal control over financial reporting, but contribute to the evidence supporting the auditor's opinion on the financial statements.

(3) To fulfill these communication requirements, IPAs shall prepare a **written and dated engagement letter** during the planning stage of a financial audit, addressed to the appropriate officials of the agency, keeping a photocopy of the signed letter as part of the audit documentation (GAGAS 4.06). The appropriate officials of the agency may include:

(a) the head of the audited agency;

(b) the audit committee or board of directors or equivalent oversight body; or

(c) the individual who possesses a sufficient level of authority and responsibility for the financial reporting process, such as the chief financial officer (see GAGAS Appendix I, Paragraphs A1.05 through A1.07 for additional information).

(4) In those situations where auditors are performing the audit under a contract with a party other than the officials of the audited entity, or pursuant to a third party request, auditors should also communicate with the individuals contracting for or requesting the audit, such as contracting officials or members or staff of legislative committees (GAGAS 4.06).

(5) GAGAS 4.07 acknowledges the AICPA and GAGAS standards concerning tests of internal control over financial reporting and compliance with laws, regulations, and provisions of contracts or grant agreements in a financial statement audit, and the supplemental reporting prescribed by laws or regulations to meet the needs of certain report users. SAS 115 is effective for audits of financial statements for periods ending on or after December 15, 2009 (FY10). It provides guidance on evaluating the severity of deficiencies identified during an audit and defines the terms "significant deficiency" and "material weakness." SAS 115 requires the auditor to communicate significant deficiencies and material in writing, to both management and those charged with governance. The written communication should address significant deficiencies of material weaknesses related to both current year findings and prior year findings that were not corrected. In

addition, Paragraph (8) of Subsection I of 2.2.2.10 below requires the auditor to report any deficiencies in internal controls, immaterial violations of provisions of contracts or grant agreements, or abuse per Section 12-6-5 NMSA 1978 and GAGAS 5.14 and 5.16 (2007), that do not rise to the level of significant deficiencies or material weaknesses under SAS 115.

(6) Within 10 days of the entrance conference, the IPA shall submit to the state auditor a copy of the signed and dated engagement letter and a list of client prepared documents with expected delivery dates, which should facilitate meeting the audit due date in Subsection A of 2.2.2.9 NMAC. A separate engagement letter and list of client prepared documents is required for each fiscal year audited.

(7) All communications with management and the agency oversight officials regarding any instances of noncompliance or internal control weaknesses must be communicated in writing. The auditor should obtain management's **responses to the audit findings in writing** to facilitate effective communication. Any violation of law or good accounting practice including instances of noncompliance or internal control weaknesses must be reported as an audit finding per Section 12-6-5 NMSA 1978. Separate management letter comments shall **not** be issued as a substitute for such findings.

M. Contract amendments:

(1) Contract amendments to contracts for audit services, agreed upon procedures services, or nonaudit services may be submitted for executed contracts. Amendments shall be approved in writing by the state auditor. Any amendments to contracts should be made on the contract amendment form available at www.osanm.org. The contract should be amended prior to the additional work being performed or as soon as practicable thereafter. Any amendments to the contract must be in compliance with the New Mexico Procurement Code, Sections 13-1-1 to 13-1-199 NMSA 1978. **Notwithstanding the delivery** dates of the contract, **audit report regulatory due dates are not subject to amendment.**

(2) Contract amendments submitted for state auditor approval shall include a detailed explanation of:

(a) the work to be performed and the estimated hours and fees required for completion of each separate professional service contemplated by the amendment;

(b) how the work to be performed is beyond the scope of work outlined in the original contract; and

(c) when the auditor or agency became aware of the work needed to be performed.

(3) Since annual financial audit contracts are fixed-price contracts, contract amendments for fee increases will only be approved for extraordinary circumstances or a significant change in the scope of an audit; for example, if an audit contract did not include a federal single audit, a contract amendment will be approved if a single audit is required. Other examples of significant changes in the scope of an audit include: the addition of a new program, function or individual fund that is material to the government-wide financial statements; the addition of a component unit; and special procedures required by a regulatory body or a local, state or federal grantor. Contract amendments will not be approved to perform additional procedures to achieve an unqualified opinion. The state auditor shall also consider the auditor independence requirements of Subsection H of 2.2.2.8 NMAC when reviewing contract amendments for approval. Requests for contract amendments should be submitted to the office with the **original** version of the signed contract amendment by the 5th of each month. The office will review the requests and respond to the agency and the IPA by the 25th of each month. Requests for contract amendments submitted after the 5th of each month will not be reviewed and responded to by the office until the 25th of the following month.

(4) The audit engagement letter shall not be interpreted as amending the contract. No fee contingencies will be included in the engagement letter. The original contract and the contract amendments approved by the state auditor constitute the entire agreement.

N. The state auditor may terminate an audit contract to be performed by an IPA after determining that the audit has been unduly delayed, or for any other reason, and perform the audit entirely or partially with IPAs contracted by him consistent with the October 6, 1993, stipulated order Vigil v. King No. SF 92-1487(C). The notice of termination of the contract will be in writing. [2.2.2.8 NMAC - Rp, 2.2.2.8 NMAC, 2-28-11]

2.2.2.9 REPORT DUE DATES:

A. The auditor shall deliver the organized and bound annual financial audit report to the state auditor by 5:00 p.m. on the date specified in the audit contract or send it post marked by the due date.

(1) The audit report due dates are as follows:

(a) regional education cooperatives, cooperative educational services and independent housing authorities: **September 30**;

(b) hospitals and special hospital districts: **October 15;**

(c) school districts, counties, and higher education: **November 15;**

(d) municipalities, special districts, and local workforce investment boards: **December 1;** mutual domestic water consumers associations, land grants, incorporated municipalities, and special districts that are defined as "local public bodies" per Section 12-6-2(B) NMSA 1978, see Subsection H of 2.2.2.16 NMAC for report due dates;

(e) councils of governments, district courts, and district attorneys: **December 15;**

(f) state agency reports are due no later than **60 days** after the financial control division of the department of finance and administration provides the state auditor with notice that the agency's books and records are ready and available for audit; see Paragraph (1) of Subsection A of 2.2.2.12 NMAC for report due dates for state agencies;

(g) agencies with a fiscal year-end other than June 30 must submit the audit report no more than **5 months after the fiscal year-end**; and

(h) all separate audit reports prepared for component units (e.g., housing authorities, charter schools, hospitals, foundations, etc.) are due the **same date the primary government's audit report is due**.

(2) If an audit report is not delivered on time to the state auditor, the auditor must include this instance of noncompliance with Subsection A of 2.2.2.9 NMAC as an audit finding in the audit report. This requirement is not negotiable. If appropriate, the finding should also be reported as an instance of deficiency, significant deficiency, or material weakness in the operation of internal control in the agency's internal controls over financial reporting pursuant to SAS 115 Exhibit B.

(3) An organized bound hard copy of the report should be submitted for review by the office with the following: a copy of the signed and dated engagement letter if not previously submitted; a copy of the signed management representation letter; a list of the passed audit adjustments, clearly labeled "passed adjustments" (or memo stating there are none); and a copy of the completed state auditor report review guide (available at **www.saonm.org**). The report review guide should reference applicable page numbers in the audit report and be signed by the person completing the review guide. The audit manager or person responsible for the firm's quality control system should either complete the report review guide or sign off as having reviewed it. A report will not be considered submitted to the office for the purpose of meeting the deadline until a copy of the signed engagement letter (if not previously submitted), a copy of the signed management representation letter, the list

of passed adjustments, and the completed report review guide are also submitted to the office. All separate reports prepared for component units should also be submitted to the office for review, along with a copy of the representation letter, a list of passed audit adjustments and a completed report review guide for each separate audit report. A separate component unit report will not be considered submitted to the office for the purpose of meeting the deadline until a copy of the signed management representation letter, the passed adjustments, and the completed report review guide are also submitted to the office. If a due date falls on a weekend or holiday, or if the office is closed due to inclement weather, the audit report is due the following workday by 5:00 p.m. If the report is mailed to the state auditor, it should be postmarked no later than the due date to be considered filed by the due date. The state auditor will grant no extensions of time to the established regulatory due dates.

(4) SAS No. 103 requires the auditor's report to be dated after audit evidence supporting the opinion has been obtained and reviewed, the financial statements have been prepared and the management representation letter has been signed. SAS No. 113 Paragraph 14 requires the management representation letter to be dated the same date as the independent auditor's report.

(5) As soon as the auditor becomes aware that circumstances exist that will make an agency's audit report late, the auditor shall notify the state auditor and oversight agency of the situation in writing. There must be a separate notification for each late audit report. The notification must include a specific explanation regarding why the report will be late, when the IPA expects to submit the report and a concurring signature by the agency. If the IPA is going to miss the expected report submission date, then the IPA should send a revised notification letter. In the event the contract was signed after the report due date, the notification letter must still be submitted to the office explaining the reason the audit report will be submitted after the report due date. A copy of the letter must be sent to the legislative finance committee and the applicable oversight agency: public education department, DFA's financial control division, DFA's local government division, or the higher education department. At the time the audit report is due, if circumstances still exist that will make the report late, the IPA or agency may consult the state auditor regarding the opinion to be rendered, but such a discussion should occur no later than the date the audit report is due. It is not the responsibility of the auditor to go beyond the scope of auditing standards generally accepted in the United States of America, or the audit report due date, to assure an unqualified opinion.

B. As in any contract, both parties can and are encouraged to negotiate a delivery date prior to the regulated due date specified in Subsection A of 2.2.2.9 NMAC. No delivery date, however, may exceed the "no later than" due date specified in Subsection A of 2.2.2.9 NMAC.

C. Delivery and release of the audit report:

(1) All audit reports (and all separate reports on component units) must be organized, bound and paginated. **The office does not accept facsimile or emailed versions of the audit reports for review**. The IPA shall deliver to the state auditor a hard copy of the audit report for review by 5:00 p.m. on the day the report is due. Reports postmarked by the due date will be considered received by the due date. Unfinished or excessively deficient reports will not satisfy this requirement; such reports will be rejected and returned to the IPA and the office may take action in accordance with Subsection C of 2.2.2.13 NMAC.

(2) The IPA should review the report using the appropriate report review guide available on the office's website prior to submitting the report to the office. All questions in the guide must be answered, and the reviewer must sign and date the last page of the guide. The audit manager or person responsible for the IPA's quality control system must either complete the report review guide or sign off as having reviewed the completed questionnaire.

(3) The office will review all audit reports submitted by the report due date before reviewing reports that are submitted after the report due date. Once the review of the report is completed pursuant to 2.2.2.13 NMAC, and any significant deficiencies have been corrected by the IPA, the state auditor will indicate to the IPA that the report is ready to print. After the office review of the final version of the audit report pursuant to 2.2.2.13 NMAC, the office will authorize the IPA to submit the following items to the office within two business days; (a) the required number of hardcopies specified in the audit contract; and (b) an electronic version of the audit report, in PDF format. The office will not release the report until the electronic version of the report is received by the office.

(4) The IPA shall deliver to the agency the number of copies of the audit report indicated in the audit contract **only** after the state auditor has officially released the audit report with a "release letter." Release of the audit report to the agency or the public prior to it being officially released by the state auditor will result in an audit finding. The agency or the IPA shall ensure that every member of the agency's governing authority receives a copy of the audit report.

D. The agency and IPA may agree to a contract provision that unjustified failure to meet delivery requirements by either party to the contract may result in a liability for a specified amount of liquidated damages from the offending party.

E. IPAs are encouraged to deliver completed audit reports before the due date to facilitate the review process performed by the state auditor. If the office rejects and returns a substandard audit report to the IPA, the office will consider the audit report late if the corrected report is not submitted by the due date. The IPA will also be required to report a finding for the late audit report.

[2.2.2.9 NMAC - Rp, 2.2.2.9 NMAC, 2-28-11]

2.2.2.10 GENERAL CRITERIA:

A. Scope of annual financial audit:

(1) The financial audit shall cover the entire financial reporting entity including the primary government and any component units of the primary government.

(a) Entities must be reported as component units within the financial statements of the primary government, if the primary government is financially accountable for the entity (GASBS 14 Paragraph 10) or if the nature and significance of the entity to the primary government warrants inclusion (GASBS 39 Paragraphs 5 and 6). The primary government, in conjunction with its auditors, must determine whether an agency that is a separate legal entity from the primary government is a component unit of the primary government as defined by GASBS 14 and 39. The flowchart at GASBS 14 Paragraph 132 is useful for this determination. All agencies that meet the criteria of GASBS 14 or 39 to be a component unit of the primary government **must be included with the audited financial statements of the primary government by discrete presentation unless otherwise approved by the state auditor**. Discrete presentation entails reporting component unit financial data in a column(s) separate from the financial data of the primary government (GASBS 14 Paragraphs 44 through 50). Exceptions may occur when an agency requires presentation other than discrete. An exemption must be requested by the agency, in writing, from the state auditor in order to present a component unit as other than a discrete component unit. The request for exemption must include a detailed explanation, conclusion and supporting documentation. The approval of the state auditor for the exemption is required prior to issuing the report. Per Paragraph 1.01 of AAG-SLV, not-for-profit component units should be reported using the government financial reporting format if they have one or more of the following characteristics: popular election of officers

or appointment of a controlling majority of the members of the organization's governing body by officials of one or more state or local governments; the potential for unilateral dissolution by a government with the net assets reverting to the government; or the power to enact and enforce a tax levy. If a not-for-profit does not qualify to be reported using the governmental format under the above criteria, that fact should be explained in the notes to the financial statements (summary of significant accounting policies-financial reporting entity).

(b) If a primary government has no component units, that fact should be disclosed in the notes to the financial statements (summary of significant accounting policies - financial reporting entity). If the primary government has component units that are not included in the financial statement due to materiality, that fact must also be disclosed in the notes. However, if the primary government is a state agency, department or board, or public institution of higher education or public post-secondary educational institution, county, municipality or public school district, Section 6-5A-1(4)a NMSA 1978 requires all 501(c) 3 component unit organizations with a gross annual income in excess of $100,000 to receive an audit. Such component units cannot be excluded from the audit based on the "materiality" criterion.

(c) **The state auditor requires the component unit(s) to be audited by the same auditor who audits the primary government** (except for public housing authority component units that are statutorily exempt). Requests for exemption from this requirement must be submitted **by the agency** to the state auditor in writing. If the request to use a different auditor for the component unit is approved, the following requirements must be met: (i) the primary auditor must agree to use the information from the work of the component unit auditor; (ii) the component unit auditor selected must appear on the office of the state auditor list of eligible independent public accountants; (iii) the bid and auditor selection processes must comply with the requirements of this rule; (iv) the office of the state auditor standard contract form must be used; (v) all component unit findings must be disclosed in the primary government's audit report; and (vi) any separately issued component unit audit report must be submitted to the state auditor for the review process described in Section 2.2.2.13 NMAC.

(d) The level of planning materiality required by the state auditor **for component units** is at the **individual fund level**. College and university component units have a different materiality level. See Paragraph (3) of Subsection E of 2.2.2.12 NMAC.

(e) The following supplemental information (SI) pertaining to component units should be included in the scope of the audit and opined on (as allowed by SAS 98): (i) component unit fund financial statements, and the combining and individual fund financial statements if separately issued financial statements of the component units are not available (AAG-SLV 3.20); and (ii) individual fund budgetary comparisons when a legally adopted budget exists for a fund if separately issued financial statements are not available; the office interprets a "legally adopted budget" to exist any time the agency prepares a budget and in every case where an entity receives federal funds, state funds, or any other "appropriated" funds.

(2) Audits of state and local governmental agencies shall be comprised of a financial and compliance audit of the financial statements and schedules as follows:

(a) The level of planning materiality required by the state auditor is at the **individual fund level**. The state auditor requires that the budgetary comparison statements be audited and included as part of the basic financial statements consistent with GASBS 34 footnote 53 and AAG-SLV 11.13.

(b) The scope of the audit includes the following statements and schedules which the auditor is required to audit and give an opinion on the basic financial statements consisting of (i) the government-wide financial statements; (ii) fund financial statements; (iii) budgetary comparison statements (for **only** the general fund and major special revenue funds when the budget information is available on the same fund structure basis as the GAAP fund structure); and (iv) notes to the financial statements.

(c) The auditor must audit the following required supplemental information, if applicable, and include it in the auditor's opinion (AAG-SLV 14.53). Budgetary comparisons for the general fund and major special revenue fund data presented on a fund, organization, or program structure basis because the budgetary information is not available on the GAAP fund structure basis for those funds (***GASB Statement No. 41, Budgetary Comparison Schedules-Perspective Differences an amendment of GASB Statement No. 34***).

(d) The auditor must audit the following supplemental information, if applicable, and include it in the auditor's opinion: (i) component unit fund financial statements, and the combining and individual fund financial statements (if there are no separately issued financial statements on the component unit per AAG-SLV 3.20); (ii) combining and individual fund financial statements; and (iii) individual fund budgetary comparison statements for the remaining funds that have a legally adopted budget **including any major capital project or debt service funds, nonmajor governmental funds, enterprise funds and internal service funds** that are not presented as part of the basic financial statements.

(e) The auditor should apply certain limited procedures to the following RSI (if applicable) and report deficiencies in, or the omission of, required information in accordance with the requirements of SAS AU 558.06: (i) management's discussion and analysis (GASBS 34.8-.11); (ii) RSI data required by GASBS 25 and 27 for defined pension plans; (iii) RSI schedules required by GASBS 43 for postemployment benefit plans other than pension plans; (iv) RSI schedules required by GASBS 45 regarding employer accounting and financial reporting for postemploment benefits other than pensions; and (v) infrastructure modified approach schedules derived from asset management systems (GASBS 34 Paragraphs 132 and 133).

(f) The audit engagement and audit contract compensation include the following audit work on the remaining supplemental information schedules presented in the audit report (whether the report is client-prepared or auditor-submitted). (i) Some examples of remaining SI schedules are: the schedule of pledged collateral required by Paragraph (5) of Subsection N of 2.2.2.10 NMAC; the schedule of changes in assets and liabilities for agency funds required by Subsection Z of 2.2.2.10 NMAC; the school district schedule of cash reconciliation required by Subparagraph (b) of Paragraph (4) of Subsection C of 2.2.2.12 NMAC. (ii) The auditor should subject the information on the remaining SI schedules to the auditing procedures applied in the audit of the basic financial statements. (iii) In addition, the school district schedule of cash reconciliation (SI) should be subjected to audit procedures that ensure the cash per the schedule reconciles to the PED reports as required by Subparagraph (b) of Paragraph (4) of Subsection C of 2.2.2.12 NMAC. (iv) The auditor's report should include either an opinion on whether the accompanying information is fairly stated in all material respects in relation to the basic financial statements taken as a whole or a disclaimer of opinion.

B. Legislation regarding budget adjustment requests (BARs) prevents or restricts many budget transfers or increases. The IPA shall satisfy himself that these restrictions are not being violated by direct payment or other unauthorized transfers.

C. Legislation can designate a fund as reverting or non-reverting. The IPA must review the state law that appropriated funds to the agency to confirm whether any unexpended, unencumbered balance of a specific

appropriation must be reverted and to whom. The law will also indicate the deadline for the required reversion. Appropriate audit procedures must be performed to determine compliance with the law and accuracy of the related liability account balances due to other funds, governmental agencies, or both. The financial statements and the accompanying notes should fully disclose the reverting or non-reverting status of a fund or appropriation. The financial statements must disclose the specific legislation that makes a fund or appropriation non-reverting. If non-reverting funds are commingled with reverting appropriations, the notes to the financial statements must disclose the methods and amounts used to calculate reversions. For more information regarding state agency reversions, see Subsection A of 2.2.2.12 NMAC and the DFA white papers "calculating reversions to the state general fund," and "basis of accounting-modified accrual and the budgetary basis."

D. Governmental auditing, accounting and financial reporting standards: The audits shall be conducted in accordance with:

(1) ***Generally Accepted Government Auditing Standards*** (GAGAS) issued by the U.S. general accounting office, the 2007 revision, as amended by *Interim Guidance on Reporting Deficiencies in Internal Control for GAGAS Financial Audits and Attestation Engagements;* (unless the 2011 revision becomes effective during the 2011 audit season and supersedes the 2007 revision);

(2) ***Codification of Statements on Auditing Standards*** (SAS) issued by the AICPA, latest edition;

(3) ***OMB Circular A-13, Audits of States, Local Governments and Non-Profit Organizations (July 28, 2003 revision which raised the threshold for Single Audits from $300,000 to $500,000 of federal expenditures)*** as amended;

(4) ***AICPA Audit Guide, Governmental Auditing Standards and Circular A-133 Audits,*** latest edition;

(5) ***AICPA Audit and Accounting Guide, State and Local Governments,*** latest edition; and

(6) 2.2.2 NMAC, ***Requirements for Contracting and Conducting Audits of Agencies***, latest edition.

E. The financial statements and notes to the financial statements shall be prepared in accordance with accounting principles generally accepted in the United States of America. Governmental accounting principles are identified in the ***Codification of Governmental Accounting and Financial Reporting Standards (GASB)***, latest edition. Auditors shall follow interpretations, technical bulletins, concept statements issued by GASB, other applicable pronouncements, and GASB illustrations trends for financial statements.

F. IPAs who perform government audits are expected to maintain professional libraries including current editions of the publications and standards noted above. The audit guides published by the practitioners publishing company (PPC) or similar authors are practice aides only and are not considered to be authoritative.

G. State compliance: An IPA shall identify significant state statutes, rules and regulations applicable to the governmental agency under audit and perform tests of compliance. In addition to the significant state statutes, rules and regulations identified by the IPA, the following state statutes and constitutional provisions must be tested:

(1) Procurement Code (Section 13-1-1 to 13-1-199 NMSA 1978) and state purchasing regulations 1.4.1 NMAC;

(2) Per Diem and Mileage Act (Section 10-8-1 to 10-8-8 NMSA 1978), Regulation Governing the Per Diem and Mileage Act 2.42.2 NMAC, Emergency Amendment to Section 11, Mileage dated June 19, 2009 available at http://www.dfafcd.state.nm.us/pdf/EmergAmendMileage.pdf; and for relevant mileage and per diem information for local public bodies, the auditor should see the "Per Diem and Mileage Act Rule Change of June 19, 2009" available at http://fmb.nmdfa.state.nm.us/content.asp?CustComKey=260039&CategoryKey=260153&pn=Page&DomName=fmb.nmdfa.state.nm.us;

(3) Personnel Act (Section 10-9-1 to 10-9-25 NMSA 1978) and State Personnel Administration 1.7.1 NMAC (state agencies only);

(4) Public Money (Section 6-10-1 to 6-10-63 NMSA 1978);

(5) Public School Finance Act (Section 22-8-1 to 22-8-48 NMSA 1978);

(6) Investment of Public Money (Section 6-8-1 to 6-8-21 NMSA 1978);

(7) Public Employees Retirement Act (Section 10-11-1 to 10-11-141 NMSA 1978). Auditors should test to **ensure 100% of payroll is reported to PERA**. This is a PERA requirement. PERA membership is mandatory under the PERA Act, unless membership is specifically excluded by statute for: seasonal employees; student employees; certain elected officials who exercise an option to exclude themselves from PERA membership; and employees that participate in a private retirement program paid for by their government employer, that are ERA retirees and PERA retirees who return to work under Section 10-11-8 and Section 10-11-3 (2005) NMSA 1978;

(8) Educational Retirement Act (Section 22-11-1 to 22-11-53 NMSA 1978);

(9) Sale of Public Property (Section 13-6-1 to 13-6-8 NMSA 1978);

(10) Anti-Donation Clause (NM Constitution Article IX, Section 14);

(11) Special, Deficiency, and Specific Appropriations (appropriation laws applicable for the year under audit);

(12) State Budgets (Section 6-3-1 to 6-3-25 NMSA 1978), state agencies only;

(13) Lease Purchase Agreements (New Mexico Constitution Article IX, Section 8 and 11; Section 6-6-11 to 6-6-12 NMSA 1978; Montano v. Gabaldon, 108 NM 94, 766 P.2d 1328, 1989);

(14) 2.20.1.1 to 2.20.1.18 NMAC, ***Accounting and Control of Fixed Assets of State Government*** (updated for GASB 34 as applicable);

(15) 2.2.2 NMAC, ***Requirements for Contracting and Conducting Audits of Agencies***;

(16) Article IX of the State Constitution limits on indebtedness;

(17) Laws of 2010 2nd Special Session, Chapter 6, Section 3, Subsection K states, "Except for gasoline credit cards used solely for operation of official vehicles, telephone credit cards used solely for official business and procurement cards used as authorized by Section 6-5-9(l) NMSA 1978, none of the appropriations contained in the General Appropriation Act of 2010 may be expended for payment of agency-issued credit card invoices;"

(18) Retiree Health Care Authority Act (RHCA) (Section 10-7C-1 to 10-7C-19 NMSA 1978): auditors should test to **ensure 100% of payroll is reported to NMRHCA**; RHCA employer and employee contributions are set forth in Section 10-7C-15 NMSA 1978; as of June 30, 2010 the contribution rates will increase; see the applicable statute for more information; and

(19) Governmental Conduct Act (10-16-1 to 10-16-18 NMSA 1978).

H. Federal compliance:

(1) The following government pronouncements establish requirements and give guidance for "Yellow Book" and single audits.

(a) **Single Audit Act Amendments of 1996** (Public Law 104-156) as amended;

(b) ***Generally Accepted Government Auditing Standards*** (GAGAS) issued by the U.S. general accounting office, latest effective edition and amendments;

(c) OMB Circular A-21, ***Cost Principles for Educational Institutions***, as revised May 10, 2004;

(d) OMB Circular A-87, ***Cost Principles for State, Local, and Indian Tribal Governments***, revised May 10, 2004;

(e) OMB Circular A-102, ***Grants and Cooperative Agreements with State and Local Governments***, revised October 7, 1994 and further amended August 29, 1997;

(f) OMB Circular A-110, ***Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-***

Profit Organizations, as revised November 19, 1993 and further amended September 30, 1999;

(g) OMB Circular A-133, ***Audits of States, Local Governments and Non-Profit Organizations***, (June 27, 2003 revision) as amended;

(h) OMB Circular A-133, ***Compliance Supplement***, latest edition; and

(i) OMB ***Catalog of Federal Domestic Assistance*** (CFDA), latest edition.

(2) IRS employee income tax compliance issues - noncompliance with these IRS requirements requires a current year audit finding.

(a) Employee fringe benefits are presumed by the IRS to be income to the employee unless they are specifically excluded from income by the tax code. Any employee fringe benefits not excluded from income by the tax code must be reported on the employee's W-2. Examples of such fringe benefits could be: meal allowances paid to employees for meals away from home when overnight travel is not involved; discounted housing like school district teacherages, dues for membership in clubs organized for business, pleasure, recreation, or other social purpose (except rotary and kiwanis club); cash and non-cash awards, and employee insurance benefits for dependents who do not meet the IRS definition of a "dependent." Personal use of a government agency vehicle is always taxable income to the employee unless the vehicle is a qualified non-personal use vehicle [Rev. 1.274-5T(k)(3)] provided to the employee as a "working condition fringe benefit." (i) Examples of qualified non-personal use vehicles are: clearly marked police and fire vehicles; unmarked law enforcement vehicles (officer must be authorized to carry a firearm and have arrest authority); ambulance or hearse; vehicle with gross weight over 14,000 lbs.; 20 passenger bus and school bus; tractor and other farm equipment; and delivery truck with driver seating only. (ii) The value of commuting and other personal use of a "nonqualified vehicle" must be included on the employee's W-2. There are three rules the IRS allows to be used for valuing personal use of an employer's vehicle: automobile lease valuation rule; cents-per-mile rule; and the commuting rule ($3 per day). For more detailed information regarding valuation of personal use of vehicles see IRS Pub. 15-B, Reg 1.61-21.

(b) Personal service contractors (1099 employees) who are retired employees of the governmental agency they worked for must be able to meet the IRS tests to qualify as contract labor. In the event a personal services contractor is in substance an employee, the governmental agency could be liable for the employee's share of FICA and employer FICA match on the contract payments. Public employees' retirement association (PERA) could expect excess retirement payments back (Section 10-11-8(C) NMSA 1978).

(c) City or county "volunteer firefighters" who are reimbursed when they provide firefighting services on state or federal land have been determined by the IRS to be employees of the respective city or county.

(d) The social security administration now requires all state and local government employers to disclose to all new employees the fact that their job is not covered by social security if they were hired for a position not covered by social security. These employees must sign a statement that they are aware of a possible reduction in their future social security benefit entitlement. See the website at www.socialsecurity.gov/form1945 for the required form and instructions.

(e) For more information regarding these and other IRS issues please contact the federal state and local government specialist with the IRS in Las Cruces, NM at 575-527-6900 ext. 232, in Albuquerque, NM at 505-837-5610, or in Santa Fe, NM at 505-986-5260.

I. Audit findings:

(1) Pursuant to the GAO's ***Interim Guidance on Reporting Deficiencies in Internal Control for GAGAS Financial Audits and Attestation Engagement*** (November 2008), "auditors may satisfy the internal control reporting requirements in GAGAS Paragraph 5.11 by including in the GAGAS report on internal control all identified 'material weaknesses' and 'significant deficiencies' following the new definitions and requirements from SAS 115." GAGAS Paragraphs 5.10 and 5.11 states that "auditors should report, as applicable to the objectives of the audit, and based upon the audit work performed, (1) significant deficiencies in internal control, identifying those considered to be material weaknesses; (2) all instances of fraud and illegal acts unless inconsequential; and (3) violations of provisions of contracts or grant agreements and abuse that could have a material effect on the financial statements. For all financial audits, auditors should report the following deficiencies in internal control: significant deficiency and material weakness." See SAS 115 Paragraphs 6 and 7 for the updated definitions of a significant deficiency and a material weakness. Auditors should also follow the updated examples of the *Report on Internal Control Over Financial Reporting and on Compliance and Other Matters Based on an Audit of Financial Statements Performed in Accordance With Government Auditing Standards* available on the office website or at http://gaqc.aicpa.org/, by selecting "Government Auditing Standards Report Illustrations with SAS No. 115 Terminology."

