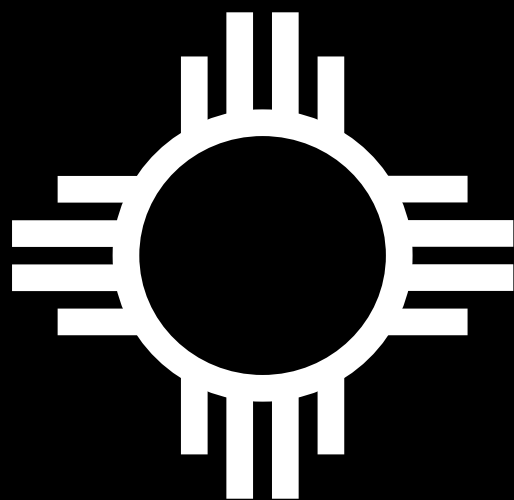


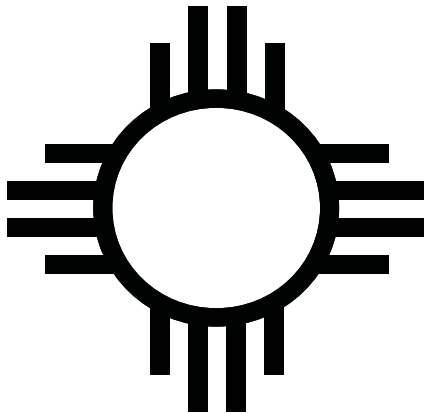
**NEW
MEXICO
REGISTER**



Volume XXIII
Issue Number 23
December 14, 2012

New Mexico Register

**Volume XXIII, Issue Number 23
December 14, 2012**



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
2012

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New Mexico Register

Volume XXIII, Number 23

December 14, 2012

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Notices of Rulemaking and Proposed Rules

NEW MEXICO DNA IDENTIFICATION SYSTEM OVERSIGHT COMMITTEE AND ADMINISTRATIVE CENTER

NEW MEXICO DNA IDENTIFICATION
SYSTEM OVERSIGHT COMMITTEE &
ADMINISTRATIVE CENTER

NOTICE OF MEETING AND PUBLIC
HEARING ON AMENDMENT OF RULES

Tuesday January 15, 2013, 11:00 AM,
Criminalistics Conference Room,
Metropolitan Forensic Science Center, 5350
2nd Street NW, Albuquerque, NM 87107

To comment on, or for additional information
including a copy of the agenda and proposed
amendments to 10.14.200 NMAC, or if you
have a disability and you require special
assistance to participate in this meeting
contact John Krebsbach, Chairperson at
(505) 823-4630 by Monday January 14,
2013.

NEW MEXICO OIL CONSERVATION COMMISSION

STATE OF NEW MEXICO
ENERGY, MINERAL AND NATURAL
RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION
SANTA FE, NEW MEXICO

The State of New Mexico, through its Oil
Conservation Commission (Commission),
hereby gives notice that, pursuant to
19.15.3.12(E)(2) NMAC, the Commission
will re-open the public hearing for Case Nos.
14784 and 14785, described below, for the
limited purpose of receiving testimony on a
re-submitted set of tables that are related to
applicants' proposed closure and reclamation
requirements at 9 a.m. on January 9, 2013,
in Porter Hall at 1220 South Saint Francis
Drive, Santa Fe, New Mexico. If you are an
individual with a disability who is in need of
a reader, amplifier, qualified sign language
interpreter or any other form of auxiliary
aid or service to attend or participate in
the hearing, please contact Ms. Florene
Davidson at (505) 476- 3458 or through the
New Mexico Relay Network at 1-800-659-
1779 by January 2, 2013. Public documents
can be provided in various forms. Please
contact Ms. Davidson if a summary or
other type of form is needed. A preliminary
agenda will be available to the public no
later than two weeks prior to the meeting. A

final agenda will be available no later than 24 hours preceding the meeting. Members of the
public may obtain copies of the agenda by contacting Ms. Davidson at the phone number
indicated above. Also, the agenda will be posted on the Oil Conservation Division's website
at www.emnrd.state.nm.us/ocd/.

STATE OF NEW MEXICO TO:

**All named parties and persons
having any right, title, interest
or claim in the following cases
and notice to the public.**

**Case No.14784: APPLICATION OF THE NEW MEXICO OIL AND GAS
ASSOCIATION FOR AMENDMENT OF CERTAIN PROVISIONS OF TITLE 19,
CHAPTER 15 OF THE NEW MEXICO ADMINISTRATIVE CODE CONCERNING
PITS, CLOSED-LOOP SYSTEMS, BELOW GRADE TANKS, SUMPS AND OTHER
ALTERNATIVE METHODS RELATED TO THE FOREGOING AND AMENDING
OTHER RULES TO CONFORMING CHANGES, STATEWIDE.**

**Case No.14785: APPLICATION OF THE INDEPENDENT PETROLEUM
ASSOCIATION OF NEW MEXICO FOR AMENDMENT OF CERTAIN PROVISIONS
OF TITLE 19, CHAPTER 15 OF THE NEW MEXICO ADMINISTRATIVE CODE
CONCERNING PITS, CLOSED-LOOP SYSTEMS, BELOW GRADE TANKS, SUMPS
AND OTHER ALTERNATIVE METHODS RELATED TO THE FOREGOING AND
AMENDING OTHER RULES TO CONFORMING CHANGES, STATEWIDE.**

On November 15, 2012 the Oil Conservation Commission entered an oral order requiring the
applicants in the above cases to submit a revised set of tables related to applicants' proposed
closure and reclamation requirements. The Oil Conservation Commission also orally ordered
that testimony be taken on the revised tables beginning January 9, 2013 and continuing until
the Commission is ready to take up further deliberation on the proposed amendments in Case
Nos. 14784 and 14785.

Copies of the text of the proposed amendments are available from the Oil Conservation
Division's Administrator, Florene Davidson at (505) 476-3458 or from the Division's website
at <http://www.emnrd.state.nm.us/ocd/Rules.htm>. Modifications to the proposed amendments
(six copies) conforming to the requirements of 19.15.3.11 NMAC must be received by the
Division no later than 5:00 p.m. on December 24, 2012. Persons intending to provide written
comments on the proposed rule change must submit their written comments no later than 5:00
p.m. on January 2, 2013 to the Division's Administrator. Persons intending to offer technical
testimony or cross-examine witnesses at the hearing must file a Pre-hearing statement (six
copies) conforming to the requirements of 19.15.3.11 NMAC, including six copies of all
exhibits the person will offer in evidence at the hearing, no later than 5:00 p.m. on January 2,
2013. Modifications, written comments and Pre-hearing statements may be hand-delivered
or mailed to Ms. Davidson at 1220 South Saint Francis Drive, Santa Fe, New Mexico 87505
or may be faxed to Ms. Davidson at (505) 476-3462.

Given under the seal of the State of New Mexico Oil Conservation Commission at Santa Fe,
New Mexico on this 3rd day of December, 2012.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

Jami Bailey
Oil Conservation Commission Chair

NEW MEXICO BOARD OF PHARMACY**NEW MEXICO BOARD OF PHARMACY****REGULAR BOARD MEETING****NOTICE TO THE PUBLIC**

The New Mexico Board of Pharmacy will convene on **January 17th & 18th, 2013 at 9:00 a.m.** and continue until finished in the **Board of Pharmacy Conference Room located at 5200 Oakland Ave., NE, Albuquerque, NM** for the purpose of conducting a regular Board meeting.

Interested persons wishing to comment and or present proposed language regarding rule hearings must submit documentation via fax (505)222-9845, mail or email to Larry Loring, Larry.Loring@state.nm.us or Debra Wilhite, debra.wilhite@state.nm.us no later than January 15, 2013, if in attendance please provide 15 copies for distribution to board members. To receive copies of the agenda and any proposed rule, you may access the links on the agenda for printing via our website listed below or contact Debra Wilhite, Administrative Secretary, at (505) 222-9835 or fax (505) 222-9845, e-mail debra.wilhite@state.nm.us

Anyone who needs special accommodations for the meeting should contact the board office at (505) 222-9830 as soon as possible.

The board may go into executive session at any time to discuss licensee and/or personnel matters.

The agenda (tentative) will be available starting January 7, 2013 through the board's website: www.rld.state.nm.us/boards/pharmacy

The Board will address:

Rule Hearings:

16.19.4 NMAC Pharmacists:
Section 10: Continuing Pharmacy Education Requirements
Section 17: Pharmacist Clinician

Hearings, Board Orders and Surrenders:

2011-090 Jack Martinez – Order to Show Cause: 10:00 a.m.

2010-043 Kelly Dillon – Order to Show Cause: 10:45 a.m.

2012-064 Kelly Kemper – NCA: 11:30 a.m.

Approval of Applications:

Other Board Matters:

Committee Reports:

Public Requests:

*Executive Director's Report:
Case presentations*

NEW MEXICO PUBLIC REGULATION COMMISSION**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

Case No. 11-00480-FM

IN THE MATTER OF THE ADOPTION OF PROPOSED AMENDMENTS TO THE RULES GOVERNING THE FIRE PROTECTION FUND, 10.25.10 NMAC, INCLUDING THE ADDITION OF CERTAIN RULES PERTAINING TO THE FIREFIGHTING QUALIFICATION SYSTEM CURRENTLY FOUND AT 10.25.11 NMAC, AND THE REPEAL OF THE REMAINDER OF 10.25.11 NMAC.

AMENDED NOTICE OF PROPOSED RULEMAKING REVISING PROCEDURAL ORDER

THIS MATTER coming before the New Mexico Public Regulation Commission (the "Commission") on its own motion, the Commission **FINDS AND CONCLUDES:**

1) On October 3, 2012, the Commission issued a Notice of Proposed Rulemaking to modify existing Rule 10.25.10 NMAC

concerning the Fire Protection Fund Rules. Notice of the proposed rulemaking was published in the New Mexico Register on October 30, 2012 and the Albuquerque Journal on October 14, 2012, but publication in the Las Cruces Sun News failed due to a printer error. Notice therefore failed to conform to NMSA 1978, Section 8-8-15 and the November 30, 2012 hearing should be vacated and rescheduled. The dates for providing written comments should be revised in accordance with the new publication and hearing dates.

2) The proposed revisions to Rule 10.25.10 and 10.25.11 NMAC seek to simplify the certification process with the intended goal of making skill level and the requisite preparation for the certification examination more easily verifiable. The proposed revisions to Rule 10.25.10 NMAC also incorporate recent law changes making municipalities and counties eligible for Fire Protection Funds for servicing areas adjacent and contiguous to their jurisdictional limits.

3) The proposed rulemaking is authorized by the Commission's general rulemaking authority provided by NMSA 1978, Section 8-8-4(B) (10) and the rulemaking authority under NMSA 1978, Sections 59A-53-12, 59A-52-6, 8, 10, 15, 16(A) & (B), and 18 of the Fire Protection Fund Act.

IT IS THEREFORE ORDERED:

A. The hearing originally scheduled for November 30, 2012 is vacated. Any person unaware of the rescheduling who appears at the originally-scheduled hearing wishing to provide comment will be directed to either attend the rescheduled hearing or submit written comments by the rescheduled hearing date.

B. The Commission commences a rulemaking proceeding to revise existing Rule 10.25.10 NMAC concerning the Fire Protection Fund Rules by, inter alia, inserting certain rules pertaining to the Firefighting Qualification System currently found at 10.25.11 NMAC and repealing the remainder of 10.25.11 NMAC based on all or part of the language in the proposed rule, a copy of the which is attached hereto as Exhibit A. As is the Commission's practice, the Commission will consider alternative approaches to any of the language in the Exhibit A, made via comments to this NOPR.