(a) Per SAS 115 Paragraph 8, the auditor must evaluate control deficiencies found during audit procedures. Evaluation guidance is provided by SAS 115 Paragraphs 8 through 16. SAS 115 Paragraph 15 lists specific indicators of material weaknesses in internal controls.

(b) Section 12-6-5 NMSA 1978 (Reports of Audits) states "each report shall set out in detail, in a separate section, **any** violation of law or good accounting practices found by the audit or examination." **Therefore, all such findings must be included in the annual financial audit report.** (i) All deficiencies in internal control must be reported. (ii) All instances of fraud, illegal acts or abuse must be reported. (iii) All violations of provisions of laws, regulations, contracts, grant agreements and other matters must be reported.

(2) GAGAS Section 4.09 (July 2007 Revision) requires auditors to "evaluate whether the audited entity has taken appropriate corrective action to address findings and recommendations from previous engagements that could have a material effect on the financial statements. When planning the audit, auditors should ask management of the audited entity to identify previous audits, attestation engagements, and other studies that directly relate to the objectives of the audit, including whether related recommendations have been implemented. Auditors should use this information in assessing risk and determining the nature, timing, and extent of current audit work, including determining the extent to which testing the implementation of the corrective actions is applicable to the current audit objectives." In addition to this standard, the IPA will report the status of **all** prior-year findings in the current year audit report including the prior year number, the title of the finding, and whether the finding has been resolved or repeated in the current year. Findings from special audits performed by the state auditor must be included in the findings of the annual financial and compliance audits of the related fiscal year.

(3) Current-year audit findings:

(a) All audit findings must have a reference number such as 2009-1, 2010-3, and 2011-1 and a short title that summarizes the finding. Depending on what type of finding the auditor has determined the finding to be, the finding reference number should be followed by one of the following descriptions: material weakness; significant deficiency; or other. "Other" refers to findings described in item (8) below. Any unresolved prior year findings must be repeated in the current year using the original finding number to preserve the audit trail.

(b) Written audit findings should be prepared and submitted to the agency management as soon as the IPA becomes

aware of the findings so the agency has time to respond to the findings prior to the exit conference. **Findings are not subject to negotiation**. The agency should also prepare a corrective action plan as required by GAGAS 5.32 (July 2007 Revision). The agency shall respond, in writing, to the IPA's audit findings within 5 business days. The agency's responses to the audit findings and the corrective action plan should be included in the finding after the recommendation. When the audited agency's comments are inconsistent or in conflict with findings, conclusions, or recommendations in the draft report, or when planned corrective actions do not adequately address the auditor's recommendations, the auditors should evaluate the validity of the audited agency's comments. If the auditors disagree with the comments, they should explain their reasons for disagreement after the agency's response. Conversely, the auditors should modify their report as necessary if they find the comments valid and supported with sufficient, appropriate evidence (GAGAS 5.37). Lack of agency responses within the 5 business days does not warrant a delay of the audit report. If the audited agency refuses to provide comments or is unable to provide comments within a reasonable period of time, indicate that the responses to the findings were not received and the reason why after the recommendation (GAGAS 5.38).

(c) Each audit finding (including unresolved prior-year findings) shall specifically state and describe the following: (i) condition (provides a description of a situation that exists and should include the extent of the condition and an accurate perspective; the number of instances found and the dollar amounts involved, if any, should be reported in the condition); (ii) criteria (should identify the required or desired state or **what is expected** from the program or operation; should cite the specific section of law, regulation, ordinance, contract, or grant agreement if applicable); (iii) effect (the logical link to establish the **impact or potential impact of the difference** between the situation that exists (condition) and the required or desired state (criteria); demonstrates the need for corrective action in response to identified problems or relevant risks; (iv) cause (identifies the reason or explanation for the condition or the factors responsible for the **difference** between what the auditors found and what is required or expected; the cause will serve as a basis for the recommendation); (v) recommendation addressing each condition and cause; and (vi) agency response (agency's comments about the finding including a specific corrective action plan).

(4) Failure to file the audit report by the due date set in 2.2.2.9 NMAC is considered noncompliance with this rule and shall be reported as a current-year compliance finding. If appropriate in the auditor's professional judgment, the finding should also be reported as a significant deficiency in the operation of internal control over financial reporting.

(5) If an agency has entered into any professional services contract with the IPA who performs the agency's annual financial audit or the scope of work on any professional services contract relates to fraud, and the contract was not approved by the state auditor, this should be reported as a finding of noncompliance with Subsection H of 2.2.2.8 NMAC.

(6) Component unit audit findings must be reported in the primary government's financial audit report.

(7) A release of the audit report by the IPA or agency prior to being officially released by the state auditor is a violation Section 12-6-5(A) NMSA 1978 and will require an additional finding in the audit report.

(8) When auditors detect deficiencies in internal controls or immaterial violations of provisions of contracts or grant agreements or abuse that are required to be reported by Section 12-6-5 NMSA 1978, and GAGAS 5.14 and 5.16, but do not rise to the level of significant deficiencies or material weaknesses under SAS 115, the auditor must communicate those deficiencies, in written findings, and refer to those findings in the report on internal control in the second paragraph of the "compliance and other matters" section of the report. The paragraph should use wording similar to "We also noted certain matters that are required to be reported under ***Government Auditing Standards*** 5.14 and 5.16, and Section 12-6-5 NMSA 1978, which are described in the accompanying schedule of findings and responses as findings 11-5 and 11-6." (See the report example at www.saonm.org.)

J. Exit conference and related confidentiality issues:

(1) The IPA must hold an exit conference with representatives of the agency's governing authority and top management including representatives of any component units (housing authorities, charter schools, hospitals, foundations, etc.) if applicable. If component unit representatives cannot attend the combined exit conference, a separate exit conference must be held with the component unit's governing authority and top management. The exit conference must be held in person; a telephone exit conference will not meet this requirement unless a telephonic exit conference is approved in writing by the state auditor prior to the exit conference. The date of the conference(s) and the names and titles of personnel attending must be stated in the last page of the audit report.

(2) The IPA shall deliver to the agency a complete and accurate draft of the audit report (stamped "draft"), **a list of the "passed audit adjustments,"** and a copy of all the adjusting journal entries before the exit conference. The draft audit report shall include the MD&A, independent auditor's report, a complete set of financial statements, notes to the financial statements, required schedules, audit findings that include responses from agency management, status of prior-year audit findings, and the reports on internal control and compliance required by government auditing standards and the Single Audit Act. The agency will have at least five (5) business days to review the draft audit report and respond to the IPA regarding any issues that need to be resolved prior to the agency accepting responsibility for the financial statements by signing and dating the management representation letter.

(3) **Neither the IPA nor agency personnel shall release any information to the public relating to the audit at the time of the exit conference or at any other time until the audit report has been officially released by the state auditor and becomes public record.** Agencies subject to the Open Meetings Act (act) who wish to have a quorum of the governing board present at the exit conference will have to schedule the exit conference during a closed meeting in compliance with the act in order to avoid disclosing audit information that is not yet public record, in a public meeting.

(a) Pursuant to the Open Meetings Act (Section 10-15-1 to 10-15-4 NMSA 1978), any closed meetings shall be held only after reasonable notice to the public.

(b) Section 12-6-5 NMSA 1978 (Reports of Audits) provides that an audit report does not become a public record, subject to public inspection, until five calendar days after the date it is released by the state auditor to the agency being audited.

(c) Example 31 in the Seventh Edition of the attorney general's ***Open Meetings Act Compliance Guide*** states that "where the agency being audited is governed by a public body subject to the Open Meetings Act and where release of the report occurs at an exit conference at which a quorum of the members of the body is present, such exit conference need not be open to the public in order to preserve the confidentiality of the information protected by Section 12-6-5."

(d) Once the audit report is officially released to the agency by the state auditor (by an authorizing letter) and the required waiting period of five calendar days has passed, the audit report **shall** be presented by the IPA, to a quorum of the governing authority of the agency at a meeting held in accordance with the Open Meeting Act, if applicable. The presentation of the audit report should be documented in the minutes of the meeting. See SAS 114

Paragraph 34 through 36 for information that should be communicated to those charged with governance.

K. Possible violations of criminal statutes in connection with financial affairs:

(1) GAGAS (2007) Paragraphs 4.10 to 4.13 state that "auditors should design the audit to provide reasonable assurance of detecting misstatements that result from violations of provisions of contracts or grant agreements and could have a direct and material effect on the determination of financial statement amounts or other financial data significant to the audit objectives. If specific information comes to the auditors' attention that provides evidence concerning the existence of possible violations of provisions of contracts or grant agreements that could have a material indirect effect on the financial statements, the auditors should apply audit procedures specifically directed to ascertaining whether such violations have occurred. When the auditors conclude that a violation of provisions of contracts or grant agreements has or is likely to have occurred, they should determine the effect on the financial statements as well as the implications for other aspects of the audit. Abuse involves behavior that is deficient or improper when compared with behavior that a prudent person would consider reasonable and necessary business practice given the facts and circumstances. Abuse also includes misuse of authority or position for personal financial interests or those of an immediate or close family member or business associate. Abuse does not necessarily involve fraud, violation of laws, regulations, or provisions of a contract or grant agreement. If during the course of the audit, auditors become aware of abuse that could be quantitatively or qualitatively material to the financial statements, auditors should apply audit procedures specifically directed to ascertain the potential effect on the financial statements or other financial data significant to the audit objectives. After performing additional work, auditors may discover that the abuse represents potential fraud or illegal acts. Because the determination of abuse is subjective, auditors are not required to provide reasonable assurance of detecting abuse."

(2) An agency or IPA, pursuant to Section 12-6-6 NMSA 1978 (Criminal Violations), shall notify the state auditor immediately, in writing, upon discovery of any violation of a criminal statute in connection with financial affairs. The notification shall include an estimate of dollar amount involved, and a complete description of the violation, including names of persons involved and any action taken or planned. If warranted, the state auditor may cause an audit of the financial affairs and transactions of the agency in whole or in part pursuant to Section 12-6-3 NMSA 1978 and 2.2.2.15 NMAC. If the state auditor does not designate an agency for audit, an agency shall follow the provisions of Subsection E of 2.2.2.15 NMAC when entering into a professional services contract for a special audit, performance audit or attestation engagement regarding the financial affairs and transactions of an agency and relating to financial fraud, waste and abuse.

(3) Section 12-6-6 NMSA 1978 states that the state auditor, immediately upon discovery of any violation of a criminal statute in connection with financial affairs, shall report the violation to the proper prosecuting officer and furnish the officer with all data and information in his possession relative to the violation.

L. Compensated absences:

(1) Vacation pay and other compensated absences should be computed in accordance with the requirements of GASB Statement No. 16, ***Accounting for Compensated Absences***, and be reported in the financial statements.

(2) The statement of net assets, governmental activities column should report both the current (**amount expected to be paid out over the next year**) and long-term portions of the compensated absence liability because the government-wide financial statements report all liabilities. Per GASBS 34 Paragraph 31 "liabilities whose average maturities are greater than one year should be reported in two components--the amount **due within one year** and the amount due in more than one year."

(3) A liability for compensated absences should not be reported in the governmental fund balance sheet unless it was actually due and payable at year-end for payments due to retired or terminated employees, but not paid for until shortly after year end.

(4) The notes to the financial statements should disclose the accounting treatment applied to compensated absences.

(5) GASBS 34 Paragraph 119 requires the following disclosures of the agency's long-term compensated absences (and other long term liabilities) presented in the statement of net assets: beginning and end-of-year balances; increases and decreases shown separately; the portion due within one year; and which governmental funds typically have been used to liquidate the liabilities in prior years. GASBS 38 Paragraph 12 requires similar disclosures for the short-term debt activity during the year even if no short-term debt is outstanding at year-end.

M. Special revenue funds authority: The authority for creation of special revenue funds must be shown in the audit report (i.e., cite the statute number, code of federal regulation, executive order, resolution number, or other specific authority) in the divider page or notes to the financial statements.

N. Public monies:

(1) Definition - All monies coming into all agencies (i.e., vending machines, fees for photocopies, telephone charges, etc.) shall be considered public monies and be accounted for as such. For state agencies, all revenues generated must be authorized by legislation (Section 6-4-2 NMSA 1978 and MAPS FIN 11.4).

(2) If the agency has material derivatives or securities investments the auditor should seek the assistance of audit firm staff or of a specialist from outside the firm, that has the skill or knowledge required to plan and perform auditing procedures for specific assertions about derivatives and securities. See the related requirements at: SAS AU 332, *Auditing Derivative Instruments, Hedging Activities, and Investments in Securities*, Paragraphs .05 and .06; and SAS AU 336, *Using the Work of a Specialist.*

(3) Compliance issues - The auditor should test for compliance with:

(a) the requirements of Sections 6-10-10(A) and (B) NMSA 1978, that county and municipal treasurers deposit money in banks, savings and loan association or credit unions located **in their respective counties**; and

(b) the requirements of Section 6-10-17 NMSA 1978, that the public official or public board has **received a joint safe keeping receipt** for pledged collateral from the custodial bank for the collateral delivered by the depository institution.

(4) List of individual deposit accounts and investment accounts required by Section 12-6-5(A) NMSA 1978; each audit report shall include a list of individual deposit and investment accounts held by the agency. The information presented in the audit report shall include at a minimum:

(a) name of depository (i.e., bank, credit union, state treasurer, state investment council) and the statewide human resources accounting and management reporting system (SHARE) fund number (state agencies only);

(b) account name;

(c) type of deposit or investment account (also required in separate component unit audit reports): (i) types of deposits are checking, savings, money market accounts, certificates of deposit; and (ii) types of investments are state treasurer general fund investment pool (SGFIP), state treasurer local government investment pool (LGIP); U.S. treasury bills, notes, bonds and strips; and U.S. agencies such as FNMA, FHLMC, GNMA, Sallie Mae, SBA, FHA, federal financing bank, federal farm credit, financial assistance corporation, including the specific name of each bond, stock, commercial paper, bankers acceptances, mutual fund, foreign

currency, etc;

(d) account balance of deposits and investments as of the balance sheet date;

(e) reconciled balance of deposits and investments as of the balance sheet date as reported in the financial statements;

(f) with the implementation of the SHARE system, both the "book" and "bank" information reside on this unified system; there are no longer stand-alone systems providing single-source information; bank balance information is now available and retrievable at each state agency being audited; this information is identical to what DFA or the state treasurer can obtain from the system; the office of the state treasurer no longer can act in the capacity of an independent third-party to provide account balance confirmations to other agencies or auditors, IPAs can now access account balance information by having the agency run a query or a trial balance report from SHARE; **therefore, IPAs and state agencies should not request bank confirmations from the office of the state treasurer (state agencies only)**.

(5) Pledged collateral:

(a) All audit reports should disclose the collateral requirements in the notes to the financial statements. In addition, there should be a **supplementary schedule** or note to the financial statements that discloses the collateral pledged by each bank and savings and loan association (S&L) that is a depository for public funds. The schedule should disclose the type of security (i.e., bond, note, treasury, bill, etc.), security number, CUSIP number, **fair market value** and maturity date. The schedule should also disclose the name of the custodian and the place of safekeeping for all collateral;

(b) if the pledged collateral **for deposits in banks, savings and loan associations, or credit unions,** in an aggregate amount is not equal to one half of the amount of public money in each account (Section 6-10-17 NMSA 1978), there should be a finding in the audit report. No security is required for the deposit of public money that is insured by the federal deposit insurance corporation (FDIC) or the national credit union shares insurance fund (NCUSIF) according to Section 6-10-16 NMSA 1978. The collateral requirements should be calculated separately for each bank and disclosed in the notes as follows to show compliance and GASB 40 disclosure information (for line items iv-viii, delete the line items if custodial credit risk category does not apply):

(i) Total on deposit in bank or credit union $450,000

(ii) Less: FDIC or NCUSIF coverage* 250,000

(iii) Uninsured public funds 200,000

(iv) Pledged collateral held by agency's agent in the agency's name (50,000)

(v) Pledged collateral held by the pledging bank's trust department in the agency's name (75,000)

(vi) Pledged collateral held by the pledging financial institution (12,500)

(vii) Pledged collateral held by the pledging bank's trust department or agent but not in the agency's name (12,500)

(viii) Uninsured and uncollateralized ($50,000)

Custodial credit risk is defined as the risk that the government's deposits may not be returned to it in the event of a bank failure. Per GASBS 40.8, the notes to the financial statements should disclose the amount of deposits subject to custodial credit risk for categories (vi), (vii) or (viii).

To determine compliance with the 50% pledged collateral requirement of Section 6-10-17 NMSA 1978 the following disclosure must be made for each financial institution:

50% pledged collateral requirement per statute $100,000

Total pledged collateral (150,000)

Pledged collateral (over) under the requirement ($50,000)

*The unlimited FDIC coverage on non-interest bearing accounts expired December 31, 2009. But the President signed a bill in May 2009, postponing the expiration date of the increased FDIC insurance limits on most bank deposit accounts until December 31, 2013. Coverage limits refer to the total of all deposits an accountholder has in the same ownership categories at each FDIC-insured institution. Government accounts have $250,000 of FDIC insurance per official custodian. See http://www.fdic.gov/deposit/deposits/DIfactsheet.html for additional information.

(c) **Repurchase agreements** must be covered by 102% of pledged collateral per Section 6-10-10(H) NMSA 1978. Disclosure similar to that shown above is also required for the 102% pledged collateral requirement.

(d) Per Sections 6-10-16(A) NMSA, "Deposits of public money shall be secured by: securities of the United States, its agencies or instrumentalities; securities of the state of New Mexico, its agencies, instrumentalities, counties, municipalities or other subdivisions; securities, including student loans, that are guaranteed by the United States or the state of New Mexico; revenue bonds that are underwritten by a member of the national association of securities dealers, known as "N.A.S.D.", and are rated "BAA" or above by a nationally recognized bond rating service; or letters of credit issued by a federal home loan bank.

(e) Securities which are of obligations of the state of New Mexico, its agencies, institutions, counties, municipalities or other subdivisions shall be accepted as securities at par value. All other securities shall be accepted as security at market value (Section 6-10-16(C) NMSA 1978).

(f) State agency investments in the office of the state treasurer's general fund investment pool do not require disclosure of specific pledged collateral for amounts held by the state treasurer. However, the notes to the financial statements should refer the reader to the state treasurer's separately issued financial statements which disclose the collateral pledged to secure state treasurer cash and investments. See Paragraph (14) of Section A of 2.2.2.12 NMAC for related GASBS 40 disclosure requirements.

(g) If an agency has other "authorized" bank accounts, pledged collateral information should be obtained from the bank and disclosed in the notes to the financial statements. The state treasurer monitors pledged collateral related to most state agency bank accounts. Agencies should not request the pledged collateral information from the state treasurer. In the event pledged collateral information specific to the agency is not available, the following note disclosure should be made: Detail of pledged collateral specific to this agency is unavailable because the bank commingles pledged collateral for all state funds it holds. However, the office of the state treasurer's collateral bureau monitors pledged collateral for all state funds held by state agencies in such "authorized" bank accounts.

(6) New applicable standards: The requirements of GASBS 53, *Accounting and Financial Reporting for Derivative Instruments*, are effective for financial statements for periods beginning after June 15, 2009 (FY10). "A key provision in this statement is that derivative instruments covered in its scope, with the exception of synthetic guaranteed investment contracts (SGICs) that are fully benefit-responsive, are reported at fair value. For many derivative instruments, historical prices are zero because their terms are developed so that the instruments may be entered into without a payment being received or made. The changes in fair value of derivative instruments that are used for investment purposes or that are reported as investment derivative instruments because of ineffectiveness are reported within the investment revenue classification. Alternatively, the changes in fair value of derivative instruments that are classified as hedging derivative instruments are reported in the statement of net assets as deferrals."

(7) State treasurer's external

investment pool (local government investment pool): Agencies that have investments in the state treasurer's short-term investment fund must disclose the information required by GASB Statement No. 31 Paragraph 15 in the notes to the financial statements. The following information may be helpful for this disclosure:

(a) the investments are valued at fair value based on quoted market prices as of the valuation date;

(b) the state treasurer local government investment pool is not SEC registered; the state treasurer is authorized to invest the short-term investment funds, with the advice and consent of the state board of finance, in accordance with Sections 6-10-10(I) through 6-10-10(O) and Sections 6-10-10(1)A and E NMSA 1978;

(c) the pool does not have unit shares; per Section 6-10-10(1)F NMSA 1978, at the end of each month all interest earned is distributed by the state treasurer to the contributing entities in amounts directly proportionate to the respective amounts deposited in the fund and the length of time the amounts were invested;

(d) participation in the local government investment pool is voluntary;

(e) the current credit risk rating per the state treasurer's website at www.stonm.org/NewMexiGrowLGIP; and

(f) the end of the fiscal year weighted average maturity (interest rate risk in number of days) also available on the state treasurer's website.

O. Budgetary presentation:

(1) Prior year balance included in budget:

(a) If the agency prepares its budget on the accrual or modified accrual basis, the statement of revenues and expenditures (budget and actual) or the budgetary comparisons shall include the amount of **fund balance** on the budgetary basis required to balance the budget.

(b) If the agency prepares its budget on the cash basis, the statement of revenues and expenditures (budget and actual) or the budgetary comparisons shall include the amount of **prior-year cash balance** required to balance the budget (or fund balance on the cash basis).

(2) The differences between the budgetary basis and GAAP basis revenues and expenditures should be reconciled. **This reconciliation is required at the individual fund level.** If the required budgetary comparison information is included in the basic financial statements, the reconciliation should be included on the statement itself (preferred) or in the notes to the financial statements. If the budgetary comparison is presented as supplemental information as required by Subparagraph (c) of Paragraph (3) below, the reconciliation to GAAP basis should be presented at the bottom of the budgetary comparison. If the required budgetary comparison is presented as RSI (for reasons described below in Subparagraph (b) of Paragraph (3) below) the reconciliation should appear in either a separate schedule or in notes to RSI according to the ***AICPA Audit and Accounting Guide, State and Local Governments***, (AAG-SLV 11.14). Also, the notes to the financial statements should disclose the legal level of budgetary control for the entity and any excess of expenditures over appropriations at the legal level of budgetary control. The legal level of budgetary control for local governments is at the fund level. The legal level of budgetary control is at the function level for school districts. The legal level of budgetary control for state agencies is explained at paragraph (11) of Subsection A of 2.2.2.12 NMAC. For additional information regarding the legal level of budgetary control, the IPA should contact the applicable oversight agency, DFA, HED, or PED.

(3) Budgetary comparisons must show the original and final appropriated budget (same as final budget approval by DFA, HED or PED), the actual amounts on the budgetary basis, and a column with the variance between the final budget and actual amounts.

(a) The basic financial statements must include budgetary comparison statements for **only** the general fund and major special revenue funds if the budget structure for those funds is similar enough to the GAAP fund structure to provide the necessary information.

(b) The required supplemental information section is the place where the budgetary comparisons should appear for the general fund and major special revenue funds if the agency budget structure differs from the GAAP fund structure enough that the budget information is unavailable for only those specific funds. An example of this "perspective difference" would occur if an agency budgets by program with portions of the general fund and major special revenue funds appearing across various program budgets. In a case like that the budgetary comparison would be presented for program budgets and include information in addition to the general fund and major special revenue funds budgetary comparison data. See GASB Statement No. 41, ***Budgetary Comparison Schedules -Perspective Differences***, Paragraphs 3 and 10. When budgetary comparisons have to be presented as required supplemental information (RSI) due to such perspective differences it is a requirement of the state auditor that they be audited and included in the auditor's opinion. See AAG-SLV 14.53 and AAG-SLV 14.79 (Example A-14) in the ***AICPA Audit and Accounting Guide, State and Local Governments (latest edition).***

(c) Supplemental information (SI) is the place where all other budgetary comparison information should appear except the general and major special revenue fund budgetary comparisons. Nonmajor governmental funds and proprietary funds that have legally adopted budgets (including budgets approved by a resolution) should have budgetary comparisons appearing in the SI section of the report. It is a requirement of the state auditor that budgetary comparison statements presented in the basic financial statements or as required supplemental information (RSI) or supplemental information (SI) be audited and included in the auditor's opinion. For an example of an opinion that includes SI or RSI see Example A-14 in the ***AICPA Audit and Accounting Guide, State and Local Governments (latest edition).***

P. Appropriations to agencies:

(1) Budget related findings:

(a) If actual expenditures exceed budgeted expenditures at the legal level of budgetary control, that fact must be reported in a finding and disclosed in the notes to the financial statements.

(b) If budgeted expenditures exceed budgeted revenues (after prior-year cash balance and any applicable federal receivables required to balance the budget), that fact must also be reported in a finding since budget deficits are generally not allowed.

(2) Special, deficiency, and capital outlay appropriations:

(a) Special, deficiency, and specific appropriations and capital outlay appropriations funded by severance tax bonds or general obligation bonds of the state must be disclosed in the financial statements. The original appropriation, the appropriation period, expenditures to date, outstanding encumbrances and unencumbered balances should be shown in a supplementary schedule or in a note to the financial statements. **This is a special requirement of the state auditor**.

(b) The accounting treatment of any unexpended balances should be fully explained in the supplementary schedule or in a note to the financial statements regarding the special appropriations.

Q. Consideration of internal control and risk assessment in a financial statement audit: All financial audits performed under this rule are required to include tests of internal controls (manual or automated) over assertions about the financial statements and about compliance related to laws, regulations, and contract and grant provisions. Inquiry alone is not sufficient testing of internal controls. The requirement to test internal controls applies even in circumstances when the auditor has assessed control risk at maximum. **This is a special requirement of the state auditor**.

This requirement does not require an auditor to retest controls previously tested during the performance of a SAS 70 audit, when the auditor is relying on the SAS 70 audit report.

R. Lease purchase agreements:

(1) The New Mexico supreme court has held that it is unconstitutional for agencies to enter into lease purchase agreements after January 9, 1989, unless special revenue funds are the designated source of payments for the agreement. (Any agreements executed prior to that date may not be extended or amended without compliance with the guidelines of **Montano v. Gabaldon**, 108 N.M. 94, 766 P.2d 1328).

(a) The attorney general interpreted **Montano** to mean that long-term contracts for professional services, leases, and real property rental agreements may still be entered into within the constraints of the Bateman Act and the Procurement Code. However, **any** agreement which is in effect for more than one fiscal year, including leases of real property, must have a provision allowing the agency to terminate the agreement at will at anytime, or at least at the end of each fiscal year, without penalty. Furthermore, the agency must have no "equitable or moral" duty to continue to make payments under the contract. The agreements must also contain a non-appropriation clause allowing for termination of the agreement in the event the agency decides not to appropriate funds for each fiscal year.

(b) The attorney general subsequently opined that if the source of funds to repay the debt is solely repaid from the project revenue or from a special non-general-tax fund and not from any general tax revenue, then the debt, be it in the form of bonds or a lease purchase agreement, is not the sort of debt which triggers the constitutional requirement of approval by the voters. This is the teaching of the **Connelly** case relied on by the court in **Montano**. **Montano** did not reverse **Connelly, Seward** and the other cases which have consistently limited the application of constitutional restrictions to debts which are paid out of general tax revenues.

(c) If specific questions as to the constitutionality of a particular lease agreement remain, an independent legal opinion should be obtained from the attorney general.

(2) Accounting for lease purchases that meet the FASB Statement No. 13 criteria for a capital lease purchase:

(a) Modified accrual basis of accounting for fund financial statements: (i) At the time of the lease purchase, the aggregate purchase liability should be reported as an expenditure and as "other financing source" in the governmental fund that acquired or constructed the general asset (NCGAS 5 Paragraph 14 and AAG-SLV 7.37). (ii) Subsequent governmental fund lease payments should be recognized as expenditures in the accounting period in which the fund liability is incurred, if measurable (NCGAS 1 Paragraph 8 (a) and AAG-SLV 8.12).

(b) Full accrual basis of accounting for government-wide statements: (i) At the time of the lease purchase, record the capitalized asset and related credit to net assets-invested in capital assets, net of related debt. The amount recorded is generally the lesser of the net present value of the minimum lease payments or the fair value of the leased property excluding executory costs and profit (NCGAS 5 Paragraph 16 and AAG-SLV 7.36). (ii) The leased property is amortized in accordance with the government's normal depreciation policy for owned assets of the same type, but the amortization period is limited to the lease term, rather than the useful life of the asset (AAG-SLV 7.36). (iii) Per GASB 34 Paragraph 33, at the time of the lease purchase, record the liability for the current and long-term portions of the minimum lease payments due, with the related debit to net assets-invested in capital assets net of related debt.

S. Interfund activity: Under the GASBS 34 Paragraph 112, interfund activities and balances that must be reported are:

(1) interfund loans reported as an interfund receivable in the fund that loaned the money and as an interfund payable in the fund that borrowed the money;

(2) interfund services provided and used (for a price close to the external exchange value) reported as a revenue in the fund that sold the services and as an expenditure or expense in the fund that used the services;

(3) interfund transfers that reported as other financing sources or uses in the fund financial statements, or after nonoperating revenues/expenses in the proprietary funds; and

(4) interfund reimbursements that appear as expenditures/expenses only in the funds that are responsible for them.