C. Persons wishing to provide public comment and/or participate in this rulemaking are encouraged to provide specific comment on the proposed rule and any topic that may be relevant to this rulemaking. Any interested person wishing to comment on the Commission's Proposed Rule Amendment may do so by submitting written comments no later than **January 7,**

2013. All response comments shall be filed no later than **January 21, 2013.** Comments suggesting changes to the Proposed Rulemaking shall state and discuss the particular reasons for the suggested changes and shall include all specific language necessary or appropriate to effectuate the changes being suggested. Specific proposed language changes to the draft rule shall be provided in legislative format. All pleadings, including comments and suggested changes to the proposed rules, shall bear the caption and docket number set forth at the top of this notice.

D. The Commission will review all timely submitted written comments and a public hearing to receive oral comment and to clarify or supplement the written comments will begin at **1:00 P.M., Wednesday, January 30, 2013** at the Commission offices, at the following location: **4th Floor Hearing Room, 1120 Paseo de Peralta, Santa Fe, NM 87501. Tel. 505-827-4366.**

E. Unless the Commission or presiding officer rules otherwise, the record in this rulemaking shall close thirty days after the conclusion of the public hearing in accordance with 1.2.3.7(B) NMAC or **March 1, 2013.** 1.2.3.7(B) NMAC distinguishes communications occurring before the record closes from communications occurring after the record has been closed. Only the latter are "ex parte" communications. Setting a record closure date permits the Commission to conduct follow-up discussions with parties who have submitted comments to the Proposed Rule or responses to bench requests. This action should not be interpreted as extending the time for parties to file comments or response comments, or allowing the filing of other documents.

F. **Interested persons should contact the Commission to confirm the date, time, and place of any public hearing, because hearings are occasionally rescheduled. Any person with a disability requiring special assistance in order to participate in the hearing should contact Cecilia Rios at (505) 827-4501 at least 48 hours prior to the hearing.**

G. At least thirty days prior to the hearing date, this **Amended Notice of Proposed Rulemaking**, shall be published, **excluding Exhibit A**, in at least two newspapers of general circulation in New Mexico and in the NEW MEXICO REGISTER in accordance with 14.4.7.1(B) (1) and shall be e-mailed to all persons listed on the attached service list who have made a written request for advance notice. If their email addresses are unknown, they shall be served via regular mail. Affidavits attesting to publication of this **Amended Notice of Proposed Rulemaking** as described above shall be filed in this Docket. This **Amended Notice of Proposed Rulemaking** shall also be posted on the Commission's official Web site.

H. Copies of any final order in this rulemaking proceeding shall be mailed, along with copies of any resulting final rule, to all persons appearing on the service list at the time of issuance of the final order, all commenters and all individuals requesting such copies.

I. This **Amended Notice of Proposed Rulemaking** constitutes due and lawful notice to all potentially interested persons and is effective immediately.

J. In accordance with 1.2.2.30(B) NMAC, this Amended Notice and Procedural Order is issued by the Commission Chairman or by a single Commissioner.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 27th day of November, 2012.

**NEW MEXICO PUBLIC REGULATION COMMISSION
BEN L. HALL, COMMISSIONER DISTRICT 5**

NEW MEXICO PUBLIC REGULATION COMMISSION

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

Case No. 12-00057-UT

IN THE MATTER OF POSSIBLE CHANGES TO THE FILING REQUIREMENTS FOR RENEWABLE ENERGY PORTFOLIO PROCUREMENT PLANS, EFFICIENT USE OF ENERGY REPORTS AND INTEGRATED RESOURCE PLANS.

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the New Mexico Public Regulation Commission is commencing a rulemaking proceeding for the purpose of promulgating rules that would streamline the filing requirements for Integrated Resource Plans, Renewable Energy Portfolio Procurement Plans, and Energy Efficiency Program Approvals for investor-owned public utilities. The Proposed Rules would also make changes to the content to be included in reports filed by public utilities. Being duly informed,

THE COMMISSION FINDS AND CONCLUDES:

1. The Commission has the authority to promulgate the proposed rule amendments under the N.M. Const. art. XI, Section 2, and under NMSA 1978, Sections 8-8-4 (1998) and 8-8-15 (amended 2001).

2. Each year public utilities, intervenors and the New Mexico Public Regulation Commission expend a great deal of time and resources preparing, litigating and evaluating plans and reports related to Integrated Resource Plans, Renewable Energy, and Energy Efficiency. The proposed rule would amend 17.7.3 NMAC (Integrated Resource Planning), 17.9.572 NMAC (Renewable Energy), and 17.7.2 NMAC (Energy Efficiency) to coordinate and streamline these required filings and reduce the amount of information required to be included in some of the filings.

3. On March 6, 2012, the Commission issued an Order Scheduling Workshop, setting a workshop to take place on March 29, 2012.

4. Utilizing federal funding, the Commission, pursuant to a competitive bid process, arranged for consulting services to be provided by National Economic Research Associates (NERA) to address the challenges of streamlining and combining the schedules and reporting requirements under the affected rules.

5. There was one workshop, followed by several teleconferences with the participants hosted by NERA. With one exception, found at Proposed Rule 17.9.572.18, the Commission's Proposed Rules consist of the consensus draft rules proposed by the workshop participants and NERA.