T. Required auditor's reports:

(1) The independent auditor's report should follow the examples contained in the ***AICPA Audit and Accounting Guide, State and Local Governments*** *(latest edition),* Appendix 14A-Illustrative Auditor's Reports. Example A-14 illustrates how to opine on the basic financial statements and the combining and individual fund financial statements presented as supplementary information. See also the guidance provided in Chapter 14, Appendix A, Footnote 3 regarding wording that should be used when opining on budgetary statements. All independent auditor's reports should include a statement that the audit was performed in accordance with auditing standards generally accepted in the United States of America **and with applicable *Government Auditing Standards*** per GAGAS 5.05 (July 2007). This statement should be modified in accordance with GAGAS 1.12b (July 2007) if some GAGAS requirements were not followed. As applicable, the first sentence of the SAS 29 opinion paragraph should state that the audit was conducted for the purpose of forming opinions on the basic financial statements, the combining and individual financial statements, and the budgetary comparisons.

(2) **The report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards** should follow the AICPA report examples that have been updated for the implementation of SAS No. 115. The report examples are available on the AICPA governmental audit quality center website at http://gaqc.aicpa.org/. Then select "Government Auditing Standards Report Illustrations with SAS No. 115 Terminology." Click on illustrative auditor's reports now available" choose "illustrative auditor's reports under government auditing standards." **The state auditor requires these report examples to be modified as described in Paragraph (8) of Subsection I of 2.2.2.10 NMAC** above when the auditor detects deficiencies in internal controls or immaterial violations of provisions of contracts or grant agreements or abuse (that do not rise to the level of significant deficiencies or material weaknesses under SAS 115) that must be reported pursuant to Section 12-6-5 NMSA 1978, and GAGAS 5.14 and 5.16 (July 2007).

(a) The state auditor requires the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards be **dated the same date as the independent auditor's report**.

(b) Section 12-6-5 NMSA 1978, states that each report shall set out in detail, in a separate section, any violation of law or good accounting practices by the audit or examination. Therefore, all findings must be reported in the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards, using the report example on the office website at www.osanm.org.

(c) No separate management letters shall be issued to the agency by the auditor. Issuance of a separate management letter to

an agency will be considered a violation of the terms of the audit contract and may result in further action by the state auditor. See also Paragraph (7) of Subsection L of 2.2.2.8 above, regarding this issue.

(3) **The report on compliance with requirements that could have a direct and material effect on each major program and on internal control over compliance in accordance with OMB Circular A-133 -** Report examples that have been updated for SAS 115 are available in Appendix A of Chapter 13 in the current version of the AICPA Audit and Accounting Guide, *Government Auditing Standards and Circular A-133 Audits*.

(4) One report cover: The state auditor requires the following reports to be **included under one report cover**: the independent auditor's report; report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards (required by GAGAS 5.07 and SAS 115); and the report on compliance with requirements that could have a direct and material effect on each major program and on internal control over compliance in accordance with OMB Circular A-133. If applicable, the independent auditor's report must include the SAS 29 opinion on the schedule of expenditures of federal awards and the HUD financial data schedule (required by SAS AU 551 and HUD *Guidelines on Reporting and Attestation Requirements of Uniform Financial Reporting Standards*). The report must also contain a table of contents and an official roster. The IPA should submit a written request for an **exemption** from the "one report cover," and receive written approval from the state auditor, in order to present any of the above information under a separate cover.

U. Service organizations: If the agency uses a service organization to process certain transactions, the auditor should follow the applicable guidance provided in SAS AU 324 on factors the independent auditor should consider. Some examples of service organizations and potential service organizations are:

(1) the New Mexico statewide human resources accounting and management reporting system (SHARE);

(2) EDP service centers that process transactions and related data for others;

(3) bank trust departments that invest and hold assets for employee benefit plans or others;

(4) payroll service companies that process payroll transactions and make payroll disbursements;

(5) public housing authority fee accountants; and

(6) tax collection authorities.

V. Disposition of property:

(1) Sections 13-6-1 and 13-6-2 NMSA 1978 govern the disposition of obsolete, worn-out or unusable tangible personal property owned by state agencies, local public bodies, school districts, and state educational institutions. At least thirty days prior to any such disposition of property on the agency inventory list described below in Subsection Y of 2.2.2.10 NMAC, written notification of the official finding and proposed disposition duly sworn and subscribed under oath by each member of the authority approving the action must be sent to the state auditor.

(2) In the event a computer is included in the planned disposition, the agency shall "sanitize" or effectively make "inaccessible," all licensed software and any electronic media pertaining to the agency. Hard drive erasure or destruction certification is still required even if the asset originally cost less than $5,000 and was not included in the capital asset inventory. According to the May 5, 2002 memorandum from the chief information technology security and privacy office on this subject, "ordinary file deletion procedures do not erase the information stored on hard disks or other magnetic media. Sanitizing erases or overwrites totally and unequivocally, all information stored on the media. There are three basic approaches:

(a) purchasing and using a commercial degaussing product to erase magnetic disks;

(b) overwriting stored data a minimum of five times; or

(c) reformatting the drives (F disking)."

(3) The agency will certify in writing the proper erasure or destruction of the hard drive and submit the certification along with the notification of the proposed disposition of property to the state auditor at least thirty days prior to taking action. The IPA shall test for compliance with this requirement. **This is a special requirement of the state auditor** and it applies even if the original purchase price of the computer was less than $5,000.

W. Joint powers agreements and memorandums of understanding:

(1) All joint powers agreements (JPA) and memorandums of understanding (MOU) must be listed in a supplementary schedule in the audit report. The schedule should include the following information for each JPA or MOU:

(a) participants;

(b) party responsible for operations;

(c) description;

(d) beginning and ending dates of the JPA or MOU;

(e) total estimated amount of project and portion applicable to the agency;

(f) amount the agency contributed in current fiscal year;

(g) audit responsibility;

(h) fiscal agent if applicable; and

(i) name of government agency where revenues and expenditures are reported.

(2) For self-insurance obtained under joint powers agreements or memorandum of understanding, see Subsection X of 2.2.2.10.NMAC (self-insurance).

X. Self insurance: Those agencies that have self-insurance agreements should disclose the data in the notes to the financial statements. The note should include the name of the agency that is providing the insurance and the amount of contribution by the agency to the fund during the year. There should be full disclosure in the notes to the financial statements per the requirements of GASBS 10.

Y. Capital asset inventory:

(1) The Audit Act (Section 12-6-10 NMSA 1978) requires agencies to capitalize only chattels and equipment that cost over $5,000. All agencies are required to update their capitalization policy and implement it in accordance with the law. This change in capitalization threshold should be accounted for prospectively as a change in estimate per APB 20 Paragraph 31. Older capital assets that were capitalized under previous lower capitalization thresholds should not be removed from the capital assets list during the implementation of this latest capitalization threshold amount. Any new items received after June 17, 2005 should be added to the inventory list only if they meet the new capitalization threshold. Regarding safeguarding and management of assets that do not meet the capitalization threshold, the state auditor encourages agencies to maintain a separate accountability report for those items that cost $5,000 or less.

(2) Section 12-6-10(A) NMSA 1978 requires each agency to conduct an annual physical inventory of movable chattels and equipment on the inventory list at the end of each fiscal year. The agency shall certify the correctness of the inventory after the physical inventory. This certification should be provided to the agency's auditors.

Z. Schedule of changes in assets and liabilities for the agency funds: Agency funds are excluded from the statement of changes in fiduciary net assets (GASBS 34 Paragraph 110) because they have no "net assets." Therefore it is a requirement of the state auditor that a schedule of changes in assets and liabilities for the agency funds be included as supplemental information (SI) for all agencies that have agency funds. The schedule should show additions and deductions for each agency fund except for

school districts. School districts should see Subparagraph (e) of Paragraph (4) of Subsection C of 2.2.2.12 NMAC for more information regarding the presentation of the statements of changes in assets and liabilities - agency funds for school districts. This schedule should appear toward the end of the table of contents and requires a SAS 29 opinion in the independent auditor's report.

AA. Accounting for forfeited property:

(1) Seized property should be accounted for in an agency fund before the "judgment of forfeiture" per Section 31-27-6 NMSA 1978 judgment of forfeiture.

(2) Once the judgment of forfeiture is made, the property should be accounted for in a special revenue fund because the revenues are legally restricted for specified purposes. The balance sheet of such a special revenue fund that accounts for seized property may have zero balances at the end of a fiscal year because net balance amounts may have been transferred to the general fund of the governing body of the seizing law enforcement agency, or the general fund to be used for drug abuse treatment services, for drug prevention and education programs, for other substance abuse demand-reduction initiatives or for enforcing narcotics law violations. Exceptions are forfeitures of property arising from: violations of hunting or fishing regulations that must be deposited in the game protection fund; and violations against cultural properties that must be used for the restoration of the affected cultural property, with net balances being deposited into the general fund.

(3) Seized property resulting in forfeiture proceeds creates revenue for the governmental agency that seized the property. That revenue and related expenditures must be included in the budget process of the governmental agency.

(4) See Section 31-27-1 NMSA 1978 and related cross references for guidance on various types of seizures and forfeitures. Section 31-27-7 NMSA 1978 provides statutory guidance for proper disposition of forfeited property and use (allowable expenditures) of all related proceeds.

BB. **Tax increment development districts:** According to Subsection C of Section 5-15-9 NMSA 1978 tax increment development districts (TIDDs) are political subdivisions of the state, and they are separate and apart from the municipality or county in which they are located. Subsection B of Section 5-15-10 NMSA 1978, states that the district shall be governed by the governing body that adopted a resolution to form the district or by a five-member board composed of four members appointed by that governing body; provided, however, that the fifth member of the five-member board is the secretary of finance and administration or the secretary's designee with full voting privileges. However, in the case of an appointed board of directors that is not the governing body, at the end of the appointed directors' initial terms, the board shall hold an election of new directors by majority vote of owners and qualified resident electors. Therefore, a TIDD and its audit firm will have to apply the criteria of GASB 14 Paragraph 132 to determine whether the TIDD is a component unit of the municipality or county that approved it, or whether the TIDD is a related organization of the municipality or county that approved it. If the TIDD is determined to be a related organization per the GAAP requirements, then the TIDD will have to contract separately for an audit separate from the audit of the municipality or county that approved it.

CC. GASBS 54, ***Fund Balance Reporting and Governmental Fund Type Definitions:*** This statement is effective financial statements for periods beginning after June 15, 2010 (FY11), and earlier application is encouraged. Fund balance reclassifications caused by implementing the statement should be applied retroactively by restating fund balance for all prior periods presented. Pursuant to GASBS 54 fund balance will be reported as: nonspendable; restricted; committed; assigned; and unassigned, depending on the constraints that control how the government can spend the amounts. The statement also provides clarification regarding the governmental fund types: general fund; special revenue fund type; capital projects fund type; debt service fund type; and permanent fund type. The statement also provides reporting and disclosure guidance regarding stabilization funds.

DD. GASBS 59, ***Financial Instruments Omnibus:*** This statement is effective for financial statements for periods beginning after June 15, 2010 (FY11), and earlier application is encouraged. GASB 59 does the following: (1) amends NCGAS 4 to be consistent with GASBS 53 for certain financial guarantees; (2) amends GASBS 25 and 43 so that investments in unallocated insurance contracts are reported as interest-earning investments contracts; (3) amends GASBS 31 to clarify what a 2a7-like pool is; (4) amends GASB 40 so that interest rate risk information is disclosed only for debt investment pools such as bond mutual funds and external bond investment pools that are not 2a7-like pools; and (5) makes several amendments to GASBS 53.

EE. SAS 117, Compliance Audits: *Statement on Auditing Standards (SAS) 117, Compliance Audits*, became effective for audits of fiscal periods ending on or after June 15, 2010 (FY10). This statement provides guidance for audits performed in accordance with all of the following: (1) generally accepted auditing standards (GAAS), (2) *Government Auditing Standards* (GAGAS), and (3) a governmental audit requirement for the auditor to express an opinion on compliance. Pursuant to Paragraph .A1 of SAS 117, the requirements of SAS 117 apply to single audits. Pursuant to Paragraph .A1 of SAS 117 and Section 1-1 of the consolidated audit guide for audits of HUD programs, the requirements of SAS 117 also apply to audits of for-profit HUD Program participants.

[2.2.2.10 NMAC - Rp, 2.2.2.10 NMAC, 2-28-11]

2.2.2.11 THE ACCOUNTABILITY IN GOVERNMENT ACT:

A. This section applies to agencies that have performance measures associated with their budgets. The purpose of the Accountability in Government Act (Section 6-3A-1 to 6-3A-9 NMSA 1978) is to provide for more cost-effective and responsive government services by using the state budget process and defined outputs, outcomes and performance measures to annually evaluate the performance of state government programs.

B. Agency performance measures are included in the General Appropriations Act. The agency shall include a schedule of performance data (outcomes, outputs, efficiency, etc.) if the schedule is required by the agency's oversight agency such as DFA, HED and PED and preparation guidelines are issued by the oversight agency.

C. The auditor's responsibilities for performing procedures and reporting on required supplemental information (RSI) is provided in SAS No. 52, ***Omnibus Statement on Auditing Standards*** 1987 (AICPA, Professional Standards, vol. 1, AU 558, ***Required Supplemental Information***). The auditor should apply the limited procedures described at SAS AU 558.07 (a) through (e) on the agency's schedule of performance data.

D. The IPA generally has no reporting requirement regarding the schedule of performance data. However, when one of the criterions listed at SAS AU 558.08 (a) through (d) exists, the auditor should add an explanatory paragraph to the report on the audited financial statements. Examples of the required explanatory paragraphs are available at SAS AU 558.08.

[2.2.2.11 NMAC - Rp, 2.2.2.11 NMAC, 2-28-11]

2.2.2.12 S P E C I F I C CRITERIA: The specific criteria should be considered in planning and conducting governmental audits. These requirements are not intended to be all-inclusive; therefore, the state statutes (NMSA) and regulations (NMAC) should be reviewed while planning

governmental audits.

A. **PERTAINING TO AUDITS OF STATE AGENCIES:**

(1) Due dates for agency audits: Section 12-6-3(C) NMSA 1978 states that state agency reports are due no later than 60 days after the financial control division of DFA provides the state auditor with notice that the agency's books and records are ready and available for audit. The financial control division requires that each agency submit a management representation letter documenting management's responsibility for the accounting records, the agency has recorded all transactions properly in SHARE, and the agency is ready and available for audit. In addition, the financial control division mandates that each agency, with the help of its independent auditor, identify and submit with the management representation letter a schedule of deliverables and agreed to milestones for the audit. The milestones ensure that the agency's books and records are ready and available for audit and the auditor delivers services on time. Once the financial control division receives the management representation letter, the schedule of deliverables and milestones, the financial control division will notify the state auditor in writing regarding the expected audit deadline for the agency. The sixty days to the audit deadline will be based on the date of financial control division's notification to the state auditor, which will be based on input from the agency to the financial control division and the agency's schedule of deliverables and milestones; however, the deadline cannot extend beyond December 15. This requirement does not prevent the auditor from performing interim audit work prior to receipt of the DFA notice of agency preparedness. Once the agency and auditor have certified to the financial control division that the agency's books and records are ready and available for audit, if the auditor or agency find that the scheduled audit deliverables or agreed upon milestones are not accomplished timely and there is a possibility the audit report will be late, the auditor shall immediately write a dated letter to the state auditor describing the problems. The letter must have a concurring signature from the head of the audited agency, the audit committee or board of directors or equivalent oversight body, or an individual who possesses a sufficient level of authority and responsibility for the financial reporting process, such as the chief financial officer. The financial control division must also be notified that the report will be late. However, that notification must exclude confidential audit information. The management representation letter that agencies must submit to the financial control division can be found in the fiscal year's closing instructions at www.dfafcd.state.nm.us under the FYxx year-end closing link.

(2) Materiality at **the individual fund level** means at the individual statewide human resources accounting and management reporting system (SHARE) fund level for state agencies. All the individual SHARE funds should be reported in the financial statements and opined on in the independent auditor's report.

(3) Accounts payable at year-end: If goods and services were received (as defined by generally accepted accounting principles) by the end of the fiscal year but not paid for by the end of the fiscal year, an accounts payable should be reported for the respective amount due in both the government-wide financial statements and the fund financial statements (NCGAS 1 Paragraph 70). Per Section 6-10-4 NMSA 1978, the "actual" expenditures in the budgetary comparison exclude any accounts payable that were not paid timely and therefore require a request to the financial control division to pay prior year bills out of current year budget. They will be paid out of the budget of the following fiscal year. An agency's reversions should be calculated using the budgetary basis expenditures because the agency does not have the legal authority to obligate the state for liabilities once the appropriation period has lapsed. Thus the agency cannot keep the cash related to accounts payable that were not paid timely. This will result in a negative fund balance in the modified accrual basis financial statements of a reverting fund.

(4) Net assets/fund balance:

(a) The government-wide statement of net assets and the proprietary fund balance sheet should show net assets as: (1) invested in capital assets, net of related debt; (2) restricted; and (3) unrestricted. GASBS 34 Paragraphs 33 through 37 explain the components of net assets. Net assets are restricted when constraints placed on net asset use are either: externally imposed by creditors (such as through debt covenants), grantors, contributors, or laws or regulations of other governments; or imposed by law through constitutional provisions or enabling legislation. Per GASBS 46 Paragraph 6 the definition of "legally enforceable" should be included in determining the net assets that are shown as "restricted." Note that restricted net assets are not the equivalent of reserved fund balances. Encumbrances should not be shown as restricted net assets. The amount of the government's net assets that are restricted by enabling legislation at the end of the reporting period should be disclosed in the notes.

(b) Governmental fund financial statement fund balances should be reported in accordance with GASBS 54. This statement is effective for financial statements for periods beginning after June 15, 2010 (FY11), and earlier application is encouraged.

(c) The statement of fiduciary net assets (fiduciary fund financial statement) should show net assets as "held in trust for…" (GASBS 34 Paragraph 108 and Example E-1).

(5) Book of record:

(a) The state maintains the centralized accounting system statewide human resources accounting and management reporting system (SHARE). **The SHARE data and reports are the original book of record that the auditor is auditing.** Each fiscal year, the agency is required to record all audit adjusting journal entries in SHARE. The financial information in SHARE is to agree to the agency's audited financial statements, with the exception of accounts payable as explained in Paragraph (3) Subsection A of 2.2.2.12 NMAC (accounts payable). If the independent auditor finds that the agency did not record all audit adjusting journal entries, the auditor must include this instance of noncompliance with Section 6-5-2.1 and 6-5-4.1 NMSA 1978. If the agency maintains a separate accounting system, it should be reconciled with the SHARE system and all applicable adjustments should be recorded in SHARE periodically throughout the fiscal year. The financial control division provides to agencies: the manual of model accounting practices (MAPs), various white papers, yearly closing instructions, and various accounting guideline memos. These documents provide guidance for an auditor regarding policy and procedures requirements and they are available on the financial control division's website at www.dfafcd.state.nm.us under manuals, white papers and processing standards, FY'xx year-end closing, and memorandums and notices links.

(b) The SHARE chart of accounts reflects the following appropriation unit levels. The statement of revenues and expenditures in the audit report should be presented in accordance with GAAP, by function or program classification and object code. However, the budgetary comparison statements must be presented using the level of appropriation reflected in the final approved budget.

Appropriation Unit Code	Appropriation Unit Description
200	Personal Services & Employee Benefits
300	Contractual Services
400	Other
500	Other Financing Uses
600	Non-budgeted

Revenue categories of appropriations to state agencies are listed below. The

budgetary comparison statements for state agencies must be presented in the audit report by the revenue categories shown below and by the expenditure categories that appear in the agency's final approved budget: (i) state general fund; (ii) other state funds; (iii) internal service funds/inter-agency transfers; or (iv) federal funds.

For more detail about the chart of accounts see the DFA website.

(6) Reversions to state general fund:

(a) All reversions to the state general fund must be identified in the financial statements by the fiscal year of appropriation (i.e., reversion to state general fund – (FY 09). The gross amount of the appropriation and the gross amount of the reversion must be shown separately.

(b) Section 6-5-10(A) NMSA 1978 requires "all unreserved, undesignated fund balances in reverting funds and accounts as reflected in the central accounting system as of June 30 shall revert by September 30 to the general fund. The division may adjust the reversion **within forty five days** of release of the audit report for that fiscal year." Failure to transfer reverting funds timely in compliance with the statute requires an audit finding.

(7) Nonreciprocal (not payments for materials or services rendered) interfund (internal) activity includes (a) transfers (redefined to include activities previously known as "operating transfers" and "residual equity transfers") and (b) reimbursements (GASBS 34 Paragraph 410):

(a) Intra-agency transfers between funds within the agency should offset. Reasons for intra-agency transfers should be fully explained in the notes to the financial statements. In the separate audit reports of state agencies, transfers between their internal funds should be shown as other financing sources or uses in the fund financial statements and as transfers (that get eliminated) in the government-wide financial statements.

(b) Inter-agency transfers (between an agency's internal funds and other funds of the state that are outside the agency such as state general fund appropriations, special appropriations, bond proceeds appropriations, reversions to the state general fund, and transfers to/from other state agencies) should be segregated from intra-agency transfers and should be fully explained in the notes to the financial statements along with the agency number and SHARE fund number to whom and from whom transferred. The transfers may be detailed in supporting schedules rather than in the notes, but agency and SHARE fund numbers must be shown. The schedule should be presented on the modified accrual basis. The IPA is responsible for performing audit procedures on all such inter-agency transfers.

(c) Regarding inter-agency transfers between legally separate component units and the primary government (the state of New Mexico): (i) component units of the state of New Mexico for statewide CAFR purposes are the New Mexico lottery authority (blended), the New Mexico finance authority (discretely presented) and the New Mexico mortgage finance authority (discretely presented); (ii) if the inter-agency transfer is between a blended component unit of the state and other funds of the state, then the component unit's separately issued financial statements should report such activity between itself and the primary government as revenues and expenses. When the blended component unit is included in the primary government's financial statements, such inter-agency transfers would be reclassified as transfers (GASBS 34 Paragraph 318); (iii) all resource flows between a discretely presented component unit of the state and other funds of the state are required to be reported as external transactions-revenues and expenses in the primary government's financial statements and the component unit's separately issued financial statements (GASBS 34 Paragraph 318).

(d) All transfers to and from SHARE fund 853, the state general fund appropriation account, must be clearly identifiable in the audit report as state general fund appropriations, reversions, or collections.

(e) Reimbursements are transfers between funds that are used to reallocate the revenues and expenditures/expenses to the appropriate fund. Reimbursements should not be reported as interfund activity in the financial statements.

(8) General services department (GSD) capital projects: GSD records the state of New Mexico capitalized land and buildings for which it is responsible, in its accounting records. The cost of furniture, fixtures, and moveable equipment owned by agencies is to be capitalized in the accounting records of the agency that purchased them. The agency must capitalize those assets based on actual amounts expended in accordance with GSD instructions issued in 2.20.1.10 NMAC, ***Valuation of Assets***.

(9) State-owned motor vehicle inventory: Successful management of the state-owned vehicles pursuant to the Transportation Services Act (Section 15-8-1 to 15-8-11 NMSA 1978) is dependent on reliable and accurate capital assets inventory records and physical verification of that inventory. Thus, the annual audit of state agencies shall include specific tests of the reliability of the capital assets inventory and verification that a physical inventory was conducted for both the agency's owned vehicles and long-term leased vehicles.

(10) Independent auditor's report:

(a) The independent auditor's report for state agencies, district attorneys, district courts, and the educational institutions created by New Mexico Constitution Article XII, Section 11, **must include an explanatory paragraph preceding the opinion paragraph**. The explanatory paragraph should reference the summary of significant accounting principles disclosure regarding the reporting agency, and indicate that the financial statements are not intended to present the financial position and changes in financial position of the primary government, the state, but just the financial position and the changes in financial position of the department. The auditor should follow Example A.16 in Appendix A of AAG-SLV 14.79 in the ***AICPA Audit and Accounting Guide State and Local Governments*** *(latest edition)*.

(b) A statement should be included that the audit was made in accordance with generally accepted government auditing standards per GAGAS (2007) Paragraphs 5.05 and 1.12 and 1.13.

(11) Budgetary basis for state agencies: Per the General Appropriation Act, 2010 Chapter 6, Section 3, item M, "For the purpose of administering the General Appropriation Act of 2010 and approving operating budgets, the state of New Mexico shall follow the modified accrual basis of accounting for governmental funds in accordance with the manual of model accounting practices issued by the department of finance and administration." The budget is adopted on the modified accrual basis of accounting except for accounts payable accrued at the end of the fiscal year that do not get accrued by the statutory deadline per Section 6-10-4 NMSA 1978. Those accounts payable that do not get paid timely or accrued by statutory deadline must be paid out of the next year's budget. As previously stated in Paragraph (3) of Subsection A of 2.2.2.12 NMAC (accounts payable), if goods and services were received by the end of the fiscal year but not paid for by the end of the fiscal year, an accounts payable should be recorded for the respective amount due in both the government-wide financial statements and the fund financial statements (NCGAS 1 Paragraph 70). If an agency needs to recognize additional accounts payable that were not accrued by the statutory deadline, then the budgetary statements and the fund financial statements will require a reconciliation of expenditures, see Paragraph (2) of Subsection O of 2.2.2.10 NMAC (budgetary presentation). Since SHARE is the book of record for the state, all transactions are recorded in SHARE under the modified accrual basis of accounting except for accounts payable not meeting the statutory deadline; therefore, the "actual" expenditures in the budgetary

comparison schedules shall equal the expenditures as recorded in SHARE for the fund. Encumbrances related to single year appropriations lapse at year end. Appropriation periods are sometimes for periods in excess of twelve months (multiple-year appropriations). When multiple year appropriation periods lapse, the authority for the budget also lapses and encumbrances can no longer be charged to that budget. The legal level of budgetary control should be disclosed in the notes to the financial statements. Per Section 9 of the General Appropriation Act of 2010, all agencies, including legislative agencies, may request category transfers among personal services and employee benefits, contractual services and other. Therefore, the legal level of budgetary control would be the appropriation program level (A-Code, P-Code, R-Code, and Z-Code). The A-Code pertains to capital outlay appropriations (general obligation/ severance tax or state general fund). The P-Code pertains to operating funds. The R-Code pertains to American Recovery & Reinvestment Act (ARRA) funds. The Z-Code pertains to special appropriations. Total expenditures for the program need to be compared to the program's approved final budget for compliance. The financial control division has prepared standardized budgetary comparison schedules for single year and multiple year appropriations and a standard budgetary basis disclosure. These examples can be obtained from the financial control division's website at www.dfafcd.state.nm.us under the CAFR unit link.

(12) Accounting for special capital outlay appropriations financed by bond proceeds:

(a) The state treasurer's office (STO) administers the debt service funds for various bond issues that are obligations of the state of New Mexico. STO should not report in its basic financial statements bonds payable that are obligations of the state of New Mexico. The proper reporting of these payables and the related bond face amounts (proceeds) is in the state's comprehensive annual financial report (CAFR). The STO audit report, notes to the financial statements must: (1) explain the following: by statute STO is responsible for making the state's bond payments and keeping the related records; however, it is not responsible for the related debt, the state is; and (2) refer the reader to the detailed supplemental information in the STO audit report and the statewide CAFR. The STO's financial statements include **audited** supplemental information (SI) regarding the state of New Mexico bond obligations. The SI schedules must show: (1) the beginning and end-of-year bond payable balances, increases and decreases (separately presented), and the portions of each bond issuance that are due within one year, as required by GASBS 34 Paragraph 119; (2) the details of debt service requirements to maturity required by GASBS 38 Paragraph 10; and (3) any violations of bond covenants and related actions taken to address violations of bond covenants, required by GASBS 38 Paragraph 9 and Section 12-6-5 NMSA 1978.

(b) State agencies that receive or administer any special capital outlay appropriations from the state legislature that are financed by bond proceeds should account for the transactions as follows: (i) The transactions should be recognized in accordance with GASB Statement 33, *Accounting and Financial Reporting for Non-Exchange Transactions*, as detailed in the instructions "Accounting and Financial Statement Presentation of Appropriation Bond Proceeds," that are posted on the financial control division's website at www.dfafcd.state.nm.us under the memorandum and notices and the CAFR unit links. The other financing sources - transfers in and receivable should be recognized when all the eligibility requirement established by the board of finance (2.61.6 NMAC) have been met and the resources are available (when the board of finance approves the draw down request). (ii) In the statement of activities, the bond proceeds for the capital project should be reported as transfers in - general obligation bond appropriation or severance tax bond appropriation. In the statement of revenues, expenditures, and changes in fund balances - special revenue fund, the bonds proceeds should be reported under other financing sources as transfers in - general obligation bond proceeds or severance tax bond proceeds. The expense should be reported at the program level in the statement of activities, and the expenditure should be reported at the appropriation unit level in the fund financial statements. A special revenue fund should be used to account for the bond proceeds and related expenditures. Refer to the financial control division's instructions to review the applicable journal entries and research documentation, which are available on the financial control division website www.dfafcd.state.nm.us under the CAFR unit and the memorandums and notices links. (iii) In the notes to the financial statements, agencies should disclose that the bond proceeds were allocated by the legislature to the agency to administer disbursements to the project recipients, and the agency is not obligated in any manner for the related indebtedness. Agencies should also disclose the specific revenue recognition policy for these appropriations as provided by the financial control division on their website www.dfafcd.state.nm.us under the CAFR unit link. (iv) The budgetary comparisons for the capital project activity should be presented in accordance with the instructions "budgetary presentation for multiple year appropriations," posted on the financial control division's website at www.dfafcd.state.nm.us under the CAFR unit link. (v) the financial control division has prepared a standard disclosure for the restatement, if applicable, of the change in the recognition of appropriated bond proceeds that is available on the financial control division's website at www.dfafcd.state.nm.us under the CAFR unit link.

(13) Amounts "due from other state agencies" and "due to other state agencies": If a state agency has amounts "due from" or "due to" other state agencies in its balance sheet, the notes should disclose the amount "due to" or "due from" each agency, the name of each agency, the SHARE fund account numbers and the purpose of the account balance.

(14) Investments in the state treasurer's general fund investment pool (SGFIP): These investments should be recorded as investments on the statement of net assets and the balance sheet, not as cash or cash equivalents. The notes to the financial statements should contain the following disclosures for the SGFIP as required by GASBS 40:

(a) An explanation that credit risk is the risk that an issuer or other counterparty to an investment will not fulfill its obligations, and a statement that the SGFIP is not rated for credit risk (GASBS 40 Paragraph 7);

(b) Interest rate risk: (i) an explanation that interest rate risk is the risk that changes in interest rates will adversely affect the fair value of an investment; (ii) disclosure required by GASBS 40 Paragraph 15, of the agency's SGFIP investment fair value as of the end of the fiscal year, and the maturities of the SGFIP for the fiscal year (per DFA or STO); and (iii) a statement that the agency does not have an investment policy that limits investment interest rate risk.

(c) The disclosure should also refer the reader to the separate audit report for the state treasurer's office for additional information regarding the SGFIP.

(15) Format for the statement of activities: State agencies that have more than one program or function must use the financial statement format like GASBS 34, Illustrations B-1 through B-4(b). The simplified statement of activities (GASBS 34, Illustration B-5) should not be used for agencies that have multiple programs or functions. GASBS 34 Paragraph 41 requires governments to report direct expenses for each function.

(16) Oversight duties of the department of finance and administration's financial control division: On October 3, 2008, the state controller and the state auditor distributed a letter to agencies regarding the CAFR unit's request for agencies' draft financial statements for the preparation of

the comprehensive annual financial report (CAFR) for the state. Agencies were concerned about violating Paragraph (4) of Subsection C of 2.2.2.9 NMAC, delivery and release of the audit report. Section 6-5-2.1.S NMSA provides the financial control division to "have access to and authority to examine books, accounts, reports, vouchers, correspondence files and other records, bank accounts, money and other property of a state agency." In addition, Section 6-5-4.1, NMSA 1978 mandates that financial control division shall compile the CAFR. The draft should exclude the opinion and findings. After some consideration and discussion of the conflicting regulations, the state controller and the state auditor concluded, "Pursuant to these rules, Sections 6-5-4.1 and 12-6-5 NMSA 1978 should be construed to give effect to both statutes and the corresponding administrative rules. Therefore, an agency shall provide a copy of its draft audited financial statements to financial control division in order that the division may compile the CAFR. This specific requirement can be viewed as an exception to the general requirement of Section 12-6-5 NMSA 1978. However, the agency may only release that information to financial control division and not the public. The agency's audit report also is not public record unless released in accordance with Section 12-6-5 NMSA 1978." To review the entire letter, the DFA-financial control division oversight letter, go to the financial control division website at www.dfafcd.state.nm.us, under the memorandums and notices link.

(17) Component units of the state that benefit a specific agency: If a component unit of the state of New Mexico benefits a specific agency of the state, the financial statements of the agency that is benefited must include the component unit financial statements by discrete presentation.

B. **PERTAINING TO AUDITS OF HOUSING AUTHORITIES:**

(1) Housing authorities within the state of New Mexico consist of regional housing authorities, component units or departments of local governments, component units of housing authorities, and a component unit of the state of New Mexico.

(2) The financial statements of a housing authority must be included in the financial audit report of the primary government by discrete presentation unless an exemption from this requirement has been obtained from the state auditor.

(a) Discrete presentation shows financial data of the component unit in a column to the right of and separate from the financial data of the primary government. See GASBS 14 Paragraphs 44 through 50 for additional guidance.

(b) The primary government in cooperation with its auditor must make the determination whether the housing authority is a component unit of the primary government. See Paragraph (1) of Subsection A of 2.2.2.10 NMAC for guidance in this determination. In the event the primary government and auditor determine that the housing authority is a department of, rather than a component unit of the primary government, a **request for exemption from the discrete presentation requirement must be submitted to the state auditor, by the agency, explaining why the housing authority should not be a discretely presented component unit**. The request for exemption must include evidence that the housing authority is not a separate legal agency from the primary government and that the corporate powers of the housing authority are held by the primary government. Evidence included in the request must address these issues: (i) the housing authority is not a corporation registered with the public regulation commission; (ii) there was never a resolution or ordinance making the housing authority a public body corporate; and (iii) the housing authority was authorized under the Municipal Housing Law, Section 3-45-1 NMSA 1978.

(c) Upon receipt of the exemption granted by the state auditor from the requirement for discrete presentation, the housing authority department or program would be included in the financial report of the primary government like any other department or program of the primary government.

(3) Audits of the public housing authorities that are **departments** of the local government shall be conducted by the same IPA that performs the audit of the local government. Separate audit contracts will not be approved.

(a) Local governments are encouraged to include representatives from the public housing authorities that are departments in the IPA selection process.

(b) The IPA shall include the housing authority's governing board and management representatives in the entrance and exit conferences with the primary government. If it is not possible to hold such combined conferences, the IPA shall hold a separate entrance and exit conference with housing authority's management and a member of the governing board.

(4) Housing authorities that are component units of a local government:

(a) must account for financial activity in proprietary funds;

(b) are authorized by the amendment to Section 12-6-3(D) NMSA 1978, in Senate Bill 263, "at the public housing authority's discretion, to be audited separately from the audit of its local primary government entity; if a separate audit is made, the public housing authority audit shall be included in the local primary government entity audit and need not be conducted by the same auditor who audits the financial affairs of the local primary government entity;" the amendment further stipulates in Section 12-6-4(A) NMSA 1978, that "a public housing authority (other than a regional housing authority) shall not bear the cost of an audit conducted solely at the request of its local primary government entity;"

(c) any separate audits of component unit housing authorities must be conducted according to the following requirements: (i) the primary government auditor must agree to use the information from the work of the component unit auditor; (ii) the component unit auditor selected must appear on the office of the state auditor list of eligible independent public accountants; (iii) the bid and auditor selection processes must comply with the requirements of this rule; (iv) the office of the state auditor standard contract form must be used; (v) all component unit findings must be disclosed in the primary government's audit report; (vi) any separately issued component unit audit report must be submitted to the state auditor for the review process described in 2.2.2.13 NMAC; (vii) the audit report will be released by the state auditor separately from the primary government's report under a separate release letter to the housing authority.

(5) Auditors and public housing authorities must follow the requirements of ***Guidelines on Reporting and Attestation Requirements of Uniform Financial Reporting Standards (UFRS) for Public Housing Authorities Not-for-Profit Multifamily Program Participants and their Independent Accountants***, which is available on the real estate assessment center (REAC) web site at www.hud.gov under a search for UFRS. Additional administrative issues related to the audit of public housing authorities follow.

(a) Housing authority audit contracts must include the cost of the audit firm's SAS 29 opinion on the financial data schedule (FDS) if the public housing authority expended $500,000 or more of federal funds or is part of a local government that expended $500,000 or more of federal funds. The PHA must electronically submit a final approved FDS based on the audited financial statements no later than 9 months after the PHA's fiscal year end. The auditor must: (i) electronically report on his comparison of the electronic FDS submission in the REAC staging data base through the use of an ID and password; (ii) include a hard copy of the FDS in the audit report; (iii) render a SAS 29 opinion on the FDS; and (iv) explain any material differences between the audited FDS and the financial statements in the notes to the financial statements.

(b) **the audit must include this separate attestation engagement; the preparation and submission cost for this HUD requirement must be included in the audit contract.** The IPA shall consider whether any fee accountant used by the housing authority is a service organization according to the criteria of SAS 70. The IPA shall follow applicable guidance at SAS AU 324 regarding service organizations.

(c) The IPA shall provide the housing authority with an itemized cost breakdown by program area for audit services rendered in conjunction with the housing authority.

(6) Single audit reporting issue: If a single audit is performed on the separate audit report for the public housing authority, including the housing authority schedule of expenditures of federal awards, then the housing authority federal funds do not need to be subjected a second time to a single audit during the single audit of the primary government. In this situation the housing authority federal expenditures do not need to be included in the primary government's schedule of expenditures of federal awards. See Paragraph 6.12 of ***the AICPA Audit Guide, Government Auditing Standards*** and ***Circular A-133*** audits for more information regarding this issue.

C. **PERTAINING TO AUDITS OF SCHOOL DISTRICTS:**

(1) Update to the auditor selection process: After completing the evaluation for each IPA the school district shall submit the IPA recommendation to the state public education department (PED) for approval, prior to submitting the recommendation to the state auditor for approval. The sample cover letter is provided at www.osanm.org. It may be used for the PED approval signature. The IPA recommendation is due to the state auditor on or before May 1. In the event that the due date falls on a weekend or holiday the due date will be the next business day.

(2) Audit planning level of materiality:

(a) As explained in Paragraphs (1) and (2) of Subsection A of 2.2.2.10 NMAC, the level of planning materiality and required auditor opinion will be at the individual fund level for the primary government and at the individual fund level for the component units.

(b) If a 501(c) 3 component unit organization had a gross annual income in excess of $100,000, Section 6-5A-1 NMSA 1978 requires that entity to be audited regardless of its materiality in relation to the primary government.

(3) Regional education cooperative (REC) audits:

(a) For accounting purposes, RECs are considered joint ventures in accordance with the GASB, ***Codification of Governmental Accounting and Financial Reporting Standards***, Section J50, "Accounting for Participation in Joint Ventures and Jointly Governed Organizations."

(b) A separate financial and compliance audit is required on activities of RECs. The IPA shall provide a copy of this report to the participating school districts and the PED once the report has been released by the state auditor. The presentation of these funds should be in conformity with accounting principles generally accepted in the United States of America.

(c) Audits of RECs should test for compliance with PED Rule 6.23.3.7 through 6.23.3.12 NMAC.

(d) If applicable, any on-behalf payments for fringe benefits and salaries made by RECs for employees of school districts should be accounted for in accordance with GASB Cod. Sec. N50.135 and communicated to the employer in accordance with Sec. N50.131.

(e) The audit report of each REC shall include a cash reconciliation schedule which reconciles the cash balance as of the end of the previous fiscal year to the cash balance as of the end of the current fiscal year. This schedule shall account for cash in the same categories used by the REC in its monthly cash reports to the PED. If there are differences in cash per the REC financial statements and cash per the REC accounting records, the IPA should provide the adjusting entries to the REC to reconcile cash per the financial statements to cash per the REC accounting records. However, if cash per the REC accounting records differs from the cash amount the REC reports to PED in the monthly cash report, then the IPA should write a finding stating that the PED reports do not reconcile to the REC accounting records.

(4) School district audits must address the following issues:

(a) Audits of school districts shall test for compliance with public education department (PED) Regulation 6.20.2 NMAC, ***Governing Budgeting and Accounting for New Mexico Public Schools and School Districts*** and the ***Manual of Procedures***, primarily Supplement 7, ***Cash Controls***.

(b) The audit report of each school district shall include a cash reconciliation schedule which reconciles the cash balance as of the end of the previous fiscal year to the cash balance as of the end of the current fiscal year. This schedule is also required for each charter school of the district and each charter school of the PED. This schedule will account for cash in the same categories as used by the district in its monthly cash reports to the PED. Sections 6.20.2.13(D) and (E) of NMAC, state that "the cash basis of accounting is used for budgeting and reporting to PED. The financial statements are prepared on the accrual basis of accounting. If there are differences between the financial statements, school district records and department records, the IPA should provide the adjusting entries to the school district to reconcile the report to the school district records." However, if there is some difference between the school district records and the PED report amounts, other than those explained by the adjusting entries, then the IPA should write a finding stating that the PED reports do not reconcile to the school district records.

(c) On-behalf payments of salaries and fringe benefits made for school district employees by RECs must be accounted for in accordance with GASB Cod. Sec. N50.129 through .133 and disclosed in accordance with Sec. N50.134. "Employer governments should obtain information about the amount of on-behalf payments for fringe benefits and salaries from the paying entity or the third-party recipient; inter-entity cooperation is encouraged. If information cannot be obtained from those sources, employer governments should make their best estimates of the amounts" (GASBS 24 Paragraph 9).

(d) Any joint ventures or other entities created by the school districts are agencies subject to the Audit Act.

(e) Agency fund reporting: Under GASBS 34 a statement of changes in fiduciary net assets is required for pension trust funds, investment trust funds, and private-purpose trust funds. However, agency funds have no net assets and will be excluded from this presentation (GASBS 34 Paragraph 110). Therefore, it is a requirement of the state auditor that a schedule of changes in assets and liabilities - agency funds for the fiscal year be included as supplemental information in the audit report for each school district and each charter school. The schedules should show the changes (both additions and deductions) in the agency funds summarized by school or for each activity.

(f) Capital expenditures by the NM public school facilities authority: School districts must: review capital expenditures made for repairs and building construction projects of the school district by the NM public school facilities authority; determine the amount of capital expenditures that should be added to the capital assets of the school district; and account for those additions properly. The auditor should test the school district capital asset additions for proper inclusion of these expenditures.

(g) Functions of the general fund: The school district audit reports must include individual fund financial statements and budgetary comparisons for the following functions of the general fund: operational, transportation, instructional material, and teacherage (if applicable).

(5) Pertaining to charter schools:

(a) A charter school is a conversion school or start-up school within a school district authorized by the local school board or authorized by the PED to operate as a charter school. A charter school is considered a public school, accredited by the state board of public education and accountable to the school district's local school board or to the PED, for ensuring compliance with applicable laws, rules and charter provisions. A charter school is administered and governed by a governing body in a manner set forth in the charter.

(b) Certain GASBS 14 criteria must be applied to determine whether a charter school is a component unit of the chartering entity (the district or PED). GASBS 14 was recently amended by GASBS 61. The Financial Reporting Entity: Omnibus -- an amendment of GASB Statement No. 14 and No. 34. The district, the PED, the charter school and the IPA must evaluate whether the amended GASBS 14 criteria requires a charter school to be presented as a component unit of its chartering entity. If a charter school is determined to be a component unit, then the charter school must be included in the financial statements of its sponsoring school district or PED by discrete presentation. Discrete presentation entails reporting component unit financial data in a column(s) separate from the financial data of the primary government.

(c) The financial statements for charter schools that are determined to be component units pursuant to the amended GASBS 14 criteria should be presented and opined on in the following manner. (i) All charter schools should be reported as major component units of the school district or PED. All the charter schools should be included in the basic financial statements (full accrual basis presentation) in one of the following manners: a separate column for each component unit presented in the government-wide statement; combining statements of component units presented as a basic financial statement after the fund financial statements; or as condensed financial statements in the notes to the basic financial statements (GASB 34 Paragraphs 124 to 126). (ii) When separate audited financial statements are not available for a charter school, the fund financial statements for that charter school must be presented in the primary government's financial statements on the modified accrual basis of accounting. If applicable, combining and individual fund financial statements should also be presented for the nonmajor funds. The financial statements should be presented as supplemental information (SI) according to AAG-SLV 3.20 (latest edition). (iii) The state auditor requires that individual fund budgetary comparison statements for all of the charter school's funds must be included in the supplemental information section of the financial statements following the fund financial statements and the combining statements for the nonmajor funds to demonstrate compliance with legally adopted budgets. The budgetary comparisons must be audited and included in the auditor's opinion.

(6) New Mexico public schools insurance authority (NMPSIA): Both legal compliance and substantive tests should be performed at the agency level on these transactions.

D. **PERTAINING TO AUDITS OF COUNTIES:**

(1) Tax roll reconciliation - county governments: audit reports for counties must include two supplementary schedules. The first one is a "tax roll reconciliation of changes in the county treasurer's property taxes receivable" showing the June 30th receivable balance and a breakout of the receivable for the most recent fiscal year ended, and a total for the previous nine fiscal years. Per Section 7-38-81(C) NMSA 1978, property taxes that have been delinquent for more than ten years, together with any penalties and interest, are presumed to have been paid. The second schedule titled "county treasurer's property tax schedule" must show by property tax type and agency, the amount of taxes: levied; collected in the current year; collected to-date; distributed in the current year; distributed to-date; the amount determined to be uncollectible in the current year; the uncollectible amount to-date; and the outstanding receivable balance at the end of the fiscal year. This information is necessary for proper revenue recognition on the part of the county as well as on the part of the recipient agencies, under GASBS 33. Property taxes levied in January 2010 are budgeted for the fiscal year July 1, 2010 through June 30, 2011. If the county does not have a system set up to gather and report the necessary information for the property tax schedule, a finding is required to be reported.

(2) The following is an example of a tax roll reconciliation schedule:

STATE OF NEW MEXICO
(NAME) COUNTY
TAX ROLL RECONCILIATION - CHANGES IN THE COUNTY TREASURER'S
PROPERTY TAXES RECEIVABLE
FOR THE YEAR ENDED JUNE 30, 2011

Property taxes receivable, beginning of year	$ 641,290
Changes to Tax Roll:	
Net taxes charged to treasurer for fiscal year	4,466,602
Adjustments:	
Increases in taxes receivables	3,066
Charge off of taxes receivables	(6,144)
Total receivables prior to collections	5,104,814
Collections for fiscal year ended June 30, 2011	(4,330,993)
Property taxes receivable, end of year	$ 773,821
Property taxes receivable by years:	
2002-2010	226,344

2011	547,477
Total taxes receivable	$ 773,821

(3) An example of the schedule titled "county treasurer's property tax schedule" may be found on the office website at www.osanm.org.

E. **PERTAINING TO AUDITS OF COLLEGES AND UNIVERSITIES:**

(1) Update to the auditor selection process: After completing the evaluation for each IPA the college or university shall submit the IPA recommendation to the higher education department (HED) for approval, prior to submitting the recommendation to the state auditor for approval. The sample cover letter provided at www.osanm.org may be used for the HED approval signature. The IPA recommendation is due to the state auditor on or before May 1. In the event the due date falls on a weekend or holiday the due date will be the next workday.

(2) Budgetary comparisons: The legal level of budgetary control per 5.3.4.10 NMAC should be disclosed in the notes to the financial statements. The state auditor requires that every college and university's audit report include budgetary comparisons as supplementary information (SI). **The budgetary comparisons must be audited and an auditor's opinion must be rendered**. A SAS 29 opinion does not meet this requirement. See Section 14.53 of the ***AICPA Audit and Accounting Guide, State and Local Governments*** (AAG-SLV). The budgetary comparisons must show columns for: the original budget; the revised budget; actual amounts on the budgetary basis; and a variance column. The auditor must confirm the final adjusted and approved budget with the HED. The auditor must compare the financial statement budget comparison to the related September 15th budget submission to HED. The only differences that should exist between the HED budget submission and the financial statement budget comparisons are (1) adjustments made by the institution after September 15th and (2) audit adjustments. If the HED budget submission does not tie to the financial statement comparison, taking into account only those differences, then the auditor should write a related finding. The auditor's opinion on the budgetary comparisons should follow Example A-14 in AAG-SLV 14.79 and footnote 3. A reconciliation of actual revenue and expense amounts on the budgetary basis to the GAAP basis financial statements should be disclosed at the bottom of the budgetary comparisons (preferred) or in the notes to the financial statements. The reconciliation is required only at the "rolled up" level of unrestricted and restricted - all operations and should include revenues and expenses. The HED approved the following format which must be used for the budgetary comparisons:

(a) Unrestricted and restricted - all operations (Schedule 1)
Beginning fund balance: Unrestricted and restricted revenues: State general fund appropriations, federal revenue sources, tuition and fees, land and permanent fund, endowments and private gifts, other
Total unrestricted and restricted revenues
Fund balance budgeted
Total unrestricted and restricted revenues and fund balance budgeted
Unrestricted and restricted expenditures: Instruction, academic support, student services, institutional support, operation and maintenance of plant, student social and cultural activities, research, public service, internal service, student aid grants and stipends, auxiliary services, intercollegiate athletics, independent operations, capital outlay, building renewal and replacement, retirement of indebtedness, other (student aid, grants and stipends; and independent operations)
Total unrestricted and restricted expenditures
Change in fund balance net assets (budgetary basis), ending fund balance
(b) Unrestricted - instruction and general (Schedule 2)
Beginning fund balance, unrestricted revenues: Tuition, miscellaneous fees, federal government appropriations, state government appropriations, local government appropriations, federal government contracts/grants, state government contracts/grants, local government contracts/grants, private contracts/grants, endowments, land and permanent fund, private gifts, sales and services, other
Total unrestricted revenues
Fund balance budgeted
Total unrestricted revenues and fund balance budgeted
Unrestricted expenditures: Instruction, academic support, student services, institutional support, operation and maintenance of plant
Total unrestricted expenditures
Net Transfers
Change in net assets (budgetary basis)
Ending fund balance
(c) Restricted - instruction and general (Schedule 3)
Restricted revenues: Tuition, miscellaneous fees, federal government appropriations, state government appropriations, local government appropriations, federal government contracts/grants, state government contracts/grants, local government contracts/grants, private contracts/grants, endowments, land and permanent fund, private gifts, sales and services, other
Total restricted revenues
Fund balance budgeted
Total restricted revenues and fund balance budgeted

Restricted expenditures: Instruction, academic support, student services, institutional support, operation and maintenance of plant
Total restricted expenditures
Change in net assets (budgetary basis)

(3) The level of planning materiality required by the state auditor follows: Institutions should present their financial statements using the business type activities (BTA) model. The level of planning materiality described in the ***AICPA Audit and Accounting Guide, State and Local Governments***, Section 4.31, must be used for the audit of these institutions. Planning materiality for component units is at the individual component unit level. **If a 501(c) 3 component unit organization had a gross annual income in excess of $100,000, Section 6-5A-1, NMSA 1978, requires that entity to be audited regardless of materiality**. See Paragraph (1) of Subsection A of 2.2.2.10 NMAC for more information about contracting for these required audits.

(4) Compensated absence liability should be shown as follows: The statement of net assets should reflect the current portion of compensated absences under current liabilities, and the long-term portion of compensated absences under noncurrent liabilities.

(5) Component unit issues: Legally separate entities that meet the criteria set forth in GASBS 14 as amended by GASBS 39 to qualify as a component unit of an educational institution must be included in the educational institution's audit report **as a discrete component unit**. An exemption must be obtained from the state auditor in order to present any component unit as blended. The **same auditor** must audit the component unit and the educational institution unless an exemption is obtained from the state auditor.

(a) If the college or university has no component units there should be a statement to that effect in the notes to the financial statement in the description of the reporting entity.

(b) Individual component unit budgetary comparisons are required if the component unit has a "legally adopted budget." A component unit has a legally adopted budget if it receives any federal funds, state funds, or any other appropriated funds whose expenditure authority derives from an appropriation bill or ordinance that was signed into law.

(c) There is also no level of materiality for reporting findings of component units that do not receive public funds. All component unit findings must be disclosed in the primary government's audit report.

(6) Management discussion and analysis (MD&A): The MD&A analysis of significant variations between original and final budget amounts and between final budget amount and actual budget results is required by this rule for colleges and universities. The analysis should include any currently known reasons for those variations that are expected to have a significant effect on future services or liquidity.

(7) Required note disclosure for donor-restricted endowments:

(a) the amounts of net appreciation on investments of donor-restricted endowments that are available for authorization for expenditure by the governing board, and how those amounts are reported in the net assets;

(b) the state law regarding the ability to spend net appreciation; and

(c) the policy for authorizing and spending investment income, such as a spending-rate or total–return policy (GASBS 34 Paragraph 121).

(8) Submit draft copy of financial statements to financial control division: Section 11 of Article XII of the New Mexico Sate Constitution established the following educational institutions: (a) the university of New Mexico; (b) NM state university; (c) NM highlands university; (d) western NM university; (e) eastern NM university; (f) NM institute of mining and technology; (g) NM military institute; (h) NM school for the visually handicapped; (i) NM school for the deaf; and (j) northern NM college. These educational institutions should provide the department of finance and administration financial control division with a draft copy of their financial statements, excluding opinions and findings, pursuant to Paragraph (16) of Subsection A of 2.2.2.12 NMAC, and the letter dated October 3, 2008, described therein, from the state controller and the state auditor.

[2.2.2.12 NMAC - Rp, 2.2.2.12 NMAC, 2-28-11]

2.2.2.13 REVIEW OF AUDIT REPORTS AND AUDIT DOCUMENTATION:

A. Section 12-6-14(B), NMSA requires that the state auditor or personnel of his office designated by him examine all audit reports of agencies made pursuant to contract. All audits under the contracts approved by the state auditor are subject to review. The office will review all reports submitted by the IPA to determine if the reports are presented in accordance with the requirements of this rule and applicable auditing, accounting and financial reporting standards. The office will review all audit reports submitted by the report due date before reviewing reports that are submitted after the report due date.

B. Released audit reports are subject to a comprehensive report and audit documentation review by the state auditor. Reviews of audit documentation maintained by the audit firm may include the review of:

(1) continuing professional education (CPE) for compliance with GAGAS requirements;

(2) the independence safeguards on nonaudit services for compliance with GAGAS requirements;

(3) working papers to determine compliance with governmental auditing, accounting and financial reporting standards issued by GASB, AICPA, GAO, and OMB Circular A-133, and the requirements of this rule; and

(4) documentation of any additional audit procedures performed after the date of the independent auditor's report, as required by SAS 103 Paragraphs 23 through 26.

C. If, during the course of its review of an audit report, the office finds significant deficiencies that warrant a determination that the audit was not made in a competent manner in accordance with the provisions of the contract and applicable standards requirements, or this rule, any or all of the following action(s) may be taken:

(1) as instructed by the office, the IPA may be required to correct the deficiencies and if necessary, the working papers and reissue the audit report to the agency, and any others receiving copies;

(2) the IPA's future audit engagement may be limited in restricted to a limited number, and if the auditor is in the middle of any multiple year proposals, those audits will take precedent over audits that are not;

(3) the IPA may be required to submit working papers along with the audit report to the state auditor for review by the office, prior to the release of future audit reports, for some or all audit contracts;

(4) the IPA may be denied the issuance of future audit contracts; or

(5) the IPA may be referred to the New Mexico public accountancy board for possible licensure action.

D. Results of review:

(1) After the review is completed, the office will issue a letter to advise the IPA about the results of the review. The IPA is required to respond to all review comments as directed.

(2) Any corrective actions will be approved by the state auditor based on the recommendation of the in-charge reviewer.

(3) The IPA may request a review of the recommended action by the state auditor. If requested, the state auditor will schedule a conference, within fifteen days, to allow the IPA an opportunity to analyze the results of the review and present any information the IPA deems appropriate.

E. Revisions to audit report: Revisions to the audit reports from reviews conducted by the federal inspector generals and the state auditor will be made by the IPA to all copies of the audit report held by the agencies any oversight agencies and the state auditor.
[2.2.2.13 NMAC - Rp, 2.2.2.13 NMAC, 2-28-11]

2.2.2.14 CONTINUING PROFESSIONAL EDUCATION AND PEER REVIEW REQUIREMENTS:

A. Continuing professional education: U.S. GAO ***Government Auditing Standards, July 2007 Revision*** (GAGAS), Section 3.46 states "Each auditor performing work under GAGAS should complete, every 2 years, at least 24 hours of CPE that directly relates to government auditing, the government environment, or the specific or unique environment in which the audited entity operates. For auditors who are involved in any amount of planning, directing, or reporting on GAGAS assignments and those auditors who are not involved in those activities but charge 20 percent or more of their time annually to GAGAS assignments should also obtain at least an additional 56 hours of CPE (for a total of 80 hours of CPE in every 2 year period) that enhances the auditor's professional proficiency to perform audits or attestation engagements." The GAO issued ***Government Auditing Standards*****: *Guidance on GAGAS Requirements for Continuing Professional Education,* GAO-05-568G, April 2005**. It provides helpful guidance to auditors and audit organizations regarding the implementation of the Yellow Book CPE requirements. The guide is available at **www.gao.gov/govaud/ybcpe2005.pdf.**

B. Peer review: (GAGAS), Section 3.50 states "each audit organization performing audits or other audits or other attestation engagements in accordance with GAGAS must establish a system of quality control that is designed to provide the audit organization with reasonable assurance that the organization and its personnel comply with professional standards and applicable legal and regulatory requirements; and have an external peer review at least once every 3 years." Section 3.56 states "The audit organization should obtain an external peer review sufficient in scope to provide a reasonable basis for determining whether, for the period under review, the reviewed audit organization's system of quality control was suitably designed and whether the audit organization is complying with its quality control system in order to provide the audit organization with reasonable assurance of conforming with applicable professional standards."

(1) Per the ***AICPA PR Section 100 Standards for Performing and Reporting on Peer Reviews***, a firm's due date for its initial peer review is eighteen months from the date the firm is enrolled in the peer review program or should have enrolled whichever is earlier. A firm's subsequent peer review is due three years and six months from the previous peer review year end.

(2) If the firm is unable to complete its external quality control review by the required due date, it will render the firm ineligible to conduct audits of governmental agencies. **Extension requests to complete the external quality control review that are approved by the administering organization will not be accepted by the state auditor**.

(3) The state auditor requires the location of the external quality control review to be the office of the firm under review, regardless of whether the firm reviewed is a sole practitioner and regardless of the number of firm employees. External quality control reviews performed at a location other than the office of the firm under review will not be accepted by the state auditor.

(4) The IPA firm profile submission to the state auditor requires copies of:

(a) proof that the firm your peer reviewer is associated with received a peer review rating of "pass" under the updated peer review standards, or an "unmodified" rating under the pre-January 1, 2009 standards, as required by the state auditor (a copy of the report should be submitted);

(b) the peer review report for the auditor's firm;

(c) the corresponding letter of comments;

(d) auditor's response to letter of comments;

(e) the letter of acceptance from the peer review program in which the firm is enrolled; and

(f) a list of the governmental audits reviewed during the peer review; the office assumes that at least one of these will be a New Mexico governmental audit.