6. Interested persons may comment on any portion of the Proposed Rules.

7. This NOPR is intended to provide due and lawful notice to all potentially interested persons.

8. Commission Rule 1.2.3.7(B) NMAC (Ex Parte Communications) draws a distinction applicable to rulemaking proceedings between communications occurring before the record has been closed and communications occurring after the record has been closed. It defines only the latter as "ex parte communications." In order to ensure compliance with Rule 1.2.3.7(B) NMAC, the Commission should set a date on which it will consider the record to be closed. The Commission finds that date shall be the earlier of thirty (30) days following the **February 11, 2013, Public Hearing**, that is, **March 11, 2013**, or the date a Final Order is issued in this case. The setting of that record closure date will permit Commissioners and

Commission Counsel to conduct follow-up discussions with persons who have submitted initial or response comments to the Commission's Proposed Rules or responses to any bench requests. However, this action should not be interpreted as extending the time during which parties may file comments or response comments, or as allowing the filing of other types of documents in this case.

9. Additional copies of the Proposed Rules can be obtained from:

Mr. Nick Guillen
NMPRC Records Management Bureau
1120 Paseo de Peralta
Santa Fe, New Mexico 87501

– or –

Mr. Nick Guillen
NMPRC Records Management Bureau
P.O. Box 1269
Santa Fe, New Mexico 87504-1269
or by calling 505-827-4366.

IT IS THEREFORE ORDERED:

A. The rulemaking proceeding shall be, and hereby is, instituted in this Docket.

B. This Notice of Proposed Rulemaking constitutes due and lawful notice to all potentially interested persons.

C. Any person wishing to comment on the Proposed Rule may do so by submitting written comments no later than **December 20, 2012**. Any person wishing to respond to comments may do so by submitting written response comments no later than **January 10, 2013**. Comments suggesting changes to the Proposed Rule shall state and discuss the particular reasons for the suggested changes and shall include all specific language necessary or appropriate to effectuate the changes being suggested. Specific proposed language changes to the Proposed Rule shall be provided in a form consistent with that of the Proposed Rule. Commenters' deletions shall be indicated by striking through the language to be deleted; additions shall be underlined.

D. All pleadings, including comments, shall bear the above caption and case number 12-00057-UT and shall be filed with the Commission's Records Division, at either of the addresses set out in paragraph 6 of this Notice.

E. A public hearing on the Proposed Rule, to be presided over by the Commission or its designee, shall be held beginning at **1:00 p.m. on February 11, 2013**, at the offices of the Commission, at the following location:

**4th Floor Hearing Room
1120 Paseo de Peralta
Santa Fe, New Mexico 87501
Tel. 505-827-4366**

The hearing will be held in order to receive oral comments and to clarify or supplement the written comments. No testimony or other evidence will be taken at the hearing as this is a rulemaking proceeding.

F. All persons providing public comment and/or participating in the public hearing are encouraged to provide specific comments on the Proposed Rule. Commenters are also encouraged to address any other topic that may be relevant to this rulemaking.

G. Interested persons should contact the Commission to confirm the date, time, and place of any public hearing, because hearings are occasionally rescheduled. Any person with a disability requiring special assistance in order to participate in the hearing should contact Ms. Cecilia Rios at (505) 827-4501 at least 48 hours prior to the commencement of the hearing.

H. Pursuant to NMSA 1978, Section 8-8-15(B) (amended 2001), at least thirty days prior to the hearing date, this Notice of Proposed Rulemaking, including Attachment A, shall be mailed to all persons who have made a written request for advance notice and shall be published without Attachment A in at least two newspapers of general circulation in New Mexico and in the NEW MEXICO REGISTER. Affidavits attesting to the publication of this Notice of Proposed Rulemaking as described above shall be filed in this Docket.

I. Copies of this Notice of Proposed Rulemaking, including Attachment A, shall be e-mailed to all persons listed on the attached Certificate of Service if their e-mail addresses are known, and if not known, mailed to such persons via regular mail.

J. This Notice of Proposed Rulemaking shall be posted on the Commission's official Web site.

K. Copies of any forthcoming final order adopting a new rule shall be

mailed, along with copies of the new rule, to all persons and entities appearing on the Certificate of Service as it exists at the time of issuance of the final order in this Docket, to all commenters in this case, and to all individuals requesting such copies.

L. This Notice of Proposed Rulemaking is effective immediately.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico this 20th day of November, 2012.

**NEW MEXICO PUBLIC REGULATION
COMMISSION**

**PATRICK H. LYONS, CHAIRMAN
THERESA BECENTI-AGUILAR, VICE
CHAIR**

**JASON A. MARKS, COMMISSIONER
DOUGLAS J. HOWE, COMMISSIONER
BEN L. HALL, COMMISSIONER**

**End of Notices and Proposed
Rules Section**

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Adopted Rules

NEW MEXICO COMMISSION OF PUBLIC RECORDS

This is an amendment to 1.15.6 NMAC, GRRDS, General Personnel Records, amending Sections 3, 6, 7, 8, 191 and adding Sections, 9 and 193, effective 12/31/2012.

1.15.6.3 STATUTORY AUTHORITY: [Section 14-3-6 NMSA 1978. Administrator: duties. The administrator shall establish a record management program for the application of efficient and economical management methods of the creation, utilization, maintenance, retention, preservation and disposal of official records. The administrator shall establish records disposal schedules for the orderly retirement of records and adopt regulations necessary for the carrying out of the public records act. Records disposal schedules shall be filed with the librarian of the supreme court library, and shall not become effective until thirty days after the filing date.] Section 14-3-4 NMSA 1978, it shall be the duty of the commission to adopt and publish rules to carry out the purposes of the Public Records Act. Section 14-3-6 NMSA 1978, the administrator shall establish a records management program for the application of efficient and economical management methods for the creation, utilization, maintenance, retention, preservation and disposal of public records. [8/8/96; 1.15.6.3 NMAC - Rn, 1 NMAC 3.2.90.3, 10/01/2000; A, 12/31/2012]

1.15.6.6 OBJECTIVE:
[A.] To establish a records management program for the application of and efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of official records (14-3-6 NMSA 1978).
[B.] To establish records disposal schedules for the orderly retirement of records and adopt regulations necessary for the carrying out of the public records act (14-3-6 NMSA 1978). To establish a records retention schedule for the orderly management, retention, disposition and preservation of records necessary for carrying out the Public Records Act pursuant to Section 14-3-6 NMSA 1978. [8/8/96; 1.15.6.6 NMAC - Rn, 1 NMAC 3.2.90.6, 10/01/2000; A, 12/31/2012]

1.15.6.7 DEFINITIONS:
[A.] **Administrator:** "Administrator" means the state records administrator. (Section 14-3-2, NMSA 1978)

[B.] **Agency:** "Agency" means any state agency, department, bureau, board, commission, institution or other organization of the state government, the territorial government and the Spanish and Mexican governments in New Mexico. (Section 14-3-2, NMSA 1978)

[C.] **Audit:** A periodic examination of an organization to determine whether appropriate procedures and practices are followed.