(5) Failure to submit the required IPA firm profile documentation, or a peer review rating of less than **"pass with deficiencies"** (under the January 1, 2009 standards) or a rating of less than **modified** (under the pre-January 1, 2009 standards) on the auditor's peer review, will disqualify the IPA from doing governmental audits.

(6) During the procurement process audit firms shall provide a copy of their most recent external peer review report to the agency upon submitting a bid proposal or offer.

(7) The peer review should meet the current GAGAS requirements.

(8) The New Mexico public accountancy board's substantial equivalency provision has been replaced with mobility. Under the mobility provision in the statute, a CPA may enter the state and perform work, provided he holds a current, valid license from some state. If the CPA is performing any type of attest work, his firm must apply for a firm permit. The peer review function falls within the category of attest work, which means that the firm must have a New Mexico firm permit.

(9) **The reviewer should be familiar with this rule. This is a requirement of the state auditor that can be achieved by attendance at audit rule training provided by the office**.

C. The state auditor performs its own quality control review of IPA audit reports and working papers. When the result of the state auditor's quality control review differs significantly from the external quality control report and corresponding letter of comments, the state auditor may no longer accept external peer review reports performed by that reviewer. In making this determination, the state auditor will take into consideration the fact that AICPA peer reviews are performed on a risk-based or key-element approach looking for systemic problems, while the state auditor reviews are engagement-specific reviews.
[2.2.2.14 NMAC - Rp, 2.2.2.14 NMAC, 2-28-11]

2.2.2.15 SPECIAL AUDITS, PERFORMANCE AUDITS AND ATTESTATION ENGAGEMENT:

A. Special audit, performance audits or attestation engagement:

(1) Pursuant to Section 12-6-3 NMSA 1978, the state auditor may cause the financial affairs and transactions of an agency to be audited in whole or in part. Accordingly, the state auditor may initiate a special audit, performance audit or attestation engagement regarding the financial affairs and transactions of an agency based on information or a report received from an agency, IPA or member of the public. The state auditor may perform the special audit, performance audit or attestation engagement. Additionally, in accordance with the procedures set forth in Subsection B of this section, the state auditor may designate an agency for special audit, performance audit or attestation engagement regarding that agency's financial affairs and transactions, to be conducted by an IPA approved by the state auditor. The state auditor, personnel of the state auditor's office designated by the state auditor or independent auditors approved by the state auditor shall have available to them all documents necessary to perform a thorough special audit, performance audit or attestation engagement regarding the financial affairs and transactions of an agency. Furthermore, pursuant to Section 12-6-11 NMSA 1978, when necessary for an audit, special audit, performance audit or attestation engagement regarding the financial affairs and transactions of an agency, the state auditor may apply to the district court of Santa Fe county for issuance of a subpoena to compel the attendance of witnesses and the production of books and records. All reasonable costs of special audits, performance audits and attestation engagements conducted pursuant to this section shall be borne by the agency audited pursuant to Section 12-6-4 NMSA 1978.

B. Designation of agency:

(1) The state auditor may designate an agency for special audit, performance audit or attestation engagement regarding that agency's financial affairs and transactions, to be conducted by an IPA approved by the state auditor. The state auditor shall inform the agency of the designation by sending the agency a notification letter. The state auditor may specify the scope and any procedures required for the special audit, performance audit or attestation engagement. If the state auditor designates an agency for special audit, performance audit or attestation engagement to be conducted by an IPA, the agency shall comply with the following procedures to obtain professional services from an IPA for the required special audit, performance audit or attestation engagement:

(a) upon receipt of notification to proceed from the office, the agency shall identify all elements or services to be solicited and request quotations or proposals for each applicable element of the special audit, performance audit or attestation engagement as specified by the office;

(b) follow all applicable procurement requirements in accordance with the Procurement Code, Chapter 13 Article 1, when selecting an IPA to perform the special audit, performance audit or attestation engagement;

(c) evaluate all competitive sealed proposals or quotations received by using an evaluation process, preferably executed by a selection committee, as similarly described in Paragraph (5) of Subsection B of 2.2.2.8 NMAC; and

(d) after completing the evaluations for each IPA and making the IPA selection, each agency shall submit the following information to the state auditor by the due date specified by the state auditor in the notification letter: (i) a completed IPA recommendation form for special audits, performance audits, or attestations engagements (the form) provided at www.osanm.org that the agency shall print on agency letterhead; (ii) a completed audit contract form including the contract fee, start and completion date, and the specific scope of services to be performed by the IPA, for special audit, performance audit, or attestation engagement, provided at www.osanm.org, with the IPA and agency signatures on the contract.

(2) IPA recommendation forms and contracts that are submitted to the office with errors or omissions will be rejected by the office. The office will return the rejected IPA recommendation form and contract to the agency with a checklist indicating the reason(s) for the rejection. Any contract amendments will be processed in accordance with Paragraphs (1) and (3) of Subsection M of 2.2.2.8 NMAC.

(3) In the event the agency's recommendation is not approved by the state auditor, the state auditor will promptly communicate the decision, including the reason(s) for disapproval, to the agency, at which time the agency shall promptly submit a different recommendation. This process will continue until the state auditor approves a recommendation and related contract. During this process, whenever a recommendation and related contract are not approved, the agency may submit a written request to the state auditor for reconsideration of the disapproval. The agency shall submit its request no later than 15 days from the date of the disapproval and shall include documentation in support of its recommendation. If warranted, after review of the request, the state auditor may hold an informal meeting to discuss the request. The state auditor may set the meeting in a timely manner with consideration given to the agency's circumstances.

(4) Reports of any special audit, performance audit or attestation engagement made pursuant to this section will be reviewed by the office for compliance with the professional services contract. Upon completion of the report, the IPA shall deliver the organized and bound report to the state auditor with a copy of the signed and dated engagement letter if not previously submitted. The IPA is required to respond to all review comments as directed by the office. After its review of the report for compliance with the professional services contract, the office will authorize the IPA to print and submit the final report; the required number of hardcopies specified in the professional services contract and an electronic version of the report, in PDF format, must be delivered to the office within two business days. The office will not release the report until the electronic version of the report is received by the office. The office will provide the agency with a letter authorizing final payment to the IPA and the release of the report pursuant to Section 12-6-5 NMSA 1978. Released reports may be selected by the office for comprehensive report and workpaper reviews. After a comprehensive review is completed, the office will issue a letter to advise the IPA about the results of the review. The IPA is required to respond to all review comments as directed.

(5) Once the report is officially released to the agency by the state auditor, by an authorizing letter, and the required waiting period of five calendar days has passed or been waived by the agency, the report shall be presented by the IPA to a quorum of the governing authority of the agency at a meeting held in accordance with the Open Meetings Act, if applicable. The presentation of the report should be documented in the minutes of the meeting.

(6) Neither the IPA nor agency personnel shall release any information to the public relating to the special audit, performance audit or attestation engagement until the report has been officially released by the state auditor and becomes public record.

(7) All reasonable costs of special audits, performance audits and attestation engagements conducted pursuant to this section shall be borne by the agency audited pursuant to Section 12-6-4 NMSA 1978. Progress payments up to 90% of the contract amount do not require state auditor approval and may be made by the agency if the agency monitors the progress of the services procured. If requested by the state auditor, the agency shall provide a copy of the approved progress billing(s). Final payments from 91% to 100% may be made by the agency only after the state auditor has stated in a letter to the agency that the report has been released by the state auditor and the engagement letter has been received by the state auditor.

C. Financial fraud, waste or abuse in government reported by agencies, IPAs or members of the public:

(1) The state auditor may conduct fact-finding procedures in connection with reports of financial fraud, waste and abuse in government made by agencies, IPAs or members of the public.

(2) Pursuant to Section 12-6-6 NMSA 1978 and Subsection K of 2.2.2.10 NMAC, every agency and IPA shall notify the state auditor immediately, in writing, upon discovery of any violation of a criminal statute in connection with financial affairs. In addition, upon discovery, the state auditor shall immediately report a violation of a criminal statute in connection with financial affairs to the proper prosecuting officer and furnish the officer with all data and information in his possession relative to the violation.

(3) An agency, IPA or member of the public may report financial fraud, waste or abuse in government to the state auditor. Reports may be submitted directly to the office orally or in writing. Reports may also be made telephonically or in writing through the fraud hotline or website established by the office for the confidential reporting of financial fraud, waste, and abuse in government. Reports may be made telephonically to the fraud hotline by calling 1-866-OSA-FRAUD (1-866-672-3728) or reported in writing through the office's website at https://www.reportlineweb.com/welcome.aspx?client=osa. Reports received or created by the office are audit information and audit documentation in connection with the state auditor's statutory duty to examine and audit the financial affairs of every agency, or in connection with the state auditor's statutory discretion to audit the financial affairs and transactions of an agency in whole or in part.

D. Confidentiality:

(1) The identity of a person making a report directly to the office orally or in writing, or telephonically or in writing through the office's fraud hotline or website, alleging financial fraud, waste, or abuse in government is confidential audit information and may not be disclosed, unless the person making the report agrees to the disclosure of that person's name.

(2) A report alleging financial fraud, waste, or abuse in government that is made directly to the office orally or in writing, or telephonically or in writing through the office's fraud hotline or website, and any resulting special audit, performance audit, or attestation engagement, is confidential audit documentation and may not be disclosed except as provided in Paragraph (3) of this subsection to an independent auditor in connection with a special audit, performance audit, or attestation examination or other existing or potential engagement regarding the financial affairs or transactions of an agency.

(3) The office shall disclose audit information and audit documentation that is confidential under this section if required by Section 12-6-6 NMSA 1978.

(4) The office may disclose audit information or audit documentation that is confidential under this subsection:

(a) to an independent auditor approved by the state auditor in connection with a special audit, performance audit, attestation engagement or other existing or potential engagement regarding the financial affairs transactions of an agency;

(b) to refer to the appropriate agency a report of financial fraud, waste or abuse in government, provided such disclosure does not undermine the independence or validity of the audit process;

(c) to ensure coordination and cooperation between agencies related to a report of financial fraud, waste or abuse in government provided such disclosure does not undermine the independence or validity of the audit process; or

(d) after a report of a special audit, performance audit or attestation engagement is released and becomes public pursuant to the Section 12-6-5 NMSA 1978, provided that disclosure of the audit information or audit documentation is consistent with the Inspection of Public Records Act, the Audit Act and this rule.

E. Reports of special audits, performance audits or attestation engagements related to financial fraud, waste or abuse in government:

(1) This section applies to instances in which an agency and an IPA enters into a professional services contract for a special audit, performance audit or attestation engagement relating to financial fraud, waste or abuse, but the agency has not been designated by the state auditor for the audit or engagement pursuant to Subsection B of 2.2.2.15 NMAC.

(2) An agency or an IPA shall not enter into a professional services contract for a special audit, performance audit or attestation engagement regarding the financial affairs and transactions of an agency and relating to financial fraud, waste or abuse in government without the prior written approval of the state auditor. The proposed professional services contract must be submitted to the state auditor for review and approval after it has been signed by the agency and the IPA. The contract must include the contract fee, start and completion date, and the specific scope of services to be performed by the IPA.

(3) A report of a special audit, performance audit or attestation engagement made pursuant to a contract approved under this section is subject to review by the state auditor. Upon completion of the report, the IPA shall deliver the organized and bound report to the state auditor with a copy of the signed and dated engagement letter if not previously submitted and a copy of the signed management representation letter.

(4) The IPA is required to respond to all review comments as directed by the office. After its review of the report, the office will authorize the IPA to print and submit the final report. The required number of hardcopies specified in the contract and an electronic version of the report, in PDF format, must be delivered to the state auditor within the time specified by the office pursuant to the authorization to print and submit the final report. The office will not release the report until the electronic version of the report is received by the office.

(5) The IPA shall deliver to the agency the number of copies of the report indicated in the contract only after the state auditor has officially released the audit report with a "release letter."

(6) Neither the IPA nor agency personnel shall release any information to the public relating to the special audit, performance audit or attestation engagement until the report has been officially released by the state auditor and becomes public record.

[2.2.2.15 NMAC - Rp, 2.2.2.15 NMAC, 2-28-11]

2.2.2.16 ANNUAL FINANCIAL PROCEDURES REQUIRED FOR LOCAL PUBLIC BODIES WITH REVENUES LESS THAN $500,000:

A. Pursuant to Section 12-6-3(B) NMSA 1978, the annual revenue of a local public body determines the type of financial reporting a local public body shall submit to the office. Local public bodies are mutual domestic water consumers associations, land grants, incorporated municipalities, and special districts. The annual revenue of a local public body shall be calculated on a cash basis, excluding capital outlay funds, federal and private grants.

B. Annually, the state auditor shall provide local public bodies written authorization to proceed with obtaining services to conduct a financial audit or other procedures. Upon receipt of the authorization, a local public body shall determine its annual revenue in accordance with Subsection A of 2.2.2.16 NMAC. The following requirements for financial reporting apply to the following annual revenue amounts:

(1) If a local public body's annual revenue is less than $10,000 and the local public body did not directly expend at least 50% of, or the remainder of, a single capital outlay award, then the local public body is exempt from submitting and filing

quarterly reports and budgets for approval to the local government division of the department of finance and administration and from submitting a financial report to the state auditor, except as otherwise provided in Subsection C of 2.2.2.16 NMAC.

(2) If a local public body's annual revenue is $10,000 or more but less than $50,000, the local public body shall comply with the requirements of Section 6-6-3 NMSA 1978; and is exempt from any financial reporting to the state auditor, except as otherwise provided in Subsection C of 2.2.2.16 NMAC.

(3) If a local public body's annual revenue is less than $50,000, and the local public body expended at least 50% of, or the remainder of, a single capital outlay award, then the local public body shall procure the services of an IPA for the performance of a tier 3 agreed upon procedures engagement in accordance with the tier 3 agreed upon procedures checklist on the state auditor's website.

(4) If a local public body's annual revenue is $50,000 or more, but less than $250,000, then the local public body shall procure the services of an IPA for the performance of a tier 4 agreed upon procedures engagement in accordance with the tier 4 agreed upon procedures checklist on the state auditor's website.

(5) If a local public body's annual revenue is $50,000 or greater, but less than $250,000, and the local public body expended any capital outlay funds, then the local public body shall procure the services of an IPA for the performance of a tier 5 agreed upon procedures engagement in accordance with the tier 5 agreed upon procedures checklist on the state auditor's website.

(6) If a local public body's annual revenue is $250,000 or greater, but less than $500,000, the local public body shall procure services of an IPA for the performance of a tier 6 agreed upon procedures engagement in accordance with the tier 6 agreed upon procedures checklist on the state auditor's website.

(7) If a local public body's annual revenue is $500,000 or more, the section shall not apply and the local public body shall procure services of an IPA for the performance of a financial and compliance audit in accordance with other provisions of 2.2.2 NMAC.

(8) Notwithstanding the annual revenue of a local public body, if the local public body expended $500,000 or more of federal funds subject to a federal single audit during the fiscal year then the local public body must procure a single audit in accordance with 2.2.2.8 NMAC.

C. A local public body that is exempt from financial reporting to the state auditor pursuant to Paragraphs (1) and (2) of Subsection B of 2.2.2.16 NMAC shall submit written certification to the local government division and the state auditor. The certification shall be provided on the form made by the state auditor and available on the state auditor's website at www.osanm.org. The agency shall certify, at a minimum:

(1) the local public body's annual revenue for the fiscal year; and

(2) that the local public body did not expend 50% of or the remainder of a single capital outlay award.

D. A local public body required to perform an agreed upon procedures engagement shall procure the services of an IPA in accordance with the procedures below.

(1) Upon receipt of notification to proceed from the office, the local public body shall identify all elements or services to be solicited and request quotations or proposals for the applicable agreed upon procedures engagement pursuant to Subsection A of 2.2.2.16 NMAC. A local public body is strongly encouraged to select an IPA on the state auditor's list of audit firms approved to perform audits of New Mexico government agencies. However, a local public body may select an IPA who has:

(a) a New Mexico firm permit to practice;

(b) current liability insurance; and

(c) a current peer review (if applicable) with a rating of at least "modified" or "pass with deficiencies."

(2) IPA services that cost less than $50,000 excluding gross receipts tax on each year's contract should be considered small purchases in accordance with the Procurement Code (Chapter 13, Article 1 NMSA 1978. The local public body **may** procure professional services for one year only. The local public body **may** procure the required services using a multiple year proposal (not to exceed three years) in which the cost of service is $50,000 or less in each year (excluding gross receipts taxes). The local public body is **encouraged** to obtain no fewer than three written or oral quotations to be recorded and placed in the procurement file. Section 13-1-191.1 NMSA 1978 requires prospective contractors to complete a standard campaign contribution disclosure form and submit it to the local public body on the date the contractor signs the contract.

(3) For IPA services that cost $50,000 or more excluding gross receipts tax on each year's contract, the local public body shall seek competitive sealed proposals and contract for services in accordance with the Procurement Code (Chapter 13, Article 1 NMSA 1978). Section 13-1-191.1 NMSA 1978 requires prospective contractors to complete a standard campaign contribution disclosure form and submit it to the local public body as part of the competitive sealed proposal.

(4) The local public body may request a multiple year proposal to provide services not to exceed a term of three years including all extensions and renewals. The term of the contract shall be one-year with the option to extend for two successive one-year terms at the same price, terms and conditions as stated on the original proposal. Exercising the option to extend shall be by mutual agreement of the parties to the contract and with the approval of the state auditor. In the event that either of the parties to the contract elects not to extend, or the state auditor disapproves the recommendation for renewal, the local public body shall use the procedures described above in Paragraphs (2) and (3) of Subsection D of 2.2.2.16 NMAC to solicit services.

(5) The local public body shall evaluate all competitive sealed proposals or quotations received using an evaluation process, preferably executed by a selection committee. Members of component units such as housing authorities, etc., should be included in the IPA selection process. As part of their evaluation process, local public bodies may and are strongly encouraged to consider the following criteria when selecting an IPA:

(a) the capability of the IPA, including: (i) whether the IPA has the resources to perform the type and size of the agreed upon procedures required; (ii) the results of the IPA's most recent external quality control review (peer review); and (iii) the organization and completeness of the IPA's proposal or bid for agreed upon procedures services;

(b) the work requirements and approach of the IPA, including: (i) the IPA's knowledge of the local public body's need and the product to be delivered; (ii) whether the IPA's proposal or bid contains a sound technical plan and realistic estimate of time to complete the agreed upon procedures engagement; (iii) plans for using local public body staff, including internal auditors; and (iv) if the proposal or bid is for a multiple year contract, the IPA's approach for planning and conducting the work efforts of subsequent years;

(c) the IPA's technical experience, including: (i) the governmental audit experience of the IPA and the specialization in the local public body's type of government; and (ii) the IPA's attendance at continuing professional education seminars or meetings on auditing, accounting and regulations directly related to state and local government audits and agreed upon procedures services.

(6) After completing the evaluations for each IPA and making the IPA selection, a local public body shall submit the completed IPA recommendation form for tiered system local public bodies (the form) and the completed and signed agreed upon procedures contract to the state auditor on or

before May 15. The blank form and contract that the local public body must use are available at www.osanm.org. In the event the due date falls on a weekend or holiday, the due date will be the next business day. Local public bodies with a fiscal year end other than June 30 must use a due date 30 days before the end of the fiscal year.

(a) The local public body shall print the form on the local public body's letterhead.

(b) The local public body shall complete the agreed upon procedures contract form provided at www.osanm.org for the applicable tier. The local public body should obtain the IPA's signature on the contract, and submit the completed and signed agreed upon procedures contract to the state auditor with the completed IPA recommendation form for agreed upon procedures.

(c) If the IPA is not on the state auditor's list of audit firms approved to perform audits of New Mexico government agencies, the local public body or the IPA shall submit: (i) firm contact information; (ii) a copy of the firm's current New Mexico firm permit to practice; (iii) proof of current liability insurance; (iv) a copy of the firm's current peer review; if applicable; and (v) an explanation regarding why the local public body selected an IPA that did not appear on the state auditor's list.

(d) The IPA recommendation form for agreed upon procedures and the related agreed upon procedures contract that are submitted to the office with errors or omissions will be rejected by the office. The office will return the rejected contract and IPA recommendation form to the local public body with a checklist indicating the reason(s) for the rejection. The office will process first the timely submitted correct IPA recommendation forms and related contracts. Then the office will process any IPA recommendation forms and related contracts that are submitted late or were rejected by the office and not resubmitted correctly by the deadline.

(e) The local public body shall retain all procurement documentation including completed evaluation forms, for five years and in accordance with applicable records laws.

E. The state auditor shall consider and approve or disapprove the IPA recommendation and related agreed upon procedures contract pursuant to Subsection C of 2.2.2.8 NMAC. In the event the local public body's recommendation and related contract are not approved by the state auditor, the state auditor shall promptly communicate the decision, including the reason(s) for disapproval, to the local public body, at which time the local public body shall promptly submit a different recommendation. This process will continue until the state auditor approves a recommendation and related contract. During this process, whenever a recommendation and related contract are not approved, the local public body may submit a written request to the state auditor for reconsideration of the disapproval. The local public body shall submit its request no later than 15 days from the date of the disapproval and shall include documentation in support of its recommendation. If warranted, after review of the request, the state auditor may hold an informal meeting to discuss the request. The state auditor may set the meeting in a timely manner with consideration given to the agency's circumstances. Any contract amendments will be processed in accordance with Paragraphs (1) and (3) of Subsection M of 2.2.2.8 NMAC.

F. Requirements of the IPA selected to perform the agreed upon procedures:

(1) The IPA will provide the local public body with a dated engagement letter during the planning stages of the engagement, describing the services to be provided. See Paragraph (4) of Subsection M of 2.2.2.8 NMAC for applicable restrictions on the engagement letter.

(2) The IPA may not subcontract any portion of the services to be performed under the contract with the local public body.

(3) Once the report is officially released to the agency by the state auditor (by an authorizing letter) and the required waiting period of five calendar days has passed or has been waived by the local public body, the agreed upon procedures report shall be presented by the IPA, to a quorum of the governing authority of the local public body at a meeting held in accordance with the Open Meetings Act, if applicable.

G. Progress payments:

(1) Progress payments up to 90% of the contract amount do not require state auditor approval and may be made by the local public body if the local public body monitors the progress of the services procured pursuant to Subsection A of 2.2.2.16 NMAC. If requested by the state auditor, the local public body shall provide a copy of the approved progress billing(s).

(2) Final payment from 91% to 100% may be made by the local public body only after the state auditor has stated in a letter to the entity that the agreed upon procedures report has been released by the state auditor and the engagement letter and management representation letter have been received by the state auditor.

H. Report due dates:

(1) For local public bodies with a June 30 fiscal year-end, the due date is December 1. Local public bodies with a fiscal year end other than June 30 must submit the agreed upon procedures report no later than five months after the fiscal year-end. An organized bound hard copy of the report should be submitted. Reports submitted via fax or email will not be accepted. A copy of the signed dated engagement letter and the signed dated management representation letter shall be submitted with the report. If a due date falls on a weekend or holiday, or if the office is closed due to inclement weather, the report is due the following business day by 5:00 p.m. If the report is mailed to the state auditor, it should be postmarked no later than the due date to be considered filed by the due date. The state auditor will grant no extensions of time to the established regulatory due dates.

(2) As soon as the auditor becomes aware that circumstances exist that will make the local public body's agreed upon procedures report late, the auditor shall notify the state auditor and oversight agency of the situation in writing. There must be a separate notification for each late agreed upon procedures report. The notification must include a specific explanation regarding why the report will be late, when the IPA expects to submit the report and a concurring signature by the local public body. If the IPA will not meet the expected report submission date, then the IPA should send a revised notification letter. In the event the contract was signed after the report due date, the notification letter must still be submitted to the office explaining the reason the agreed upon procedures report will be submitted after the report due date. A copy of the letter must be sent to the local government division (LGD) of DFA if LGD oversees the local public body.

(3) Neither the IPA nor the local public body shall release any information to the public relating to the agreed upon procedures engagement until five days after the report has been officially released by the sate auditor or the five days have been waived by the local public body and the report has become public record pursuant to Section 12-6-5(A) NMSA 1978.

I. Implementation date: 2.2.2.16 NMAC is effective for local public bodies with fiscal years ending on or after June 30, 2010.

J. Review of agreed upon procedures reports and related workpapers: Agreed upon procedures reports will be reviewed by the office for compliance with the professional services contract. After its review of the agreed upon procedures report for compliance with the professional services contract, the office will authorize the IPA to print and submit the final report; the required number of hardcopies specified in the professional services contract and an electronic version of the agreed upon procedures report, in PDF format, must be delivered to the office within two business days. The office will not release the agreed upon procedures report until the electronic version of the report is received by the

office. The office will provide the local public body with a letter authorizing the release of the report after the required five day waiting period, and final payment to the IPA. Released reports may be selected by the office for comprehensive report and workpaper reviews. After a comprehensive review is completed, the office will issue a letter to advise the IPA about the results of the review. The IPA is required to respond to all review comments as directed. If during the course of its review, the office finds significant deficiencies that warrant a determination that the engagement was not performed in accordance with the provisions of the contract, applicable AICPA standards, or the requirements of this rule, any or all of the following action(s) may be taken:

(1) as instructed by the office, the IPA may be required to correct the working papers and reissue the agreed upon procedures report to the agency, and any others receiving copies;

(2) the IPA's future engagements may be limited in number;

(3) the IPA may be required to submit working papers along with the agreed upon procedures report to the state auditor for review by the office, prior to the release of future agreed upon procedures reports, for some or all contracts; or

(4) the IPA may be referred to the New Mexico public accountancy board for possible licensure action.

K. IPA Independence: IPA's that perform agreed upon procedure engagements under the tiered system must maintain independence in mental attitude in all matters relating to the engagement.

(1) An IPA who performs the local public body's annual agreed upon procedures engagement shall not enter into any special audit or nonaudit service contract with that local public body without the prior written approval of the state auditor. To obtain this approval, the original professional services contract for nonaudit or special audit services must be submitted to the state auditor for review and approval after it has been signed by the local public body and the IPA. The contract must include the contract fee, start and completion date, and the specific scope of services to be performed by the IPA. Requests for approval of professional service contracts shall be submitted to the office with the original version of the signed agreement by the 5th of each month. The office will review the requests and respond to the local public body and the IPA by the 25th of each month. Upon completion of the nonaudit services, the IPA must provide the state auditor with a copy of any report submitted to the local public body.

(2) Except as provided in Subsection E of 2.2.2.15 NMAC, a local public body and an IPA who does not perform that local public body's annual financial audit shall submit a copy to the state auditor of each professional services contract entered into between the local public body and the IPA for a special audit, agreed upon procedure or any other nonaudit services. The contract shall not require approval by the state auditor but shall be submitted to the state auditor within 30 days of execution.

L. Current guidance regarding tier 6 compilations: The accounting and review services committee (ARSC) issued statement on standards for accounting and review services (SSARS) No. 19, compilation and review engagements on December 30, 2009. The new standard is effective for periods ending on or after December 15, 2010 (FY11). The new standards supersedes AR Section 20, Defining Professional Requirements in Statements on Standards for Accounting and Review Services, AR section 50, Standards for Accounting and Review Services, and AR section 100, Compilation and Review of Financial Statements.

[2.2.2.16 NMAC - Rp, 2.2.2.16 NMAC, 2-28-11]

NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

This is an amendment to 8.301.3 NMAC, Sections 3, 8, 9 and 31 - 33, effective March 1, 2011.

8.301.3.3 STATUTORY AUTHORITY: The New Mexico medicaid program and other health care programs are administered pursuant to regulations promulgated by the federal department of health and human services under Title XIX of the Social Security Act as amended or by state statute. [~~See Section 27-2-12 et seq. NMSA, 1978 (Repl. Pamp. 1991).~~)] See NMSA 1978, Sections 27-2-12 et seq.

[1-1-95; 8.301.3.3 NMAC - Rn, 8 NMAC 4.MAD.000.3, 3-1-06; A, 5-14-10; A, 3-1-11]

8.301.3.8 MISSION STATEMENT: To reduce the impact of poverty on people living in New Mexico and to assure low income and [~~disabled individuals~~] individuals with disabilities in New Mexico equal participation in the [~~lives~~] life of their communities.

[2-1-95; 8.301.3.8 NMAC - Rn, 8 NMAC 4.MAD.002, 3-1-06; A, 5-14-10; A, 3-1-11]

8.301.3.9 GENERAL NONCOVERED SERVICES: [~~MAD~~] The medical assistance division (MAD) does not cover certain procedures, services, or miscellaneous items. See specific provider or service sections for additional information on service coverage and limitations. A provider cannot turn an account over to collections or to any other factor intending to collect from the eligible recipient or their personal representative. See 8.302.2.11 NMAC, *billing and claims filing limitations.* A provider cannot bill an eligible recipient or their personal representative for the copying of the eligible recipient's records, but must provide copies of the records to other providers upon request.

[2-1-95; 8.301.3.9 NMAC - Rn, 8 NMAC 4.MAD.602 & A, 3-1-06; A, 5-14-10; A, 3-1-11]

8.301.3.31 BARIATRIC SURGERY SERVICES: MAD does not reimburse for bariatric surgery [~~services~~] or other weight reduction surgeries or procedures.

[2-1-95; 8.301.3.31 NMAC - Rn, 8 NMAC 4.MAD.602.22 & A, 3-1-06; Repealed, 5-14-10; 8.301.3.31 NMAC - N, 5-14-10; A, 3-1-11]

8.301.3.32 SERVICES AND TESTS WHICH ARE NOT ROUTINELY WARRANTED DUE TO THE ELIGIBLE RECIPIENT'S AGE: MAD does not reimburse for routine screening, tests, or services which are not medically necessary due to the age of the eligible recipient:

A. **Papanicolaou** test (pap smear) for women under age 21 unless prior history or risk factors make the test medically warranted; and

B. prostate specific antigen (PSA) test for men under age 40 unless prior history or risk factors make the test medically warranted.

[8.301.3.32 NMAC - N, 3-1-11]

8.301.3.33 SERVICES FOR SURROGATE MOTHERS: MAD does not pay for services for pregnancy, complications encountered during pregnancy related conditions, prenatal care and post partum care, or delivery for services to a surrogate mother for which an agreement or contract between the surrogate mother and another party exists.

[8.301.3.33 NMAC - N, 3-1-11]

NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

This is an amendment to 8.324.5 NMAC, Sections 3, 6, and 8-16, effective March 1, 2011.

8.324.5.3 STATUTORY AUTHORITY: The New Mexico medicaid program [~~is~~] and other health care programs are administered pursuant to regulations promulgated by the federal department of health and human services under Title XIX of the Social Security Act[~~, as amended~~

~~and by the state human services department pursuant to state statute~~] as amended or by state statute. See Sections 27-2-12 et seq. NMSA 1978 [~~(Repl. Pamp. 1991)~~].
[2/1/95; 8.324.5.3 NMAC - Rn, 8 NMAC 4.MAD.000.3, 7/1/04; A, 3/1/11]

8.324.5.6 OBJECTIVE: [~~The objective of these regulations is to provide policies for the service portion of the New Mexico medicaid program. These policies describe eligible providers, covered services, noncovered services, utilization review, and provider reimbursement.~~] The objective of this rule is to provide instructions for the service portion of the New Mexico medical assistance programs.
[2/1/95; 8.324.5.6 NMAC - Rn, 8 NMAC 4.MAD.000.6, 7/1/04; A, 3/1/11]

8.324.5.8 MISSION STATEMENT: [~~The mission of the New Mexico medical assistance division (MAD) is to maximize the health status of medicaid-eligible individuals by furnishing payment for quality health services at levels comparable to private health plans.~~] To reduce the impact of poverty on people living in New Mexico and to assure low income and individuals with disabilities in New Mexico equal participation in the life of their communities.
[2/1/95; 8.324.5.8 NMAC - Rn, 8 NMAC 4.MAD.002, 7/1/04; A, 3/1/11]

8.324.5.9 DURABLE MEDICAL EQUIPMENT AND MEDICAL SUPPLIES: [~~The New Mexico medicaid program (medicaid)~~] The New Mexico medical assistance division (MAD) pays for medically necessary services furnished to eligible recipients, including durable medical equipment and medical supplies, as specified at 42 CFR Section 440.70 (c). [~~This part describes eligible providers, covered services, services restrictions, noncovered services, and general reimbursement methodology.~~]
[2/1/95; 8.324.5.9 NMAC - Rn, 8 NMAC 4.MAD.754, 7/1/04; A, 3/1/11]

8.324.5.10 ELIGIBLE PROVIDERS: [~~Upon approval of medical assistance program provider participation agreements by the medical assistance division (MAD), all suppliers of medical supplies and/or durable medical equipment that are licensed to do business may become medicaid providers. Once enrolled, 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 have received these materials and for updating them as they receive new materials from MAD.~~] Health care to New Mexico MAD eligible recipients is furnished by a variety of providers and provider groups. The reimbursement and billing for these services is administered by MAD. Upon approval of a New Mexico MAD provider participation agreement by MAD or its designee, licensed practitioners, facilities and other providers of services that meet applicable requirements are eligible to be reimbursed for furnishing covered services to eligible recipients. A provider must be enrolled before submitting a claim for payment to the MAD claims processing contractors. MAD makes available on the HSD/MAD website, on other program-specific websites, or in hard copy format, information necessary to participate in health care programs administered by HSD or its authorized agents, including program rules, billing instructions, utilization review instructions, and other pertinent materials. When enrolled, a provider receives instruction on how to access these documents. It is the provider's responsibility to access these instructions, to understand the information provided and to comply with the requirements. The provider must contact HSD or its authorized agents to obtain answers to questions related to the material or not covered by the material. To be eligible for reimbursement, a provider must adhere to the provisions of the MAD provider participation agreement and all applicable statutes, regulations, and executive orders. MAD or its selected claims processing contractor issues payments to a provider using electronic funds transfer (EFT) only.
[2/1/95; 8.324.5.10 NMAC - Rn, 8 NMAC 4.MAD.754.1 & A, 7/1/04; A, 3/1/11]

8.324.5.11 PROVIDER RESPONSIBILITIES: [~~Providers who furnish services to medicaid recipients must comply with all specified medicaid participation requirements. See 8.302.1 NMAC, *General Provider Policies*. Providers must verify that individuals are eligible for medicaid at the time services are furnished and determine if medicaid recipients have other health insurance. Providers must maintain records that are sufficient to fully disclose the extent and nature of the services provided to recipients. See 8.302.1 NMAC, *General Provider Policies*. Providers must notify recipients of covered and non-covered services by medicaid prior to providing services. See 8.301.3 NMAC, *General Noncovered Services* and 8.302.1 NMAC, *General Provider Policies*.~~]

A. A provider who furnishes services to a medicaid or other health care programs eligible recipient must comply with all federal and state laws, regulations, and executive orders relevant to the provision of services as specified in the MAD provider participation agreement. A provider also must conform to MAD program rules and instructions as specified in the provider rules manual and its appendices, and program directions and billing instructions, as updated. A provider is also responsible for following coding manual guidelines and CMS correct coding initiatives, including not improperly unbundling or upcoding services.

B. A provider must verify that an individual is eligible for a specific health care program administered by the HSD and its authorized agents, and must verify the eligible recipient's enrollment status at the time services are furnished. A provider must determine if an eligible recipient has other health insurance. A provider must maintain records that are sufficient to fully disclose the extent and nature of the services provided to an eligible recipient.

C. When services are billed to and paid by a MAD fee-for-service coordinated services contractor authorized by HSD, under an administrative services contract, the provider must also enroll as a provider with the coordinated services contractor and follow that contractor's instructions for billing and for authorization of services.

See 8.302.1 NMAC, *General Provider Policies*.
[2/1/95; 8.324.5.11 NMAC - Rn, 8 NMAC 4.MAD.754.2 & A, 7/1/04; A, 3/1/11]

8.324.5.12 COVERED DURABLE MEDICAL EQUIPMENT AND MEDICAL SUPPLIES:

A. [~~Medicaid~~] **Durable medical equipment:** MAD covers durable medical equipment (DME) that [~~meet~~] meets the definition of DME, the medical necessity criteria and the prior authorization requirements. [~~Medicaid~~] MAD covers repairs, maintenance, delivery of durable medical equipment and disposable and non-reusable items essential for use of the equipment, subject to the limitations specified in this section. All items purchased or rented must be ordered by [~~providers who are currently enrolled in medicaid~~] a provider who is currently enrolled with MAD. MAD coverage for DME is limited for an eligible recipient in an institutional setting when the institution is to provide the necessary items. An institutional setting is a hospital, nursing facility, intermediate care facility for the metally retarded and a rehabilitation facility. An eligible recipient who is receiving services from a home and community-based waiver is not considered an institutionalized eligible recipient. MAD does not cover multiple services. An eligible recipient is limited to one wheelchair, one hospital bed, one oxygen delivery system or one of any particular type of equipment. A back-up ventilator is covered.

(1) "Durable medical equipment"

is defined as equipment that can withstand repeated use, is primarily and customarily used to serve a medical purpose, is not useful to individuals in the absence of an illness or injury and is appropriate for use at home.

(2) Equipment used in [~~a~~] an eligible recipient's residence must be used exclusively by the eligible recipient for whom it was approved.

(3) To meet the medical necessity criterion, durable medical equipment must be necessary for the treatment of an illness or injury or to improve the functioning of a body part.

(4) Replacement of equipment is limited [~~to one item every three years for adults,~~] to the same extent as it is limited by medicare policy. When medicare does not specify a limitation, equipment is limited to one item every three years unless there are changes in medical necessity or [~~are~~] as otherwise indicated in policy.

B. [~~Medicaid~~] **Medical supplies:** MAD covers medical supplies that are necessary for an ongoing course of treatment within the limits specified in this section. As distinguished from DME, medical supplies are disposable and non-reusable items. [~~Medicaid also covers oxygen, nutritional products and shipping charges as specified in this section. Medicaid coverage for DME and medical supplies may be limited for recipients in institutional settings when the institutions are expected to provide the necessary items. Institutional settings are hospitals, nursing facilities, intermediate care facilities for the mentally retarded and rehabilitation facilities.~~]

(1) A provider or medical supplier that routinely supplies an item to an eligible recipient must document that the order for additional supplies was requested by the recipient or their personal representative and the provider or supplier must confirm that the eligible recipient does not have in excess of a 15-calendar day supply of the item before releasing the next supply order to the eligible recipient. A provider must keep documentation in their files available for audit that show compliance with this requirement.

(2) Medicaid coverage for DME and medical supplies is limited for an eligible recipient in an institutional setting when the institution is to provide the necessary items. An institutional setting is a hospital, nursing facility, intermediate care facility for the mentally retarded and a rehabilitation facility.

[~~D.~~] C. **Covered services [~~for institutionalized and non-institutionalized recipients~~] and items:** [~~Medicaid~~] MAD covers the following items without prior authorization for both an institutionalized and non-institutionalized [~~recipients~~] eligible recipient:

(1) trusses and anatomical supports that do not need to be made to measure;

(2) family planning devices;

(3) [~~repairs to DME; medicaid covers repair and replacement parts if recipients own the equipment for which the repair is necessary and the equipment being repaired is a covered medicaid benefit;~~] repairs to DME and replacement parts if an eligible recipient owns the equipment for which the repair is necessary and the equipment being repaired is a covered MAD benefit; some replacement items used in repairs may require prior authorization; [~~repairs to augmentative and alternative communication devices require prior authorization;~~] see Subsection C of 8.324.5.14 NMAC;

(4) repairs to augmentative and alternative communication devices require prior authorization;

[~~(4)~~] (5) monthly rental includes monthly service and repairs; and

[~~(5)~~] (6) replacement batteries and battery packs for augmentative and alternative communication devices owned by the eligible recipient.

[~~C.~~] D. **Covered services for non-institutionalized recipients:** [~~Medicaid covers certain medical supplies, nutritional products and durable medical equipment provided to eligible non-institutionalized recipients without prior authorization. Medicaid covers the following for non-institutionalized recipients:~~] MAD covers certain medical supplies, nutritional products and durable medical equipment provided to a non-institutionalized eligible recipient without prior authorization. Monthly allowed quantities of items are limited to the same extent as limited by medicare policy. When medicare does not specify a limitation, an item is limited to reasonable amounts as defined by medicaid and published in the billing instructions for DME/medical supplies. MAD covers the following for a non-institutionalized eligible recipient:

(1) needles, syringes and intravenous (IV) equipment including pumps for administration of drugs, hyper-alimentation or enteral feedings;

(2) diabetic supplies, chemical reagents, including blood, urine and stool testing reagents;

(3) gauze, bandages, dressings, pads, and tape;

(4) catheters, colostomy, ileostomy and urostomy supplies and urinary drainage supplies;

(5) parenteral nutritional support products prescribed by a physician on the basis of a specific medical indication for [~~a~~] an eligible recipient who has a defined and specific pathophysiologic process for which nutritional support is considered specifically therapeutic and for which regular food, blenderized food, or commercially available retail consumer nutritional supplements would not meet medical needs;

(6) apnea monitors: prior authorization is required if the monitor is needed for six [~~(6)~~] months or longer; and

(7) disposable [~~sterile~~] gloves (sterile or non-sterile) are limited to 200 per month[~~; disposable non-sterile gloves are limited to 200 per month~~].

E. **Covered oxygen and oxygen administration equipment:**

(1) [~~Medicaid~~] MAD covers the following oxygen and oxygen administration systems, within the specified limitations:

(a) oxygen contents, including oxygen gas and liquid oxygen;

(b) oxygen administration equipment purchase, with prior authorization: oxygen administration equipment may be supplied on a rental basis for one [~~(1)~~] month without prior authorization; rental beyond the initial month requires prior authorization.

(c) oxygen concentrators, liquid oxygen systems and compressed gaseous oxygen tank systems; medicaid approves the most economical oxygen delivery system [~~possible for a specific recipient when considering types of oxygen concentrators~~] available that meets the medical needs of the eligible recipient;

(d) cylinder carts, humidifiers, regulators and flow meters;

(e) purchase of cannulae or masks; and

(f) oxygen tents and croup or pediatric tents.

(2) [~~Medicaid~~] MAD does not cover oxygen tank rental (demurrage) charges as separate charges when renting gaseous tank oxygen systems. If [~~medicaid~~] MAD pays rental charges for systems, tank rental is included in the rental payments. MAD follows the medicare rules for limiting or capping reimbursement for oxygen rental at 36 months, requirements for the provider to maintain and repair the equipment, and to provide ongoing services and disposable supplies after the capped rental.

(3) [~~Nursing homes are administratively responsible for overseeing oxygen supplied to their residents. Nursing homes are encouraged to enter into agreements with oxygen suppliers to provide a well-managed process for provision of oxygen.~~] A nursing home is administratively responsible for overseeing oxygen supplied to the eligible recipient.

F. **Augmentative and alternative communication devices:** [~~Medicaid~~] MAD covers medically necessary electronic or manual augmentative communication devices for [~~medicaid recipients~~] an eligible recipient. Medical necessity is determined by [~~the medical assistance division~~] MAD or its designee(s). Communication devices whose purpose is also educational [~~and/or~~] or vocational are

covered only when it has been determined the device meets medical criteria.

(1) [~~A recipient must have the cognitive ability to use the augmentative communication device and meet one of the following criteria:~~

~~(a) the recipient cannot functionally communicate verbally or through gestures due to various medical conditions in which speech is not expected to be restored; or~~

~~(b) the recipient cannot verbally or through gestures participate in his/her own health care decisions (i.e., making decisions regarding medical care or indicating medical needs or communicate informed consent on medical decisions).~~] An eligible recipient must:

(a) have the cognitive ability to use the augmentative communication device; and

(b) be able to functionally communicate verbally or through gestures.

(2) All of the following criteria must be met before an augmentative communication device can be considered for authorization. The communication device must be:

(a) a reasonable and necessary part of the eligible recipient's treatment plan;

(b) consistent with the symptoms, diagnosis or medical condition of the illness or injury under treatment;

(c) not furnished for the convenience of the eligible recipient, the family, the attending practitioner or other practitioner or supplier;

(d) necessary and consistent with generally accepted professional medical standards of care [~~(i.e., not experimental or investigational)~~];

(e) established as safe and effective for the eligible recipient's treatment protocol; [~~and~~]

(f) furnished at the most appropriate level suitable for use in the eligible recipient's home environment;

(g) augmentative and alternative communication devices are authorized every 60 months for an eligible recipient 21 years of age or older and every 36 months for an eligible recipient under 21 years of age, unless earlier authorization is dictated by medical necessity; and

(h) repairs to, and replacement parts for augmentative and alternative communication devices owned by the recipient.

G. **Rental of durable medical equipment:** [~~Medicaid~~] MAD covers the rental of durable medical equipment. [~~All rental payments must be applied toward purchase of the equipment. When the rental charges equal the amount allowed by medicaid for purchase, the equipment becomes the property of the recipient for whom it was approved.~~]

(1) [~~Medicaid~~] MAD does not cover routine maintenance and repairs for rental equipment as it is the provider's responsibility to repair or replace equipment during the rental period.

(2) Low cost items, defined as those items for which the medicaid allowed payment is less than [~~one hundred and fifty ($150)~~] $150 dollars, may only be purchased. Purchased DME becomes the property of the [~~medicaid~~] eligible recipient for whom it was approved.

[~~(3) Oxygen concentrators, ventilators, stationary and portable liquid oxygen systems are not subject to the mandatory provisions of applying the rental payments toward purchase. See Subsection E of 8.324.5.12 NMAC, c*overed oxygen and oxygen administration equipment*.~~]

(3) MAD covers the rental and purchase of used equipment. The equipment must be identified and billed as used equipment. The equipment must have a statement of condition or warranty, and a stated policy covering liability.

H. **Delivery of equipment and shipping charges:** [~~Medicaid~~] MAD covers the delivery of DME only when the equipment is initially purchased or rented and the round trip delivery is over [~~seventy-five (75)~~] 75 miles. [~~Providers may bill delivery charges as separate additional charges only when the providers customarily charge a separate amount for delivery to non-medicaid patients~~] A provider may bill delivery charges as a separate additional charge when the provider customarily charges a separate amount for delivery to those clients who are not recipients of MAD services. [~~Medicaid~~] MAD does not pay delivery charges for equipment purchased by medicare, for which [~~medicaid~~] MAD is responsible only for the coinsurance and deductible. [~~Medicaid~~] MAD covers shipping charges for DME and medical supplies when it is cost effective or practical to ship items rather than have [~~recipients~~] an eligible recipient travel to pick up items. Shipping charges are defined as the actual cost of shipping items from [~~providers to recipients~~] a provider to an eligible recipient by a means other than that of provider delivery. [~~Medicaid~~] MAD does not pay shipping charges for items purchased by medicare for which [~~medicaid~~] MAD is only responsible for the coinsurance and deductible.

[~~I. **Rental and purchase of used equipment:** MAD covers the rental and purchase of used equipment. The equipment must be identified and billed as used equipment. The equipment must have a statement of condition or warranty, and a stated policy covering liability.~~]

[~~J.~~] I. **Wheelchairs and seating systems [~~for institutionalized recipients~~]:**

(1) [~~Medicaid covers customized wheelchairs and seating systems made for specific recipients, including recipients who are institutionalized.~~] MAD covers customized wheelchairs and seating systems made for a specific eligible recipient, including an eligible recipient who is institutionalized. Written prior authorization is required. MAD or its designee cannot give verbal authorizations for customized wheelchairs/seating systems. A customized wheelchair and seating system is defined as one that has been uniquely constructed or substantially modified for a specific eligible recipient and is so different from another item used for the same purpose that the two items cannot be grouped together for pricing purposes. There must be a customization of the frame for the wheelchair base or seating system to be considered customized.

(2) Repairs to a wheelchair owned by [~~a~~] an eligible recipient residing in an institution may be covered.

(3) Customized or motorized wheelchairs required by an [~~institutional recipient~~] eligible recipient who is institutionalized to pursue educational or employment activity outside the institution may be covered, and will be reviewed on a case-by-case basis.

[2/1/95; 3/1/99; 8.324.5.12 NMAC - Rn, 8 NMAC 4.MAD.754.3 & A, 7/1/04; A, 12/1/04; A, 11/1/05; A, 3/1/11]

8.324.5.13 PRIOR AUTHORIZATION AND UTILIZATION REVIEW: All [~~Medicaid~~] MAD 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, *Prior Authorization and Utilization Review*. [~~Once enrolled, providers receive instructions and documentation forms necessary for prior authorization and claims processing.~~] The provider must contact HSD or its authorized agents to request utilization review instructions. It is the provider's responsibility to access these instructions or ask for paper copies to be provided, to understand the information provided, to comply with the requirements, and to obtain answers to questions not covered by these materials. When services are billed to and paid by a coordinated services contractor authorized by HSD, the provider must follow that contractor's written instructions for authorization of services.

A. **Services [~~for non-institutionalized recipients~~] that require prior authorization:** [~~Medicaid~~] MAD covers certain medical supplies, nutritional products and durable medical equipment provided to [~~eligible recipients~~] an eligible recipient with prior authorization. Written requests for items not included in the

categories listed above or for a quantity greater than that covered by [~~medicaid~~] MAD may be submitted by the eligible recipient's physician, with a prior authorization request, to MAD for consideration of medical necessity. Please refer to criteria in 8.301.3 NMAC, *General Noncovered Services* [~~MAD-602.6~~] for durable medical equipment or medical supplies that are not covered. Services for which prior authorization was obtained remain subject to review at any point in the payment process. Certain procedures or services may require prior authorization for MAD or its designee. Services for which prior authorization was obtained remain subject to utilization review at any point in the payment process, including after payment. See Subsection A of 8.311.2.16 NMAC, *emergency room services.* Prior authorization does not guarantee that an individual is eligible for medicaid. A provider must verify that the individual is eligible for medicaid at the time services are furnished and determine if the recipient has other health insurance. [~~Medicaid~~] MAD covers the following benefits with prior authorization for non-institutionalized eligible recipients:

(1) enteral nutritional supplements and products provided to [~~recipients~~] an eligible recipient who must be tube fed oral nutritional supplements when administered enterally are included;

(2) oral nutritional support products prescribed by a physician:

(a) on the basis of a specific medical indication for [~~a recipient~~] an eligible recipient who has a defined need for which nutritional support is considered therapeutic, and for which regular food, blenderized food, or commercially available retail consumer nutritional supplements would not meet the medical needs;

(b) when medically necessary due to inborn errors of metabolism; [~~or~~]

(c) medically necessary to correct or ameliorate physical illnesses or conditions in [~~children~~] an eligible recipient under the age of [~~twenty-one~~] 21; or

(d) coverage does not include commercially available food alternatives, such as low or sodium-free foods, low or fat-free foods, low or cholesterol-free foods, low or sugar-free foods, low or high calorie foods for weight loss or weight gain, or alternative foods due to food allergies or intolerance;

(3) either disposable diapers or underpads prescribed for [~~recipients~~] an eligible recipient age three and older who [~~suffer~~] suffers from neurological or neuromuscular disorders or who [~~have~~] has other diseases associated with incontinence is limited to either 200 diapers per month or 150 underpads per month;

(4) supports and positioning devices that are part of a DME system, such as seating inserts or lateral supports for specialized wheelchairs;

(5) protective devices, such as helmets and pads;

(6) bathtub rails and other rails for use in the bathroom;

(7) electronic monitoring devices, such as electronic sphygmomanometers, oxygen saturation, fetal or blood glucose monitors and pacemaker monitors;

(8) passive motion exercise equipment;

(9) decubitus care equipment;

(10) equipment to apply heat or cold;

(11) hospital beds and full length side rails;

(12) compressor air power sources for equipment that is not self-contained or cylinder driven;

(13) home suction pumps and lymph edema pumps;

(14) hydraulic patient lifts;

(15) ultraviolet cabinets;

(16) traction equipment;

(17) prone standers and walkers;

(18) trapeze bars or other patient helpers that are attached to bed or freestanding;

(19) home hemodialysis [~~and/or~~] or peritoneal dialysis systems, replacement supplies [~~and/or~~] or accessories;

(20) wheelchairs and functional attachments to wheelchairs: wheelchairs are authorized every [~~five (5) years; for recipients under twenty-one (21)~~] 60 months; for an eligible recipient under 21 years of age, wheelchairs can be authorized every [~~(3) years~~] 36 months; earlier authorization is possible when dictated by medical necessity;

(21) wheelchair trays;

(22) whirlpool baths designed for home use;

(23) intermittent or continuous positive pressure breathing equipment; and

(24) manual or electronic augmentative and alternative communication devices;

[~~(25) augmentative and alternative communication devices are authorized every five (5) years for adults and every three (3) years for recipients under twenty-one (21) years of age, unless earlier authorization is dictated by medical necessity.~~

~~B. **Services for institutionalized and non-institutionalized recipients that require prior authorization:** Medicaid covers the following items with prior authorization for both institutionalized and non-institutionalized recipients:~~

~~(1)~~] (25) trusses and anatomical supports that require fitting or adjusting by trained individuals, including JOBST hose;

[~~(2)~~] (26) custom-fitted compression stockings; and

[~~(3)~~] (27) artificial larynx prosthesis[~~;~~

~~(4) repairs to, and replacement parts for, augmentative and alternative communication devices owned by the recipient.~~

~~C. **Additional review:** Services for which prior authorization was obtained remain subject to review at any point in the payment process.~~

~~D. **Eligibility determination:** Prior authorization does not guarantee that individuals are eligible for medicaid. Providers must verify that individuals are eligible for medicaid at the time services are furnished and determine if medicaid recipients have other health insurance~~].

[~~E.~~] B. **Reconsideration:** [~~Providers who disagree~~] A provider who disagrees with prior authorization request denials or other review decisions can request a re-review and a reconsideration. See 8.350.2 NMAC, *Reconsideration of Utilization Review Decisions* [MAD-953].

[~~F. **Reasons for prior authorization denial:** Requests for prior authorization are denied for any of the following reasons~~

~~(1) prescribing providers have not examined recipients within two (2) months or have insufficient knowledge of the recipient's condition to enable them to prescribe or recertify the need for DME~~

~~(2) prescriptions do not document recent physician involvement in the estimate of duration of need or the recipient's condition; or~~

~~(3) requests are not signed by attending physicians: signature stamps or signatures by employees are not acceptable.~~] [2/1/95; 3/1/99; 6/15/99; 8.324.5.13 NMAC - Rn, 8 NMAC 4.MAD.754.4 & A, 7/1/04; A, 11/1/05; A, 3/1/11]

8.324.5.14 SERVICE LIMITATIONS AND COVERAGE RESTRICTIONS:

[~~A. **Non-covered multiple services:** Medicaid does not cover multiple services. Recipients are limited to one wheelchair, one hospital bed, one oxygen delivery system or one of any particular type of equipment. A back-up ventilator is covered.~~

~~B.~~] A. **Special requirements for purchase of wheelchairs:** [~~Before billing for a customized wheelchair, providers who deliver the wheelchair and seating system to a recipient must make a final evaluation to ensure that the wheelchair and seating system meets the medical, social and environmental needs of the recipient for whom it was authorized.~~] Before billing for a customized wheelchair, the provider who delivers the wheelchair and seating system to an eligible recipient must make a final evaluation to ensure that the wheelchair and seating system meets the medical, social and

environmental needs of the eligible recipient for whom it was authorized.

(1) [~~Providers assume~~] The provider assumes responsibility for correcting defects or deficiencies in wheelchair and seating systems that make them unsatisfactory for use by [~~recipients~~] the eligible recipient.

(2) [~~Providers are~~] The provider is responsible for consulting physical therapists, occupational therapists, special education instructors, teachers, parents or guardians, as necessary, to ensure that the wheelchair meets the eligible recipient's needs.

(3) Evaluations by a physical therapist [~~and/or~~] or occupational therapist are required when ordering customized wheelchairs and seating systems. These therapists should be familiar with the brands and categories of wheelchairs and appropriate seating systems and work with the eligible recipient and those consultants listed in Paragraph (2) of Subsection B of 8.324.5.14 NMAC to assure that the selected system matches physical seating needs. The physical [~~and/or~~] or occupational therapist may not be a wheelchair vendor or under the employment of a wheelchair vendor or wheelchair manufacturer.

[~~(3)~~] (4) [~~Medicaid~~] MAD does not pay for special modifications or replacement of customized wheelchairs after the wheelchairs are furnished to [~~recipients~~] the eligible recipient.

[~~(4)~~] (5) When the equipment is delivered to the eligible recipient and the eligible recipient accepts the order, the provider will submit the claim for reimbursement.

[~~C.~~] B. **Special requirements for purchase of augmentative and alternative communication devices:**

(1) The purchase of augmentative communication devices requires prior authorization. In addition to being prescribed by a physician, the communication device must also be recommended by a speech-language pathologist, who has completed a systematic and comprehensive evaluation. The speech pathologist may not be a vendor of augmentative communication systems nor have a financial relationship with a vendor.

(2) A trial rental period of up to 60 calendar days is required for all electronic devices to ensure that the chosen device is the most appropriate device to meet the eligible recipient's medical needs. At the end of the trial rental period, if purchase of the device is recommended, documentation of the eligible recipient's ability to use the communication device must be provided showing that the eligible recipient's ability to use the device is improving and that the eligible recipient is motivated to continue to use this device.

(3) [~~Medicaid~~] MAD does not pay for supplies for augmentative and alternative communication devices, such as, but not limited to, paper, printer ribbons and computer discs.

(4) Prior authorization is required for equipment repairs.

(5) A provider or medical supplier that routinely supplies an item to an eligible recipient must document that the order for additional supplies was requested by the recipient or their personal representative and the provider or supplier must confirm that the eligible recipient does not have in excess of a 15 calendar day supply of the item before releasing the next supply order to the eligible recipient. A provider must keep documentation in their files available for audit that show compliance with this requirement.

[2/1/95; 3/1/99; 8.324.5.14 NMAC - Rn, 8 NMAC 4.MAD.754.5 & A, 7/1/04; A, 3/1/11]

8.324.5.15 NONCOVERED SERVICES: [~~Medicaid~~] MAD does not cover certain durable medical equipment and medical supplies. See 8.301.3 NMAC, *General Noncovered Services* [~~[MAD-602]~~], for an overview of the criteria used to assess whether equipment and supplies are not covered.