[D.] **Commission:** "Commission" means the state commission of public records. (Section 14-3-2, NMSA 1978)

[E.] **Pending litigation:** A proceeding in a court of law whose activity is in progress but not yet completed.

[F.] **Record destruction:** The process of totally obliterating information on records by any method to make the information unreadable or unusable under any circumstances.

[G.] **Records management:** The systematic control of all records from creation or receipt through processing, distribution, maintenance and retrieval, to their ultimate disposition.

[H.] **Records retention period:** The period of time during which records must be maintained by an organization because they are needed for operational, legal, fiscal, historical or other purposes.

[I.] **Records retention schedule:** A document prepared as part of a records retention program that lists the period of time for retaining records.

[J.] **Public records:** "Public records" means all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by any agency in pursuance of law or in connection with the transaction of public business and preserved, or appropriate for preservation; 3.2.90 by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein. (Section 14-4-2, NMSA 1978)

[K.] **Non-records:** Library or museum material of the state library, state institutions and state museums, extra copies of documents reserved only for convenience of reference and stocks of publications and processed documents are non-records. (Section 14-3-2 C, NMSA 1978). The following specific types of materials are non-records: extra copies of correspondence; documents preserved only for convenience of reference; blank forms/

books which are outdated; materials neither made nor received in pursuance of statutory requirements nor in connection with the functional responsibility of the officer/agency; preliminary and non-final drafts of letters, reports and memoranda which may contain or reflect the working or deliberative process by which a final decision or position of the agency, board, department or subdivision thereof is reached; shorthand notes, steno tapes, mechanical recordings which have been transcribed, except where noted on agency retention schedules; routing and other interdepartmental forms which are not significant evidence of the activity concerned and do not otherwise have value as described above; stocks of publications already sent to archives and processed documents preserved for supply purposes only; form and guide letters, sample letters, form paragraphs; subject files, including copies of correspondence, memoranda, publications, reports and other information received by agency and filed by subject (also referred to as reading files or information files). [See also Item No. 1.15.2.101 of Records Retention and Disposition Schedule for General Administrative Records (1 NMAC 1.15.2 filed, 10/01/2000).]

[A.] **"Administrator"** means the state records administrator (Section 14-3-2 NMSA 1978).

[B.] **"Agency"** means any state agency, department, bureau, board, commission, institution or other organization of the state government, the territorial government and the Spanish and Mexican governments in New Mexico (Section 14-3-2 NMSA 1978).

[C.] **"Archives"** means the permanent records of the state of New Mexico, which may include government and private collections of the Spanish, Mexican, territorial and statehood periods, assessed to have significant historical value to warrant their preservation by the state of New Mexico. The term also refers to the organizational unit of the SRCA storing these records.

[D.] **"Audit"** means a periodic examination of an organization to determine whether appropriate procedures and practices are followed.

[E.] **"Commission"** means the state commission of public records (Section 14-3-2 NMSA 1978).

[F.] **"Disposition"** means final action that puts into effect the results of an appraisal decision for a series of records (i.e., transfer to archives or destruction).

[G.] **"Microphotography"** means the transfer of images onto film and electronic imaging or other information storage techniques that meet the performance

guidelines for legal acceptance of public records produced by information system technologies pursuant to regulations adopted by the commission.

H. "Non-record" means extra copies of documents kept solely for convenience of reference, stocks of publications, records not usually included within the scope of the official records of an agency or government entity and library material intended only for reference or exhibition. The following specific types of materials are non-records: materials neither made nor received in pursuance of statutory requirements nor in connection with the functional responsibility of the officer or agency; extra copies of correspondence; preliminary drafts; blank forms, transmittal letters or forms that do not add information; sample letters; and reading file or informational files.

I. "Pending litigation" means a proceeding in a court of law whose activity is in progress but not yet completed.

J. "Public record" means all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by any agency in pursuance of law or in connection with the transaction of public business and preserved, or appropriate for preservation, by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein (Section 14-4-2 NMSA 1978).

K. "Records custodian" means the statutory head of the agency using or maintaining the records or the custodian's designee.

L. "Record destruction" means the process of totally obliterating information on records by any method to make the information unreadable or unusable under any circumstances.

M. "Records management" means the systematic control of all records from creation or receipt through processing, distribution, maintenance and retrieval, to their ultimate disposition.

N. "Records retention and disposition schedule" means rules adopted by the commission pursuant to Section 14-3-4 NMSA 1978 describing records of an agency, establishing a timetable for their life cycle and providing authorization for their disposition.

O. "Retention" means the period of time during which records must be maintained by an organization because they are needed for operational, legal, fiscal, historical or other purposes.

[8/8/96; 5/19/97; 1.15.6.7 NMAC - Rn, 1 NMAC 3.2.90.7, 10/01/2000; A, 12/31/2012]

1.15.6.8 [INSTRUCTIONS:

A. For records of an administrative nature, refer to the Records Retention and Disposition Schedule for General Administrative Records, 1.15.2 NMAC.