[2/1/95; 3/1/99; 8.324.5.15 NMAC - Rn, 8 NMAC 4.MAD.754.6 &A, 7/1/04; A, 3/1/11]

8.324.5.16 REIMBURSEMENT: [~~Durable medical equipment or medical supply providers must submit claims for reimbursement on the HCFA-1500 claim form or its successor. See 8.302.2 NMAC, *Billing for Medicaid Services*. Once enrolled, providers receive instructions on documentation, billing and claims processing.~~

~~A. Reimbursement for purchase or rental of DME and for nutritional products is made at the lesser of the provider's billed charges, the medicare fee schedule, or the MAD maximum allowed amount.~~

~~(1) The provider's billed charge must be the lesser of the usual and customary charge for the item or service, or the actual acquisition cost plus a percentage as described below:~~

~~(a) for items for which the provider's actual acquisition cost, reflecting all discounts and rebates, is less than one thousand dollars ($1,000), the provider must bill the actual acquisition cost plus twenty-five percent (25%).~~

~~(b) for items for which the provider's actual acquisition cost, reflecting all discounts and rebates, is one thousand dollars ($1,000) or greater, the provider must bill the actual acquisition cost plus fifteen percent (15%).~~

~~(2) "Usual and customary charge" refers to the amount that the individual provider charges the general public in the majority of cases for a specific item or service.~~

~~(3) Medicare fees are implemented when MAD is advised by medicare of changes in the fee schedule. MAD implements medicare fees retroactively.~~

~~(4) If there is not a medicare fee schedule for the item, the MAD maximum allowed amount is the provider's actual acquisition cost plus the applicable percentage as described in Paragraph (1) of Subsection A of 8.324.5.16 NMAC.~~

~~(5) All rental payments must be applied towards purchase, with the exception of ventilators, oxygen concentrators and liquid oxygen units. Providers must keep a running total of rental charges identifying the total of all rental charges for each piece of equipment.~~

~~(6) "Set-up fees" are considered to be included in the payment for the equipment or supplies and are not reimbursed as separate charges.~~

~~B. **Reimbursement for medical supplies and home infusion drugs:** Reimbursement to providers is made at the lesser of the following:~~

~~(1) The provider's billed charge;~~

~~(a) the provider's billed charge is their usual and customary charge for services.~~

~~(b) "usual and customary charge" refers to the amount which the individual provider charges the general public in the majority of cases for a specific service or item, or~~

~~(2) The maximum established by MAD, which is the department's estimated acquisition cost of the item plus twenty-five percent (25%). The department's estimated acquisition cost will be calculated using the average wholesale price less 10.5 percent (10.5%).~~

~~(3) Home infusion drugs are reimbursed at the lesser of the provider's billed charge or the MAD fee schedule.~~

~~(a) Home infusion providers will be reimbursed a dispensing fee for each package or intravenous admisture prepared and dispensed to the recipient.~~

~~(b) Reimbursement will be made at the lesser of the provider's usual and customary charge or the MAD fee schedule.~~]

A. **Reimbursement for purchase or rental:** Unless otherwise specified in this section, the provider's billed charges must be the usual and customary charge for the item or service. The term "usual and customary charge" refers to the amount that the individual provider charges the general public in the majority of cases for a specific item or service. Reimbursement for DME and medical supplies and nutritional products is made at the lesser of:

(1) the provider's billed charges or the MAD fee schedule; or

(2) when applicable; alternatively, when there is no applicable MAD fee schedule, payment is limited to the provider's acquisition invoice cost plus a percentage, as follows:

(a) durable medical equipment, medical supplies and nutritional products;

(i) items for which the provider's actual acquisition cost, reflecting all discounts and rebates, is less than $1,000 dollars, payment is limited to the provider's actual acquisition cost plus 20 percent;

(ii) items for which the provider's actual acquisition cost, reflecting all discounts and rebates, is $1,000 or greater, payment is limited to the provider's actual acquisition cost plus 10 percent;

(b) custom specialized wheelchairs and their customized related accessories: payment is limited to the provider's actual acquisition cost plus 15 percent.

B. **Rental payments must be applied towards the purchase with the exception of ventilators:** Unless otherwise specified in this section, the provider's billed charges must be the usual and customary charge for the item or service. The term "usual and customary charge" refers to the amount that the individual provider charges the general public in the majority of cases for a specific item or service. Reimbursement for rental of DME is made at the lesser of:

(1) the provider's billed charges; or

(2) the MAD fee schedule, when applicable; payment for the month of rental is limited to the provider's acquisition invoice cost plus a percentage, as follows: a provider must keep a running total of rental payments for each piece of equipment; a provider must consider the items sold and the item becomes the property of the eligible recipient when 13 rental payments have been made for the item, or earlier when the rental payments total the lesser of the provider's usual and customary charge for the purchase of the item or the MAD fee schedule for the purchase of the item; or for an item for which a fee schedule purchase price has not been established by MAD when the provider has received rental payments equal to one of the following:

(a) items for which the provider's actual acquisition cost, reflecting all discounts and rebates, is less than $1,000 dollars, payment is limited to the provider's actual acquisition cost plus 20 percent;

(b) items for which the provider's actual acquisition cost, reflecting all discounts and rebates, is $1,000 or greater, payment is limited to the provider's actual acquisition cost plus 10 percent;

(3) MAD follows medicare rules regarding capped rental; for rental months one through three, the full fee schedule rental fee is allowed; for rental months four through 13, the rental fee schedule rental fee is reduced by 25 percent; no additional rental payments are made following the month 13 or to the most current schedule determined by medicare; the provider may only bill for routine maintenance and for repairs, and oxygen contents, to the extent as allowed by medicare;

(4) oxygen is paid using the medicare billing, capped rental period, and payment rules;

(5) a provider must retain a copy of their acquisition invoice showing the provider's purchase of an item and make it available to MAD upon request;

(6) 'set-up fees" are considered to be included in the payment for the equipment or supplies and are not reimbursed as separate charges.

C. **Reimbursement for home infusion drugs:** Unless otherwise specified in this section, the provider's billed charges must be the usual and customary charge for the item or service. The term "usual and customary charge" refers to the amount that the individual provider charges the general public in the majority of cases for a specific item or service. Home infusion drugs are reimbursed as follow at the lesser of:

(1) the provider's billed charge; or

(2) the MAD fee;

(3) for home infusion drugs for which a fee schedule price has not been established by MAD, or for which the description associated with the appropriate billing code is too broad to establish a reasonable payment level, payment is limited to the provider's acquisition cost plus 20 percent; a provider must retain a copy of their acquisition invoice showing the provider's purchase of an item and make it available to MAD upon request.

[~~C.~~] D. **Reimbursement for delivery and shipping charges:** Delivery charges are reimbursed at the MAD maximum amount per mile. Shipping charges are reimbursed at actual cost if the method used is the least expensive method of shipping. [~~Medicaid~~] MAD does not pay for charges for shipping items from suppliers to the providers.

[2/1/95; 12/30/95; 3/1/01; 8.324.5.16 NMAC - Rn, 8 NMAC 4.MAD.754.7 & A, 7/1/04; A, 3/1/11]

NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

This is an amendment to 8.324.7 NMAC, Sections 1, 3, 6 and 8-17, effective March 1, 2011.

8.324.7.1 ISSUING AGENCY: New Mexico Human Services Department (HSD).

[2/1/95; 8.324.7.1 NMAC - Rn, 8 NMAC 4.MAD.000.1, 7/1/04; A, 3/1/11]

8.324.7.3 STATUTORY AUTHORITY: The New Mexico medicaid [~~programs is~~] and other health care programs are administered pursuant to regulations promulgated by the federal department of health and human services under [~~Title XIX of~~] the Social Security Act, as amended [~~and by the state human services department pursuant to~~] or by state statute. See Section 27-2-12 et seq. NMSA 1978 [~~(Repl. Pamp. 1991)~~].

[2/1/95; 8.324.7.3 NMAC - Rn, 8 NMAC 4.MAD.000.3, 7/1/04; A, 3/1/11]

8.324.7.6 OBJECTIVE: The objective of [~~these regulations~~] this rule is to provide [~~policies~~] instruction for the service portion of the New Mexico [~~medicaid program. These policies describe eligible providers, covered services, noncovered services, utilization review, and provider reimbursement~~] medical assistance program.

[2/1/95; 8.324.7.6 NMAC - Rn, 8 NMAC 4.MAD.000.6, 7/1/04; A, 3/1/11]

8.324.7.8 MISSION STATEMENT: [~~The mission of the New Mexico medical assistance division (MAD) is to maximize the health status of medicaid-eligible recipients by furnishing payment for quality health services at levels comparable to private health plans.~~] To reduce the impact of poverty on people living in New Mexico and to assure low income and individuals with disabilities in New Mexico equal participation in the life of their communities.

[2/1/95; 8.324.7.8 NMAC - Rn, 8 NMAC 4.MAD.002, 7/1/04; A, 3/1/11]

8.324.7.9 TRANSPORTATION SERVICES: [~~Transportation services are reimbursed by the New Mexico medical assistance program (medicaid) under Title XIX of the Social Security Act, as amended. Medicaid~~] The New Mexico medical assistance division (MAD) covers expenses for transportation and other related expenses that [~~the New Mexico medical assistance division (MAD)~~] MAD or its coordinated services contractor determines are necessary to secure [~~medicaid~~]covered medical examinations and treatment for an eligible [~~recipients~~] recipient in or out of their home community [42 CFR Section 440.170]. Travel expenses include the cost of transportation by [~~public transportation,~~] long distance common carriers, taxicab, handivan, and ground or air ambulance, all as appropriate to the situation and location of the eligible recipient. Related travel expenses include the cost of meals and lodging made necessary by receipt of medical care away from the eligible recipient's home

community. When medically necessary, medicaid covers similar expenses for an attendant who accompanies the eligible recipient to the medical examination or treatment. [~~This part describes the types of providers eligible to furnish transportation and related expenses, covered services, service limitations and reimbursement methodology.~~]

[2/28/98; 8.324.7.9 NMAC - Rn, 8 NMAC 4.MAD.756 & A, 7/1/04; A, 3/1/11]

8.324.7.10 ELIGIBLE PROVIDERS: [~~Upon approval of New Mexico medical assistance program provider participation applications by MAD, the following providers are eligible to be reimbursed for providing transportation or transportation related services to recipients:~~] Health care to eligible recipients is furnished by a variety of providers and provider groups. The reimbursement and billing for these services are administered by MAD. Upon approval of a New Mexico MAD provider participation agreement by MAD or its designee, licensed practitioners, facilities and other providers of services that meet applicable requirements are eligible to be reimbursed for furnishing covered services to eligible recipients. A provider must be enrolled before submitting a claim for payment to the MAD claims processing contractors. MAD makes available on the HSD/MAD website, on other program-specific websites, or in hard copy format, information necessary to participate in health care programs administered by HSD or its authorized agents, including program rules, billing instructions, utilization review instructions, and other pertinent materials. When enrolled, a provider receives instruction on how to access these documents. It is the provider's responsibility to access these instructions, to understand the information provided and to comply with the requirements. The provider must contact HSD or its authorized agents obtain answers to questions related to the material or not covered by the material. To be eligible for reimbursement, a provider must adhere to the provisions of the MAD provider participation agreement and all applicable statutes, regulations, and executive orders. MAD or its selected claims processing contractor issues payments to a provider using electronic funds transfer (EFT) only. Providers must supply necessary information in order for payment to be made. The following providers are eligible to be reimbursed for providing transportation or transportation related services to eligible recipients:

A. air ambulances certified by the state of New Mexico department of health, emergency medical services bureau;

B. ground ambulance services certified by the New Mexico public regulation commission or by the appropriate state licensing body for out-of-state ground ambulance services, within those geographic regions in the state specifically authorized by the New Mexico public regulation commission;

C. non-emergency transportation vendors (taxicab, vans and other vehicles) and certain bus services certified by the New Mexico public regulation commission, within those geographic regions in the state specifically authorized by the New Mexico public regulation commission;

D. long distance common carriers, that include buses, trains and airplanes;

E. certain carriers exempted or warranted by the New Mexico public regulation commission within those geographic regions in the state specifically authorized by the New Mexico public regulation commission; [~~and~~]

F. lodging and meal providers; and

G. when services are billed to and paid by a MAD fee-for-service coordinated services contractor authorized by HSD, under an administrative services contract, the provider must also enroll as a provider with the coordinated services contractor and follow that contractor's instructions for billing and for authorization of services.

[2/28/98; 8.324.7.10 NMAC - Rn, 8 NMAC 4.MAD.756.1 & A, 7/1/04; A, 3/1/11]

8.324.7.11 PROVIDER RESPONSIBILITIES: [~~Providers who furnish services to medicaid recipients must comply with all specified medicaid participation requirements. See 8.302.1 NMAC, *General Provider Policies*. Providers must verify that individuals are eligible for medicaid at the time services are furnished and determine if medicaid recipients have other health insurance. Providers must maintain records that are sufficient to fully disclose the extent and nature of the services provided to recipients.~~]

A. A provider who furnishes services to medicaid or other health care programs eligible recipients must comply with all federal and state laws, regulations. and executive orders relevant to the provision of services as specified in the MAD provider participation agreement. A provider also must conform to MAD program rules and instructions as specified in the provider rules manual and its appendices, and program directions and billing instructions, as updated. A provider is also responsible for following coding manual guidelines and CMS correct coding initiatives, including not improperly unbundling or upcoding services.

B. A provider must verify that individuals are eligible for a specific health care program administered by the HSD and its authorized agents, and must verify the eligible recipient's enrollment status at the time services are furnished. A provider must determine if an eligible recipient has other health insurance. A provider must maintain records that are sufficient to fully disclose the extent and nature of the services provided to an eligible recipient. See 8.302.1 NMAC, *General Provider Policies.*

[2/28/98; 8.324.7.11 NMAC - Rn, 8 NMAC 4.MAD.756.2 & A, 7/1/04; A, 3/1/11]

8.324.7.12 COVERED SERVICES AND SERVICE LIMITATIONS: [~~Medicaid reimburses recipients or transportation providers for transportation only if a recipient does not have access to transportation services that are available free of charge.~~] MAD reimburses an eligible recipient or transportation provider for transportation only when the transport is to a MAD enrolled provider and is subject to the following:

A. **Free [~~alternatives examples~~] alternatives:** Alternative transportation services that can be provided free of charge include volunteers, relatives or transportation services provided by nursing facilities or other residential centers. An eligible recipient must certify in writing that they do not have access to free alternatives.

B. **Least costly alternatives:** MAD covers the most appropriate and least costly transportation alternatives suitable for the eligible recipient's medical condition. If [~~recipients~~] an eligible recipient can use private vehicles or [~~less costly~~] public transportation, those alternatives must be used before [~~recipients~~] an eligible recipient can use more expensive transportation alternatives.

C. **Non-emergency transportation service:** [~~Medicaid covers non-emergency transportation services for recipients who have no primary transportation and who are unable to access a less costly form of public transportation.~~] MAD covers non-emergency transportation services for an eligible recipient who has no primary transportation and who is unable to access a less costly form of public transportation except as described under non-covered services, see 8.324.7.13 NMAC, *non-covered services.*

D. **Long distance common carriers:** [~~Medicaid~~] MAD covers long distance services furnished by a common carrier if an eligible recipient must leave their home communities to receive medical services. Authorization forms for direct payment to long distance bus common carriers by MAD are available through local county [~~ISD~~] income support division (ISD) offices.

E. **Ground ambulance services:** [~~Medicaid~~] MAD covers services provided by ground ambulances when:

(1) an emergency that requires ambulance service is certified by a physician or is documented in the provider's records as meeting emergency medical necessity criteria: terms are defined as follows:

(a) "emergency" is defined as a medical or behavioral health condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson, who possesses an average knowledge of health and medicine could reasonably expect the absence of immediate medical attention to result in placing the health of the eligible recipient (or with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy, serious impairment to body function or serious dysfunction of any bodily organ or part;

(b) "medical necessity" for ambulance services is established if the eligible recipient's physical, mental or behavioral health condition is such that the use of any other method of transportation is contraindicated and would endanger the eligible recipient's health.

(2) Scheduled, non-emergency ambulance services are ordered by a physician who certifies that the use of any other method of non-emergency transportation is contraindicated by the eligible recipient's physical, mental or behavioral health condition. [~~Medicaid~~] MAD covers non-reusable items and oxygen required during transportation; coverage for these items is included in the base rate reimbursement for ground ambulance.

F. **Air ambulance services:** [~~Medicaid~~] MAD covers services provided by air ambulances, [~~which include~~] including private airplanes, if an emergency exists and the physician certifies the medical necessity for the service [~~is certified by the physician~~].

(1) An emergency that would require air over ground ambulance services is defined as a medical condition, including emergency labor and delivery, manifesting itself by acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably be expected to result in one of the following:

(a) eligible recipient's death;

(b) placement of [~~individual's~~] eligible recipient's health in serious jeopardy;

(c) serious impairment of bodily functions; or

(d) serious dysfunction of any bodily organ or part.

(2) Coverage for [~~these items~~] the following is included in the base rate reimbursement for air ambulance:

(a) non-reusable items and oxygen required during transportation;

(b) professional attendants required during transportation;

(c) detention time or standby time; and

(d) use of equipment required during transportation.

G. **Lodging services:** [~~Medicaid~~] MAD covers lodging services if [~~recipients are~~] an eligible recipient is required to travel to receive medical services more than four [~~(4)~~] hours one way and an overnight stay is required due to medical necessity or cost considerations. If medically justified and approved, lodging is initially set for up to five [~~(5)~~] continuous days. For a longer stay, the need for lodging must be re-evaluated by the fifth day to authorize up to an additional [~~fifteen (15)~~] 15 days. Re-evaluation must be made every [~~fifteen (15)~~] 15 days for extended stays, prior to the expiration of the existing authorization. Approval of lodging is based on the medical provider's statement of need. Authorization forms for direct payment by MAD to [~~medicaid~~] its lodging providers are available through local county income support division (ISD) offices.

H. **Meal services:** [~~Medicaid~~] MAD covers meals if [~~a~~] an eligible recipient is required to leave his home community for eight [~~(8)~~] hours or more to receive medical services. Authorization forms for direct payment to [~~medicaid~~] MAD meal providers by MAD are available through local county ISD offices.

I. **Coverage for attendants:** [~~Medicaid~~] MAD covers transportation, meals and lodging for one attendant if the medical necessity for the attendant is certified in writing justified by the eligible recipient's medical provider or the eligible recipient who is receiving medical service is under [~~eighteen (18)~~] 18 years of age. The attendant for a child under [~~eighteen (18)~~] 18 years of age should be the parent or legal guardian. If the medical appointment is for an adult eligible recipient, [~~medicaid~~] MAD does not cover transportation services or related expenses of children under [~~eighteen (18)~~] 18 years of age traveling with the adult eligible recipient.

J. **Coverage for medicaid home and community-based services waiver recipients:** [~~Transportation to medicaid waiver facilities will be covered for medicaid waiver recipients receiving occupational therapy, physical therapy, speech therapy, and behavioral therapy services.~~] Transportation of a medicaid waiver recipient to or from a provider of waiver service is only covered when the service is a physical therapy, occupational therapy, speech therapy or a behavioral health service.

K. **Medicaid family planning waiver eligible recipients:** MAD does not cover transportation services for recipients eligible for medicaid family planning waiver services.

[12/30/95; 2/28/98; 8.324.7.12 NMAC - Rn, 8 NMAC 4.MAD.756.3 & A, 7/1/04; A, 3/1/11]

8.324.7.13 NONCOVERED SERVICES: Transportation services are subject to the same limitations and coverage restrictions that exist for other [~~medicaid~~] MAD services. See 8.301.3 NMAC, *General Noncovered Services* [~~[MAD-602]. Medicaid will not pay to transport recipients to a medical service that is not covered under the medicaid program. Providers must notify recipients of medicaid-covered and non-covered services prior to providing services. See 8.302.1, General Provider Policies. Transportation to pharmacy providers is not a covered benefit. Please see Subsection F of 8.324.4.18 NMAC, Pharmacy Services, for alternatives.~~] Payments for transportation for any non-covered service is subject to retroactive recoupment.

A. MAD does not pay to transport an eligible recipient to a medical service or to a provider that is not covered under the MAD program.

B. A provider will not be eligible to seek reimbursement from an eligible recipient if the provider fails to notify the eligible recipient or their personal representative that the service is not a covered MAD service. See 8.302.1 NMAC, *General Provider Policies*.

C. MAD does not pay for transportation to a pharmacy. See Subsection F of 8.324.4.18 NMAC, *Pharmacy Services*, for alternatives.

[12/30/95; 2/28/98; 8.324.7.13 NMAC - Rn, 8 NMAC 4.MAD.756.4 & A, 7/1/04; A, 3/1/11]

8.324.7.14 OUT-OF-STATE TRANSPORTATION AND RELATED EXPENSES: All out-of-state transportation and related expenses must be prior approved by MAD. Out-of-state transportation is approved only if the out-of-state medical service is approved by MAD or its designated contractor. Documentation must be available to the reviewer to justify the out-of-state travel and verify that treatment is not available in the state of New Mexico.

A. Requests for out-of-state transportation must be coordinated through [~~the MAD, client services bureau~~] MAD.

B. Authorization for lodging and meal services by an out-of-state provider can be granted for up to [~~thirty (30)~~] 30 days by MAD. Re-evaluation authorizations are completed prior to expiration and every [~~thirty (30)~~] 30 days, thereafter.

C. Transportation to border cities, defined as those cities within [~~one hundred (100)~~] 100 miles of the New Mexico border (Mexico excluded), are treated as an in-state provider service. See 8.302.4 NMAC, *Out-of-State and Border Area Providers* [~~MAD-704~~].

[12/30/95; 2/28/98; 8.324.7.14 NMAC - Rn, 8 NMAC 4.MAD.756.5, 7/1/04; A, 3/1/11]

8.324.7.15 PRIOR AUTHORIZATION AND UTILIZATION REVIEW: All [~~medicaid~~] MAD services are subject to utilization review for medical necessity and program compliance. Reviews can 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, *Prior Authorization and Utilization Review*. [~~Once enrolled, providers receive utilization review instructions and documentation forms necessary for prior authorization and claims processing.~~] The provider must contact HSD or its authorized agents to request utilization review instructions. It is the provider's responsibility to access these instructions or ask for paper copies to be provided, to understand the information provided, to comply with the requirements, and to obtain answers to questions not covered by these materials. When services are billed to and paid by a MAD fee-for-service coordinated services contractor authorized by HSD, under the administrative services contract, the provider must follow that contractor's instructions for authorization of services.

A. **Prior authorization:** Certain procedures or services may require prior authorization from MAD or its designee. Services for which prior authorization is received remain subject to utilization review at any time during the payment process.

B. **Referrals for travel outside the home community:**

(1) [~~If a recipient must travel over sixty-five (65) miles from his home community to receive medical care, the designated medicaid medical management provider or the medicaid primary care provider in the home community must provide the following information to the non-emergency transportation provider:~~] If an eligible recipient must travel over 65 miles from their home community to receive medical care, the transportation provider must obtain a written verification from the referring provider or the service provider containing the following information for the provider to retain with their billing records:

(a) the medical [~~and/or~~] or diagnostic service for which the eligible recipient is being referred [~~for~~];

(b) the name of the out of community medical provider; and

(c) justification that the medical care is not available in the home community.

(2) Referrals and referral information must be obtained from a [~~medicaid~~] MAD provider. For continued out of community non-emergency transportation, the required information must be obtained every six [~~(6)~~] months regardless of the frequency of transport.

C. **Eligibility determination:** Prior approval of services does not guarantee that individuals are eligible for [~~medicaid~~] MAD services. Providers must verify that an individual is eligible for [~~medicaid~~] MAD services at the time services are furnished and determine if the [~~medicaid recipients have~~] eligible recipient has other health insurance.

D. **Reconsideration:** A provider who is dissatisfied with a utilization review decision or action can request a re-review and a reconsideration. See 8.350.2 NMAC, *Reconsideration of Utilization Review Decisions* [MAD-953].

[12/30/95; 2/28/98; 8.324.7.15 NMAC - Rn, 8 NMAC 4.MAD.756.6 & A, 7/1/04; A, 3/1/11]

8.324.7.16 REIMBURSEMENT:

A. Transportation providers must submit claims for reimbursement on the [~~HCFA-1500~~] CMS-1500 claim form or its successor. See 8.302.2 NMAC, *Billing for Medicaid Services*. [~~Once enrolled, providers receive instructions on documentation, billing and claims processing.~~] Reimbursement to transportation providers for covered services is made at the lesser of the following:

(1) the provider's billed charge:

(a) the billed charge must be the provider's usual and customary charge for services; for a provider with [~~tariffs~~] a tariff, the billed charge must be the lesser of the charges allowed by the provider's tariff or the provider's usual and customary charge.

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

(2) the MAD fee schedule for the specific service or procedure; reimbursement by the [~~medicaid~~] MAD program to a transportation provider is inclusive of gross-receipts taxes and other applicable taxes; [~~Air ambulance providers are~~] an air ambulance provider is exempt from paying gross receipts tax; therefore, the maximum rates paid for air ambulance service [~~will~~] do not include gross receipts tax.

B. **Ground [~~ambulances~~] ambulance:** A provider of ground ambulance services is reimbursed at the lesser of their billed charge for the service or the MAD maximum allowed amount.

(1) The MAD maximum allowed amount for transports up to 15 miles is limited to the base rate amount. The allowable base rate for advanced life support (ALS) or basic life support (BLS) includes reimbursement for the ALS or BLS equipped service, oxygen, disposable supplies and medications used in transport. The base rate reimbursement includes mileage reimbursement for the first 15 miles of transport.

(2) The allowable base rate for a scheduled non-emergency transport includes reimbursement for oxygen, disposable supplies and medications used in transport. The base rate includes mileage reimbursement for the first 15 miles of transport.

C. **Air [~~ambulances~~] ambulance:** A provider of air ambulance services [~~are~~] is reimbursed at the lesser of billed charges or the MAD maximum allowed rate.

D. **Non-emergency transportation services:**

(1) [~~Providers~~] A provider of non-emergency transportation [~~are~~] is reimbursed at the lesser of their approved tariff or the [~~medicaid~~] MAD rate for one or multiple recipient transports not meeting the "additional passenger" criteria Paragraph [~~4~~] (3), below).

[~~(2) Providers of non-emergency transportation will be reimbursed at a reduced per mile rate when a provider reaches total mileage transports of five million miles (5,000,000) during any medicaid calendar year. The provider will then be reimbursed at the lesser of its approved non-medicaid tariff or the medicaid reduced rate.~~]

[~~(3)~~] (2) Reimbursement will be limited to MAD's reimbursement limitation per one-way trip for [~~a medicaid~~] an eligible recipient being transported for medical care. [~~Medicaid~~] MAD does not provide reimbursement for any portion of the trip for which the [~~medicaid-~~] eligible recipient is not in the vehicle.

[~~(4) Reimbursement will be limited to MAD's reimbursement limitation per one-way trip for a medical attendant accompanying a medicaid recipient being transported for medical care.~~]

[~~(5)~~] (3) An "additional passenger transport" is a non-emergency transport of two or more [~~medicaid clients~~] eligible recipients who are picked up at the same location and are being transported to the same provider. Additional passenger transport services will not be covered. When more than one eligible recipient is being transported from the same location to the same provider and each eligible recipient has a scheduled [~~medicaid~~] MAD-covered medical appointment, [~~medicaid~~] MAD will allow coverage for one eligible recipient [~~and one medical attendant, if medically indicated. Additional passengers will not be covered~~].

[~~(6)~~] (4) [~~Medicaid~~] MAD covers

transportation for one attendant [;] when the eligible recipient is a child 10 years of age and younger not meeting the additional passenger criteria in Paragraph [4] (3), above, if the medical necessity for the attendant is justified in writing by the eligible recipient's medical provider for each transport. In cases where the recipient's condition is ongoing and the need for a medical attendant will not change, the attestation must only be renewed every six months, unless the recipient who is receiving medical service is under [eighteen (18)] 18 years of age. [The attendant for a child under eighteen (18) years of age should be the parent or legal guardian.] If the medical appointment is for an adult eligible recipient, [medicaid] MAD does not cover transportation services or related expenses of children under [eighteen (18)] 18 years of age traveling with the adult eligible recipient.

[(7)] (5) [Medicaid] MAD covers transportation to scheduled, structured counseling and therapy sessions for [recipients] an eligible recipient, family, or multi-family groups, based on individualized needs as specified in the treatment plan. Claims for services are to be filed under the name of the [medicaid] eligible recipient being primarily treated through these sessions.

[12/30/95; 8.324.7.16 NMAC - Rn, 8 NMAC 4.MAD.756.7 & A, 7/1/04; A, 3/1/11]

8.324.7.17 CLIENT MEDICAL TRANSPORTATION FUND: In non-emergency situations, [recipients] an eligible recipient may request reimbursement from the client medical transportation (CMT) fund through their local county ISD office for money spent on [transportation and related expenses] covered transportation services. For reimbursement from the CMT fund, appointments for which reimbursement is requested must have occurred within [thirty (30)] 30-calendar days of the completed request for reimbursement.

A. **Submission of medical verification forms:** Unless medical service providers [return] issue, the signed [medical appointment verification form to the address on the back of the form, a] letter on the provider's stationary which indicates that the eligible recipient kept the appointment(s) for which the CMT fund reimbursement is requested, an eligible recipient will not be reimbursed for the travel [and related expenses. The signed form indicates that the recipient kept the appointment(s) for which the CMT fund reimbursement is requested]. For medical services, [such as vision services,] written receipts confirming the dates of service must be given to the eligible recipient for submission to the local county ISD office.

B. **Preparation of referrals for travel outside the home community:** [If a recipient must travel over sixty-five (65) miles from his home community to receive medical care, designated medical management provider, or primary care provider in the home community must furnish a written referral and written statement that the services are not available within the recipient's home community. Referrals and documentation must be obtained from a medicaid provider. The document is submitted to the local county ISD office to authorize mileage per diem and related expenses, as appropriate.] If an eligible recipient must travel over 65 miles from their home community to receive medical care, the transportation provider must obtain a written verification from the referring provider or from the service provider containing the following information for the provider to retain with their billing records:

(a) the medical or diagnostic service for which the eligible recipient is being referred;

(b) the name of the out of community medical provider; and

(c) justification that the medical care is not available in the home community.

C. **Fund advances in emergency situations:** Money from the CMT fund is advanced for travel only if an emergency exists. 'Emergency', in this situation, is defined as a non-routine, unforeseen accident, injury or acute illness demanding immediate action and for which transportation arrangements could not be made five [(5)] calendar days in advance of the visit to the provider. Advance funds must be requested and disbursed prior to the medical appointment. [A medical appointment verification form and/or written referral must be received by the ISD office within thirty (30) days from the date of the medical appointment for which the advance funds were requested.] A letter on the provider's stationary which indicates that the eligible recipient kept the appointment(s) for which the CMT fund reimbursement is requested or which indicates that referral outside of the eligible recipient's home community is medically necessary must be received by the ISD office within 30-calendar days from the date of the appointment for which the advance funds were requested.

D. **Eligible recipients enrolled in managed care plans:** Eligible recipients enrolled in medicaid managed care plans on the date of service are not eligible to use the client medical transportation fund for services that are the responsibility of the managed care organization.

[12/30/95; 8.324.7.17 NMAC - Rn, 8 NMAC 4.MAD.756.8 & A, 7/1/04; A, 3/1/11]

NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

This is an amendment to 8.301.6 NMAC, Sections 1, 3, 5, 6 and 8 - 14, March 1, 2011. This rule was also renumbered and reformatted from 8 NMAC 4.MAD.000 and 8 NMAC 4.MAD.605 to comply with NMAC requirements.

8.301.6.1 ISSUING AGENCY: New Mexico Human Services Department (HSD).

[2/1/95; 8.301.6.1 NMAC - Rn, 8 NMAC 4.MAD.000.1 & A, 3/1/11]

8.301.6.3 STATUTORY AUTHORITY: [The New Mexico medicaid program is administered pursuant to regulations promulgated by the federal department of health and human services under Title XIX of the Social Security Act, as amended and by the state human services department pursuant to state statute. See Sections 27-2-12 et seq. NMSA 1978 (Repl. Pamp. 1991).] The New Mexico medicaid and other health care programs are administered pursuant to regulations promulgated by the federal department of health and human services under the Social Security Act as amended or by state statute. See NMSA 1978, Section 27-1-12 et seq.

[2/1/95; 8.301.6.3 NMAC - Rn, 8 NMAC 4.MAD.000.3 & A, 3/1/11]

8.301.6.5 EFFECTIVE DATE: February 1, 1995, unless a later date is cited at the end of a section.

[2/1/95; 8.301.6.5 NMAC - Rn, 8 NMAC 4.MAD.000.5 & A, 3/1/11]

8.301.6.6 OBJECTIVE: [The objective of these regulations is to provide policies for the service portion of the New Mexico medicaid program. These policies describe eligible providers, covered services, noncovered services, utilization review and provider reimbursement.] The objective of this rule is to provide instruction for the service portion of the New Mexico medical assistance programs.

[2/1/95; 8.301.6.6 NMAC - Rn, 8 NMAC 4.MAD.000.6 & A, 3/1/11]

8.301.6.8 MISSION STATEMENT: [The mission of the New Mexico medical assistance division (MAD) is to maximize the health status of medicaid-eligible individuals by furnishing payment for quality health services at levels comparable to private health plans.] To reduce the impact of poverty on the people living in New Mexico and to assure low income and individuals with disabilities in New Mexico equal participation in the life

of their communities.
[2/1/95; 8.301.6.8 NMAC - Rn, 8 NMAC 4.MAD.002 & A, 3/1/11]

8.301.6.9 CLIENT MEDICAL TRANSPORTATION SERVICES: [~~Medicaid covers expenses for transportation and other related expenses which the New Mexico medical assistance division (MAD) determines are necessary to secure medicaid covered medical examinations and treatment for eligible recipients in or out of their home community [42 CFR 440.170]. Travel expenses include the cost of transportation by public transportation, taxicab, handivan, and ground or air ambulance. Related travel expenses include the cost of meals and lodging made necessary by receipt of medical care away from the recipient's home community. When medically necessary, medicaid covers similar expenses for an attendant who accompanies the recipient to the medical examination or treatment. This part describes covered services, service limitations, and reimbursement rates.~~] The medical assistance division (MAD) covers expenses for transportation, meals and lodging it determines are necessary to secure MAD covered medical examination and treatment for eligible recipients in or out of their home community [42 CFR 440.170]. Travel expenses include the cost of transportation by long distance common carrier, taxicab, handivan, and ground or air ambulance, all as appropriate to the situation and location of the eligible recipient. When medically necessary, MAD covers similar expenses for an attendant who accompanies the eligible recipient to the medical examination or treatment.
[2/28/98; 8.301.6.9 NMAC - Rn, 8 NMAC 4.MAD.605 & A, 3/1/11]

8.301.6.10 COVERED SERVICES AND SERVICE LIMITATIONS: [~~Medicaid~~] MAD reimburses eligible recipients or transportation providers for medically necessary transportation [~~and related expenses only if a recipient does not have access to transportation services which are available free of charge.~~] subject to the following:

A. **Free alternatives [~~examples~~]:** Alternative transportation services which may be provided free of charge, include volunteers, relatives or transportation services provided by nursing facilities or other residential centers. [~~Recipients~~] An eligible recipient must certify in writing that they do not have access to free alternatives.

B. **Least costly alternatives:** [~~Medicaid~~] MAD covers the most appropriate and least costly transportation alternatives suitable for the eligible recipient's medical condition. If [~~recipients~~] an eligible recipient can use private vehicles or [~~less costly~~] public transportation, those alternatives must be used before [~~recipients~~] the eligible recipient can use more expensive transportation alternatives.

C. **Non-emergency transportation service:** [~~Medicaid covers non-emergency transportation services for clients who have no primary transportation and who are unable to access a less costly form of public transportation.~~] MAD covers non-emergency transportation services for an eligible recipient who does not have primary transportation and who is unable to access a less costly form of public transportation.

D. **Long distance common carriers:** [~~Medicaid covers long distance services furnished by a common carrier if recipients must leave their home communities to receive medical services. Authorization forms for direct payment to long distance bus common carriers by MAD are available through local county ISD offices.~~] MAD covers long distance services furnished by a common carrier if the eligible recipient must leave their home community to receive medical services. Authorization forms for direct payment to long distance bus common carriers by MAD are available through the eligible recipient's local county income support division (ISD) office.

E. **Ground ambulance services:** [~~Medicaid~~] MAD covers services provided by ground ambulances when:

(1) an emergency which requires ambulance service is certified by a physician or is documented in the provider's records as meeting emergency medical necessity [~~criteria; terms are defined as follows~~] as defined as:

(a) [~~"emergency" is defined as a situation caused by an unforeseen accident, injury or acute illness demanding immediate action and transport to a place for treatment;~~] an emergency condition that is a medical or behavioral health condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in placing the health of the individual (or with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy, serious impairment to body function or serious dysfunction of any bodily organ or part; and

(b) "medical necessity" for ambulance services is established if the eligible recipient's condition is such that the use of any other method of transportation is contraindicated and would endanger the eligible recipient's health;

(2) scheduled, non-emergency ambulance services are ordered by a physician who certifies that the use of any other method of non-emergency transportation is contraindicated by the eligible recipient's medical condition; and

(3) [~~medicaid~~] MAD covers non-reusable items and oxygen required during transportation; coverage for these items are included in the base rate reimbursement for ground ambulance.

F. **Air ambulance services:** [~~Medicaid~~] MAD covers services provided by air ambulances, [~~which include~~] including private airplanes, if an emergency exists and the medical necessity for the service is certified by the physician.

(1) [~~"Emergency" is defined as a medical condition, including emergency labor and delivery, manifesting itself by acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably be expected to result in one of the following:~~

~~(a) individual's death;~~

~~(b) placement of individual's health in serious jeopardy;~~

~~(c) serious impairment of bodily functions; or~~

~~(d) serious dysfunction of any bodily organ or part.~~] An emergency condition is a medical or behavioral health condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in placing the health of the individual (or with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy, serious impairment to body function or serious dysfunction of any bodily organ or part.

(2) [~~Medicaid~~] MAD covers the following services for air ambulances:

(a) non-reusable items and oxygen required during transportation;

(b) professional attendants required during transportation; and

(c) detention time or standby time up to one [~~(1)~~] hour without physician documentation; if the detention or standby time is more than one [~~(1)~~] hour, a statement from the attending physician or flight nurse justifying the additional time is required[~~; and~~].

G. **Lodging services:** [~~Medicaid~~] MAD covers lodging services if recipients are required to travel to receive medical services more than four [~~(4)~~] hours one way and an overnight stay is required due to medical necessity or cost considerations. If medically justified and approved, lodging is initially set for up to five [~~(5)~~] continuous days. For a longer stay, the need for lodging must be re-evaluated by the fifth day to authorize up to an additional [~~fifteen (15)~~] 15 days. Re-evaluation must be made every [~~fifteen (15)~~] 15 days for extended

stays, prior to the expiration of the existing authorization. Approval of lodging is based on the medical provider's statement of need. Authorization forms for direct payment to medicaid lodging providers by [~~the~~] MAD are available through local county income support division (ISD) offices.

H. **Meal services:** Medicaid covers meals if a recipient is required to leave their home community for eight [~~(8)~~] hours or more to receive medical services. Authorization forms for direct payment to medicaid meal providers by MAD are available through local county ISD offices.

I. **Coverage for attendants:** [~~Medicaid~~] MAD covers transportation, meals and lodging in the same manner as for [~~recipients~~] an eligible recipient, for one attendant if the medical necessity for the attendant is certified in writing by the eligible recipient's medical provider or the eligible recipient who is receiving medical service is under [~~eighteen (18)~~] 18 years of age. [~~The attendant for a child under eighteen (18) years of age should be the parent or legal guardian.~~] If the medical appointment is for an adult recipient, [~~medicaid~~] MAD does not cover transportation services or related expenses of children under [~~eighteen (18)~~] 18 years of age traveling with the adult recipient.

J. **Coverage for medicaid waiver recipients:** Transportation of a medicaid waiver recipient to a provider of a waiver service is only covered when the service is occupational therapy, physical therapy, speech therapy and behavioral therapy services.

K. **Medicaid family planning waiver eligible recipients:** MAD does not cover transportation service for recipients eligible for medicaid family planning waiver services.

[2/28/98; 8.301.6.10 NMAC - Rn, 8 NMAC 4.MAD.605.1 & A, 3/1/11]

8.301.6.11 NONCOVERED SERVICES: Transportation services are subject to the same limitations and coverage restrictions which exist for other [~~medicaid~~] services. A payment for transportation to a MAD non-covered service is subject to retroactive recoupment. MAD does not cover the following services or related costs of travel:

A. attendants where there is not required certification from the eligible recipient's medical provider;

B. minor aged children of the eligible recipient that are simply accompanying the eligible recipient to medical services;

C. transportation to a non-covered MAD service;

D. transportation to a pharmacy provider. See Subsection F of 8.324.14.18 NMAC, *transportation services.* See Section [~~MAD-602, General Program Limitations~~] 8.301.3 NMAC, *General Noncovered Services*.

[2/28/98; 8.301.6.11 NMAC - Rn, 8 NMAC 4.MAD.605.2 & A, 3/1/11]

8.301.6.12 OUT-OF-STATE TRANSPORTATION AND RELATED EXPENSES: All out-of-state [~~transportation and related expenses~~] transportation, meals and lodging must be prior approved by MAD. Out-of-state transportation is approved only if the out-of-state medical service is approved. Documentation must be available to the reviewer to justify the out-of-state travel and verify that treatment is not available in the state of New Mexico.

A. Requests for out-of-state transportation must be coordinated through the MAD[~~,~~] client services bureau or MAD's designated contractor.

B. Authorization for lodging and meal services by out-of-state providers can be granted for up to [~~thirty (30)~~] 30 calendar days by MAD. Re-evaluation authorizations are completed prior to expiration and every [~~thirty (30)~~] 30 days, thereafter.

C. Transportation to border cities, those cities within [~~one hundred (100)~~] 100 miles of the New Mexico border (Mexico excluded), are treated as in-state provider service. [~~See, Section MAD-704, Out-of-State Provider Services.~~] An eligible recipient who receives MAD reimbursable services from a border area provider is eligible for transportation services to that provider. See 8.302.4 NMAC, *Out of State and Border Area Providers*, to determine when a provider is considered an out-of-state provider or a border area provider.

[2/28/98; 8.301.6.12 NMAC - Rn, 8 NMAC 4.MAD.605.3 & A, 3/1/11]

8.301.6.13 CLIENT MEDICAL TRANSPORTATION FUND: In non-emergency situations, [~~recipients~~] an eligible recipient can request reimbursement from the client medical transportation (CMT) fund through their local county ISD office for money they spend on [~~transportation and related expenses.~~] transportation, meals and lodging. For reimbursement from the CMT fund, [~~recipients~~] an eligible recipient must apply for reimbursement within [~~thirty (30)~~] 30-calendar days [~~of~~] after the appointment.

A. **Information requirements:** The following information must be furnished to the ISD CMT fund custodian within [~~thirty (30)~~] 30-calendar days of the provider visit to receive reimbursement:

(1) [~~completed medical appointment verification form or~~] submit a letter on the [~~providers~~] provider's stationary which indicates that the eligible recipient kept the appointment(s) for which the CMT fund reimbursement is requested; [~~in non-emergency situations where services are provided, such as vision services or pharmacy services, written receipts confirming the dates of service must be presented; verification forms are available through the local county ISD offices~~] for medical services, written receipts confirming the dates of service must be given to the eligible recipient for submission to the local county ISD office;

(2) proper referral with original signatures and documentation stating that the services are not available within the community from the [~~medicaid primary care network provider,~~] designated [~~medicaid~~] MAD medical management provider[~~;~~] or [~~medicaid~~] MAD primary care provider, when a referral is [~~required~~] necessary;

(3) verification of current [~~medicaid~~] eligibility for a MAD service for the month the appointment and travel are made;

(4) certification that free alternative transportation services are not available and that the recipient is not enrolled in a managed care organization;

(5) verification of mileage; and

(6) documentation justifying a medical attendant.

B. **Fund advances in emergency situations:** Money from the CMT fund is advanced for travel only if an emergency exists. "Emergency" is defined in this instance as a non-routine, unforeseen accident, injury or acute illness demanding immediate action and for which transportation arrangements could not be made five [~~(5)~~] calendar days in advance of the visit to the provider. Advance funds must be requested and disbursed prior to the medical appointment.

(1) [~~The ISD CMT fund custodian verifies that the recipient is eligible for medicaid services and has a medical appointment or a proper referral from the medicaid PCN provider, designated medicaid medical management provider, or medicaid primary care provider prior to advancing money from the CMT fund.~~] The ISD CMT fund custodian or a MAD fee-for-service coordinated service contractor or the appropriate utilization contractor verifies that the recipient is eligible for a MAD service and has a medical appointment prior to advancing money from the CMT fund and that the recipient is not enrolled in a managed care organization.

(2) Written referral for out of community service must be received by the CMT fund custodian or a MAD fee-for-service coordinated service contractor or the appropriate utilization contractor no later than [~~thirty (30)~~] 30-calendar days from the date of the medical appointment for which the advance funds were requested.

If [~~recipients~~] an eligible recipient fails to provide supporting documentation, recoupment proceedings are initiated. See Section OIG-900, Restitutions.
[2/28/98; 8.301.6.13 NMAC - Rn, 8 NMAC 4.MAD.605.4 & A, 3/1/11]

8.301.6.14 CMT REIMBURSEMENT RATES: Reimbursement for lodging and meal expenses is based on the MAD allowable fee schedule. The CMT fund reimbursement rate for transportation services and related expenses are:

A. private automobile use is reimbursed by the mile, based on the established MAD reimbursement schedule;

B. meals are reimbursed at the rate established by MAD; authorization forms used for direct payment to medicaid meal providers by MAD are available through the recipient's local county ISD office; [~~and~~]

C. lodging is reimbursed at the rate established by MAD; authorization forms for direct payment to medicaid lodging providers by MAD are available through the recipient's local county ISD office; and

D. the CMT fund reimbursement rate for transportation services is at the established MAD reimbursement schedule per mile when a private automobile is used.
[2/28/98; 8.301.6.14 NMAC - Rn, 8 NMAC 4.MAD.605.5 & A, 3/1/11]

NEW MEXICO BOARD OF NURSING

This is an amendment to 16.12.1 NMAC, Section 8, effective 03-01-11.

16.12.1.8 ADMINISTRATION:

A. Members of the board are appointed by the governor and are accountable to the governor for the enforcement of the Nursing Practice Act, Section 61-3-1 *et seq*., NMSA, 1978.

(1) Rules are adopted by the board to further define the Nursing Practice Act and the functions of the board.

(2) A code of conduct shall be adopted by the board, and shall be reviewed annually at a regularly scheduled meeting of the board.

(3) The board shall meet at least once every three months.

(a) A meeting notice resolution, consistent with the Open Meetings Act, Section 10-15-1 *et seq*., NMSA, 1978, shall be adopted by the board and shall be reviewed annually at a regularly scheduled board meeting.

(b) A schedule of regular meeting dates shall be approved by the board at a regular meeting prior to the beginning of the next calendar year, and shall be published in the board's fall/winter newsletter, and on the board's website.

(4) The board may appoint advisory committees consisting of at least one member who is a board member and at least two members expert in the pertinent field of health care to assist it in the performance of its duties, Section 61-3-10, M. NMSA, 1978.

(a) Exception: no current board members shall be appointed to an advisory committee for the diversion program, Section 61-3-29, B. NMSA, 1978.

(b) Members of advisory committees who fail to attend three consecutive committee meetings shall automatically be removed as a member of the committee.

(c) Advisory committee members may be reimbursed as provided in the Per Diem and Mileage Act, Section 10-8-8 NMSA, 1978 for travel to a committee meeting or function.

(i) Mileage may be paid when there is a total of sixty (60) miles or more traveled.

(ii) Per diem may be paid for overnight stays only upon prior approval of the executive director or assistant director.

(5) The board shall elect a chairman, vice-chairman and secretary annually. The term of office begins with the meeting subsequent to the election. Any member of the board may serve as an officer of the board.

[~~**(6)** Board members shall not be involved with the administration or management of the board office "except in the absence or incapacity of the executive director".~~]

[~~(7)~~](6) Board may appoint site visitors who have expertise in the pertinent field of education/health care to accompany board staff on visits to educational programs, health care institutions/facilities, etc. to assist it in the performance of its duties and responsibilities. Site visitors may be reimbursed as provided in the Per Diem and Mileage Act, Section 10-8-1 to 10-8-8 NMSA, 1978, for travel to a committee meeting or function.

(a) Mileage may be paid when there is a total of sixty (60) miles or more traveled.

(b) Per diem may be paid for overnight stays only upon prior approval of the executive director or assistant director.

B. The board shall hire an executive director who is accountable to the board for the administration and management of the board office, including but not limited to the fiscal operation, records, hiring and firing of personnel. The operation of the board office shall be in accordance with the state of New Mexico statutes and rules.

(1) The executive director shall not have the power to grant, deny or withdraw approval for schools of nursing or to revoke, suspend or withhold any license authorized by the NPA.

(2) The executive director, or designee, shall represent the board to the public.

C. Honorarium: members of the board and board staff, when speaking on behalf of the board of nursing, may accept an honorarium. The honorarium shall be made in the name of the New Mexico board of nursing and deposited in the nursing fund with the state of New Mexico.

D. Verification of license/certificate.

(1) Employers and other interested persons may request verification of the status of a license/certificate.

(2) Verification of relicensure/recertification status is available immediately by phone and 24 hours on board website.

(3) Requests for verification of licensure/certification to other boards of nursing should be submitted through the NCSBN web based system.

E. Reimbursement for disciplinary witnesses and experts on behalf of the state.

(1) Individuals subpoenaed as a disciplinary witness for the state may be reimbursed for mileage as provided for in the Per Diem and Mileage Act, Section 10-8-1 to 10-8-8 NMSA, 1978, when sixty (60) miles or more are traveled to a disciplinary hearing.

(2) Individuals who serve as an expert witness for the state in a disciplinary matter may be reimbursed by the board in an amount not to exceed: two hundred dollars ($200.00) for reviewing the file, research and advisement in the matter, and three hundred dollars ($300.00) for testifying at a disciplinary hearing.

(3) The executive director may approve additional reimbursement for the review of files and testimony of expert witnesses when such reimbursement is essential to the prosecution of the case.

F. Telephonic attendance at board meetings by board members.

(1) Pursuant to the provisions of the Open Meetings Act, Section 10-15-1 C NMSA, 1978, as amended, board members may participant in a meeting of the board by means of a conference telephone or similar communications equipment.

(2) Board members participation in meeting telephonically shall constitute presence in person at the meeting. Telephonic participation may only occur when it is difficult or impossible for the person to be physically present. That is, there are circumstances beyond the member's control which make attendance in person extremely burdensome.

(3) Each board member

participating telephonically must be identified when speaking and all participants must be able to hear all other participants.

(4) Members of the public attending the meeting must be able to hear all members of the board and members of the public who speak during the meeting.

G. Use of fax: The board of nursing may accept and send facsimile of documents. Faxes of communications related to participants of the diversion program are accepted to the confidential fax number only.
[1-1-98; 16.12.1.8 NMAC - Rn & A, 16 NMAC 12.1.8, 7-30-01; A, 11-16-01; A, 1-2-04; A, 6-01-04; A, 2-17-06; A, 6-17-08; A, 3-1-10; A, 03-01-11]

NEW MEXICO ORGANIC COMMODITY COMMISSION

This is an amendment to 21.15.1 NMAC, Section 11, effective 2/28/2011.

21.15.1.11 FEES AND ASSESSMENTS

A. Application fee: all new applicants, regardless of category, must remit a [~~$175.00~~] $250.00 application fee with the completed application. [~~First time applicants shall also remit a $25.00 set-up fee.~~] Applications without accompanying fees shall be deemed incomplete and the applicant shall be notified that the application will not be further processed without the fee. Applicants applying for dual categories (crop and processor, animal and processor, but not crop and animal) must pay two fees, except where total annual gross sales of organic product are less than $50,000.00 and all handling/processing is performed by the certified producer; in such cases only one fee will be required. Handling/processing applicants that provide a process or service to organic producers but do not take ownership of the organic product or do not sell an organic product shall remit a $225.00 application fee. Annual update applications must also be accompanied by a [~~$175.00~~] $200.00 fee payment. Annual update applications sent in after the announced due date will be subject to a late fees on the following scale: up to one month late $75.00; one to two months $100.00; two to three months $200.00; three months and later $500.00.

B. All operations receiving certification from the commission must also remit annually by March 15 an assessment based on gross sales of organic products for the calendar year just ended. The commission shall send out a reminder notification of the assessment obligation in January. "Organic products" are defined as all products certified by the New Mexico organic commodity commission as "100 percent organic", "organic" or "made with organic (ingredients or food groups)".

(1) Producers, processors and handlers, whose total annual organic gross sales are less than one million dollars, shall be assessed at a rate of one-half of one percent (½ percent) plus a supplemental assessment of one-fourth of one percent (¼ percent) for a combined total of three-fourths of one percent (¾ percent) of total annual gross sales of organically produced agricultural products[~~, except:~~].

(2) [~~As provided for in the Organic Commodity Act, at 76.22.16 (d), the commission may, following notice and comment, adjust the assessment rate up or down by no more than one hundred percent.~~] Producers, processors and handlers, whose total annual organic gross sales are above one million dollars, shall be assessed at a rate of seven thousand, five hundred dollars ($7500) plus seventy-five one thousandths of one percent on any amount over one million dollars of total annual gross sales of organically produced agricultural products.

[~~(3)~~ ~~Assessments shall be limited based on gross annual organic income as follows: sales between $1 million and $1.5 million at $3,500; between $1.5 million and $2 million at $5,500; and over $2 million at $10,000.~~

~~**(4)** As provided for in the Organic Commodity Act, at 76.22.17, the commission may authorize a supplemental assessment, which shall not exceed one-fourth of one percent (1/4 percent) of total annual gross sales of organically produced agricultural products.~~]

C. Collection of assessments: all assessment shall be collected directly by the commission and shall be deposited into the organic market development fund.
[21.15.1.11 NMAC - Rp 21 NMAC 15.1.14, 8/30/2001; A, 8/15/2003; A, 3/15/2007; A, 3/30/2007; A, 2/28/2011]

NEW MEXICO BOARD OF PHARMACY

This is an amendment to 16.19.20 NMAC, Sections 1 and 68, effective 03-07-2011.

16.19.20.1 ISSUING AGENCY: Regulation and Licensing Department - Board of Pharmacy, Albuquerque, NM[~~; (505) 841-9102~~].
[16.19.20.1 NMAC - Rp 16 NMAC 19.20.1, 07-15-02; A, 12-15-02; A, 03-07-11]

16.19.20.68 SCHEDULE IV: Shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section:

A. DEPRESSANTS: Unless specifically exempt or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances, including its' salts, isomers, and salts of isomers whenever the existence of such salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) Alprazolam
(2) Barbital
(3) Chloral Betaine
(4) Chloral Hydrate
(5) Chlordiazepoxide
(6) Clonazepam
(7) Clorazepate
(8) Clotiazepam
(9) Diazepam
(10) Estazolam
(11) Ethchlorvynol
(12) Ethinamate
(13) Flurazepam
(14) Halazepam
(15) Lorazepam
(16) Mebutamate
(17) Meprobamate
(18) Methohexital
(19) Methylphenobarbital
(20) Midazolam
(21) Oxazepam
(22) Paraldehyde
(23) Petrichloral
(24) Phenobarbital
(25) Prazepam
(26) Quazepam
(27) Temazepam
(28) Triazolam
(29) Zopiclone

B. FENFLURAMINE: Any material, compound, mixture or preparation which contains any quantity of the following substance, including its' salts, isomers (whether optical position, or geometric) and its' salts, or such isomers, whenever the existence of such salts, isomers, and salts of isomers is possible: Fenfluramine

C. STIMULANTS: Unless specifically exempt or unless listed in another schedule any material, compound, mixture or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its' salts, isomers (whether optical position, or geometric) and salts of such isomers whenever the existence of such salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) Diethylpropion
(2) Phentermine
(3) Pemoline (including organometallic complexes and chelates thereon)
(4) Pipradrol
(5) SPA ((-)-1-dimethyl amino-1,2-diphenylmethane)
(6) Mazindol
(7) Cathine

(8) Fencamfamin
(9) Fenproporex
(10) Mefenorex
(11) Modafinil
(12) Sibutramine

D. OTHER SUBSTANCES: Unless specifically exempt or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances, including its' salts:

(1) Dextropropoxyphene(Alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-propionoxybutane)
(2) Pentazocine
(3) Carisoprodol
(4) Nalbuphine Hydrochloride
(5) Butorphanol Tartrate
(6) Dezocine
(7) Dichloralphenazone
(8) Zaleplon
(9) Zolpidem
(10) Tramadol

E. NARCOTIC DRUG: Unless specifically exempt or unless listed in another schedule, any material, compound, mixture or preparation containing limited quantities of any of the following narcotic drugs or any salts thereof: Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

F. EXEMPTION OF CHLORAL: When packaged in a sealed, oxygen-free environment, under nitrogen pressure, safeguarded against exposure to the air. Chloral when existing under the above conditions, is a substance which is not intended for general administration to a human being or another animal, and contains no narcotic controlled substances and is packaged in such a form that the package quantity does not present any significant potential for abuse. All persons who engage in industrial activities with respect to such chloral are subject to registration; but shall be exempt from Section 30-31-16 through 19 of the New Mexico Controlled Substances Act and 16.19.20.19 NMAC through 16.19.20.52 NMAC of the board of pharmacy regulations.

G. EXEMPT COMPOUNDS: Librax and Menrium are preparations which contain chlordiazepoxide, a depressant listed in Schedule IV, 16.19.20.68.A.5 NMAC and other ingredients in such combinations, quantity, preparation or concentration as to vitiate the potential for abuse of chlordiazepoxide, and are hereby exempt preparations.

(1) Librax
(2) Menrium, 5-2
(3) Menrium, 4-5
(4) Menrium, 10-4

[16.19.20.68 NMAC - Rp 16 NMAC 19.20.28(3), 07-15-02; A, 06-30-05; A, 05-14-10; A, 03-07-11]

NEW MEXICO BOARD OF PHARMACY

This is an amendment to 16.19.26 NMAC, Section 1 and addition of new Section 12, effective 03-07-11.

16.19.26.1 ISSUING AGENCY: Regulation and Licensing Department - Board of Pharmacy, Albuquerque, NM[~~, (505) 841-9102~~].
[16.19.26.1 NMAC - N, 12-15-02; A, 03-07-11]

16.19.26.12 TB TESTING:

A. PROTOCOL:

(1) Prescriptive authority for Tuberculosis (TB) testing shall be exercised solely in accordance with the written protocol for TB testing drug therapy approved by the board.

(2) Any pharmacist exercising prescriptive authority for TB testing must maintain a current copy of the written protocol for TB testing approved by the board.

B. EDUCATION AND TRAINING:

(1) The pharmacist must successfully complete training as specified by the centers for disease control.

(2) Continuing education: Any pharmacist exercising prescriptive authority for TB testing shall complete continuing education as specified by the centers for disease control.

C. AUTHORIZED DRUGS:

(1) TB skin antigen serum(s).

(2) Prescriptive authority for TB testing shall be limited to those drugs delineated in the written protocol approved by the board.

D. RECORDS:

(1) The prescribing pharmacist must generate a written or electronic prescription fro any TB test administered.

(2) Informed consent must be documented in accordance with the approved protocol for TB testing and a record of such consent maintained in the pharmacy for a period of at least three years.

E. NOTIFICATION: Upon signed consent of the patient, the pharmacist shall notify the patient's designated physician or primary care provider and the department of health of any positive TB test.

[16.19.26.12 NMAC - N, 03-07-11]

End of Adopted Rules Section

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