B. For records of a financial nature, refer to the Records Retention and Disposition Schedule for General Financial Records, 1.15.4 NMAC.

C. For records of a personnel nature, refer to the Records Retention and Disposition Schedule for General Personnel Records, 1.15.6 NMAC.

D. For records of a medical nature, refer to the Records Retention and Disposition Schedule for General Medical Records, 1.15.8 NMAC.

E. Retention periods shall be extended until six months after all current or pending litigation, current claims, audit exceptions or court orders involving a record have been resolved or concluded.

F. The descriptions of files are intended to be evocative, not complete. For example, there will always be some documents that are filed in a file that are not listed in the description, and similarly, not every file will contain an example of each document listed in the description.

G. Confidentiality is denoted as "-C-". Not all materials in a file may be confidential. Refer to NOTE. Where portions of file may be confidential, refer to legal counsel for agency.

H. Access to confidential documents and/or confidential files shall be only by authorization of agency or attorney general and/or by court order, unless otherwise provided by statute. Release of confidential documents to law enforcement and other government agencies, shall only be upon specific statutory authorization or court order.

I. All records, papers or documents may be photographed, microfilmed, microphotographed or reproduced on film. Such photographs, microfilms, photographic film or microphotographs shall be deemed to be an original record for all purposes, including introduction in evidence in all courts or administrative agencies. (Section 14-1-5, 14-1-6 NMSA 1978)

J. Data processing and other machine readable records. Many paper records are being eliminated when the information has been placed on magnetic tapes, disks, or other data processing media. In these cases, the information on the data processing medium should be retained for the length of time specified in records retention & disposition schedules for paper records and should be subject to the same confidentiality and access restrictions as paper records. When the destruction of a

record is required, all versions of said record shall be electronically over-written on machine readable media on which it is stored (or media destroyed). (See also 1.13.70 NMAC: PERFORMANCE GUIDELINES FOR THE LEGAL ACCEPTANCE OF PUBLIC RECORDS PRODUCED BY INFORMATION TECHNOLOGY SYSTEMS).] **ABBREVIATIONS AND ACRONYMS:**

A. "CFR" stands for code of federal regulations.

B. "EDRRDS" stands for education records retention and disposition schedules.

C. "ERRDS" stands for executive records retention and disposition schedules.

D. "GRRDS" stands for general records retention and disposition schedules.

E. "JRRDS" stands for judicial records retention and disposition schedules.

F. "LRRDS" stands for legislative records retention and disposition schedules.

G. "LGRDRS" stands for local government records retention and disposition schedules.

H. "SRCA" stands for state records center and archives.

I. "USC" stands for United States code.

[8/8/96; 5/19/97; 1.15.6.8 NMAC - Rn, 1 NMAC 3.2.90.8, 10/01/2000; 1.15.6.8 NMAC - N, 12/31/2012]

1.15.6.9 INSTRUCTIONS:

A. Records retention and disposition schedules identify the types of records maintained by state agencies and specify a period of time which records must be retained. A retention period may be stated in terms of months or years and is sometimes expressed as contingent upon the occurrence of an event. There are several types of records retention and disposition schedules promulgated by the commission for state agencies. General schedules list records common to all agencies and executive schedules list records specific to an agency. Each record series will be represented in the format listed below.

(1) Program - describes the function of the records

(2) Maintenance system - describes how an agency files (organizes) records

(3) Description - describes the purpose and content of a record

(4) Retention - defines the length of time records must be kept before they are eligible for destruction or archival preservation.

B. For records of a general administrative nature, refer to the GRRDS.

General Administrative, 1.15.2 NMAC.

C. For records of a financial nature, refer to the GRRDS, General Financial, 1.15.4 NMAC.

D. For records of a personnel nature, refer to the GRRDS, General Personnel, 1.15.6 NMAC.

E. For records of a medical nature, refer to the GRRDS, General Medical, 1.15.8 NMAC.

F. Retention periods shall be extended until six months after all current or pending litigation; current claims, audit exceptions or court orders involving a record have been resolved or concluded.

G. The descriptions of files are intended to be evocative, not complete. For example, there will always be some documents that are included in a file that are not listed in the description, and similarly, not every file will contain an example of each document listed in the description.

H. Confidentiality is denoted for files likely to contain confidential materials or information; however files without a confidentiality note may contain confidential or privileged information. Failure to include a confidentiality note in the description of a record series does not waive confidentiality. Refer questions concerning the confidentiality of a file to legal counsel for the agency.

I. Access to confidential documents, information or files shall be only by authorization of the agency records custodian (Section 14-2-8 NMSA 1978), or by the office of the attorney general or by court order, unless otherwise provided by law. Release of confidential documents to law enforcement and other government agencies, shall only be upon specific statutory authorization or court order.

J. Records may be photographed, microfilmed, digitized or converted to computer output microfilm provided a microphotography plan has been approved by the state records administrator (Section 14-3-17 NMSA 1978). Such photographs, microfilms, photographic film or microphotographs shall be deemed to be an original record for all purposes, including introduction as evidence in all courts or administrative agencies (Section 14-1-6 NMSA 1978).

K. Public records placed on magnetic tapes, disks or other data processing media shall be retained for the length of time specified in records retention and disposition schedules and are subject to the same confidentiality and access restrictions as paper records. See also 1.13.70 NMAC, Performance Guidelines for the Legal Acceptance of Public Records Produced by Information Technology Systems.

L. Email is a transmission medium for content that may or may not be a public record. Email messages that contain

information sent or received by an agency in connection with the transaction of official state business or in pursuance of law are public records and are subject to retention requirements established in records retention and disposition schedules. Email messages are required to be categorized, filed and retained on the basis of content (1.13.4 NMAC, Records Management Requirements for Electronic Messaging). The content of email messages may vary considerably; therefore, each email shall be evaluated to determine if it meets the definition of a public record as defined in the Public Records Act. Non-records or transitory emails that do not provide evidence of official agency policies or business transactions may be deleted.

M. Non-scheduled public records created by an agency in pursuance of law or in connection with the transaction of public business shall have a retention period of permanent until such time the non-scheduled record has been scheduled and a retention period adhering to operational, legal, fiscal, historical or other purposes is established.

[1.15.6.9 NMAC - Rn & A, 1.15.6.8 NMAC, 12/31/2012]

1.15.6.191 [EMPLOYEE ELIGIBILITY VERIFICATION, (FORM I-9):

A. Program: personnel files

B. Maintenance system: alphabetical

C. Description: shows employee information and verification; employer review and certification; certification, updating and re-verification and signature

D. Retention: three years after the date of hire or one year after the date the individual's employment is terminated, whichever is later (8 CFR 274A.6)

EMPLOYEE ELIGIBILITY VERIFICATION, (FORM I-9) FILES:

A. Program: personnel files

B. Maintenance system: chronological by year, then numerical by employee identification number

C. Description: records documenting the employer's determination, verification and re-verification of eligibility that an employee is authorized to work in the United States. File may include *form I-9* (i.e., employee name, address, date of birth, social security number, attestation of citizenship, etc.), copy of social security card, copy of employment authorization with photo, copy of driver's license, copy of birth certificate, copy of U.S. citizenship identification card, etc.

D. Retention: three years from date of hire or one year from date of separation of employment, whichever is

later (8 CFR 274A.2)

E. Confidentiality: Portions of this record may be confidential pursuant, but not limited to, 5 USC, Section 552a (i.e., social security number).

[12/30/94; 1/10/97; 1.15.6.191 NMAC - Rn, 1 NMAC 3.2.90.30.P191, 10/01/2000; A, 12/31/2012]

1.15.6.193 PERSONNEL RECORDS LEGAL AND PHYSICAL CUSTODY TRANSFER FORM:

A. Program: personnel files

B. Maintenance system: agency preference

C. Description: form documenting the legal and physical transfer of agency personnel files to the state personnel office. Form shows agency information (i.e., agency name, department of finance agency code, address, contact name, etc.), box number, folder number, employee name, employee identification number, employee social security number, records custodian signature, state personnel office director signature, etc.

D. Retention: 55 years from date of transfer

E. Confidentiality: Portions of this record may be confidential pursuant, but not limited to 5 USC, Section 552a (i.e., social security number).

[1.15.6.193 NMAC - N, 12/31/2012]

NEW MEXICO COMMISSION OF PUBLIC RECORDS

This is an amendment to 1.15.7 NMAC, GRRDS, General Personnel Records (Interpretive), amending Sections 3, 6, 7, 8, 120 and adding Section 9, effective 12/31/2012.

1.15.7.3 STATUTORY AUTHORITY: [Section 14-3-6 NMSA 1978. Administrator: duties. The

administrator shall establish a record management program for the application of efficient and economical management methods of the creation, utilization, maintenance, retention, preservation and disposal of official records. The administrator shall establish records disposal schedules for the orderly retirement of records and adopt regulations necessary for the carrying out of the public records act. Records disposal schedules shall be filed with the librarian of the supreme court library, and shall not become effective until thirty days after the filing date.] Section 14-3-4 NMSA 1978, it shall be the duty of the commission to adopt and publish rules to carry out the purposes of the Public Records Act. Section

14-3-6 NMSA 1978, the administrator shall establish a records management program for the application of efficient and economical management methods for the creation, utilization, maintenance, retention, preservation and disposal of public records. [8/8/96; 1.15.7.3 NMAC - Rn, 1 NMAC 3.2.90.3, 10/01/2000; A, 12/31/2012]

1.15.7.6 OBJECTIVE:

A. To establish a records management program for the application of and efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of official records (Section 14-3-6 NMSA 1978):

B. To establish records disposal schedules for the orderly retirement of records and adopt regulations necessary for the carrying out of the public records act (Section 14-3-6 NMSA 1978);] To establish a records retention schedule for the orderly management, retention, disposition and preservation of records necessary for carrying out the Public Records Act pursuant to Section 14-3-6 NMSA 1978. [8/8/96; 1.15.7.6 NMAC - Rn, 1 NMAC 3.2.90.6, 10/01/2000; A, 12/31/2012]

1.15.7.7 DEFINITIONS:

A. Administrator: "Administrator" means the state records administrator. (Section 14-3-2, NMSA 1978)

B. Agency: "Agency" means any state agency, department, bureau, board, commission, institution or other organization of the state government, the territorial government and the Spanish and Mexican governments in New Mexico. (Section 14-3-2, NMSA 1978)

C. Audit: A periodic examination of an organization to determine whether appropriate procedures and practices are followed.

D. Commission: "Commission" means the state commission of public records. (Section 14-3-2, NMSA 1978)

E. Pending litigation: A proceeding in a court of law whose activity is in progress but not yet completed.

F. Record destruction: The process of totally obliterating information on records by any method to make the information unreadable or unusable under any circumstances.

G. Records management: The systematic control of all records from creation or receipt through processing, distribution, maintenance and retrieval, to their ultimate disposition.

H. Records retention period: The period of time during which records must be maintained by an organization because they are needed for

operational, legal, fiscal, historical or other purposes:

I. Records retention schedule: A document prepared as part of a records retention program that lists the period of time for retaining records:

J. Public records: "Public records" means all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by any agency in pursuance of law or in connection with the transaction of public business and preserved, or appropriate for preservation, by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein. (Section 14-4-2, NMSA 1978)

K. Non-records: Library or museum material of the state library, state institutions and state museums, extra copies of documents reserved only for convenience of reference and stocks of publications and processed documents are non-records. (Section 14-3-2 C, NMSA 1978). The following specific types of materials are non-records: extra copies of correspondence; documents preserved only for convenience of reference; blank forms/ books which are outdated; materials neither made nor received in pursuance of statutory requirements nor in connection with the functional responsibility of the officer/ agency; preliminary and non-final drafts of letters, reports and memoranda which may contain or reflect the working or deliberative process by which a final decision or position of the agency, board, department or subdivision thereof is reached: shorthand notes, steno tapes, mechanical recordings which have been transcribed, except where noted on agency retention schedules; routing and other interdepartmental forms which are not significant evidence of the activity concerned and do not otherwise have value as described above; stocks of publications already sent to archives and processed documents preserved for supply purposes only; form and guide letters, sample letters; form paragraphs; subject files, including copies of correspondence, memoranda, publications, reports and other information received by agency and filed by subject (also referred to as reading files or information files). [See also Item No. 1.15.2.101 NMAC of Records Retention and Disposition Schedule for General Administrative Records (1.15.2 NMAC filed 10/01/2000):]

A. "Administrator" means the state records administrator (Section 14-3-2 NMSA 1978).

B. "Agency" means any institution or other organization of local government in New Mexico.

C. "Archives" means the permanent records of the state of New Mexico, which may include government and private collections of the Spanish, Mexican, territorial and statehood periods, assessed to have significant historical value to warrant their preservation by the state of New Mexico. The term also refers to the organizational unit of the SRCA storing these records.

D. "Audit" means a periodic examination of an organization to determine whether appropriate procedures and practices are followed.

E. "Commission" means the state commission of public records (Section 14-3-2 NMSA 1978).

F. "Disposition" means final action that puts into effect the results of an appraisal decision for a series of records (i.e., transfer to archives or destruction).

G. "Microphotography" means the transfer of images onto film and electronic imaging or other information storage techniques that meet the performance guidelines for legal acceptance of public records produced by information system technologies pursuant to regulations adopted by the commission.

H. "Non-record" means extra copies of documents kept solely for convenience of reference, stocks of publications, records not usually included within the scope of the official records of an agency or government entity and library material intended only for reference or exhibition. The following specific types of materials are non-records: materials neither made nor received in pursuance of statutory requirements nor in connection with the functional responsibility of the officer or agency; extra copies of correspondence; preliminary drafts; blank forms, transmittal letters or forms that do not add information; sample letters; and reading file or informational files.

I. "Pending litigation" means a proceeding in a court of law whose activity is in progress but not yet completed.

J. "Public record" means all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by any agency in pursuance of law or in connection with the transaction of public business and preserved, or appropriate for preservation, by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein (Section 14-4-2 NMSA 1978).

K. "Records custodian" means the statutory head of the agency using or maintaining the records or the custodian's

designee.

L. “Record destruction” means the process of totally obliterating information on records by any method to make the information unreadable or unusable under any circumstances.

M. “Records management” means the systematic control of all records from creation or receipt through processing, distribution, maintenance and retrieval, to their ultimate disposition.

N. “Records retention and disposition schedule” means rules adopted by the commission pursuant to Section 14-3-4 NMSA 1978 describing records of an agency, establishing a timetable for their life cycle and providing authorization for their disposition.

O. “Retention” means the period of time during which records must be maintained by an organization because they are needed for operational, legal, fiscal, historical or other purposes.

[8/8/96; 5/19/97; 1.15.2.7 NMAC - Rn, 1 NMAC 3.2.90.7, 10/01/2000; A, 12/31/2012]

1.15.2.8 [INSTRUCTIONS:

A. For records of an administrative nature, refer to the Records Retention and Disposition Schedule for General Administrative Records, 1.15.2. NMAC

B. For records of a financial nature, refer to the Records Retention and Disposition Schedule for General Financial Records, 1.15.4. NMAC

C. For records of a personnel nature, refer to the Records Retention and Disposition Schedule for General Personnel Records, 1.15.6. NMAC

D. For records of a medical nature, refer to the Records Retention and Disposition Schedule for General Medical Records, 1.15.8. NMAC

E. Retention periods shall be extended until six months after all current or pending litigation, current claims, audit exceptions or court orders involving a record have been resolved or concluded.

F. The descriptions of files are intended to be evocative, not complete. For example, there will always be some documents that are filed in a file that are not listed in the description, and similarly, not every file will contain an example of each document listed in the description.

G. Confidentiality is denoted as “-C-”. Not all materials in a file may be confidential. Refer to NOTE. Where portions of file may be confidential, refer to legal counsel for agency.

H. Access to confidential documents and/or confidential files shall be only by authorization of agency or attorney general and/or by court order, unless otherwise provided by statute. Release of confidential documents to law enforcement

and other government agencies, shall only be upon specific statutory authorization or court order.

I. All records, papers or documents may be photographed, microfilmed, microphotographed or reproduced on film. Such photographs, microfilms, photographic film or microphotographs shall be deemed to be an original record for all purposes, including introduction in evidence in all courts or administrative agencies. (Section 14-1-5; 14-1-6 NMSA 1978)

J. Data processing and other machine readable records. Many paper records are being eliminated when the information has been placed on magnetic tapes, disks, or other data processing media. In these cases, the information on the data processing medium should be retained for the length of time specified in records retention and disposition schedules for paper records and should be subject to the same confidentiality and access restrictions as paper records. When the destruction of a record is required, all versions of said record shall be electronically over-written on machine readable media on which it is stored (or media destroyed). (See also 1.13.70 NMAC: Performance Guidelines for the Legal Acceptance of Public Records Produced by Information Technology Systems).] **ABBREVIATIONS AND ACRONYMS:**

A. “CFR” stands for code of federal regulations.

B. “EDRRDS” stands for education records retention and disposition schedules.

C. “ERRDS” stands for executive records retention and disposition schedules.

D. “GRRDS” stands for general records retention and disposition schedules.

E. “JRRDS” stands for judicial records retention and disposition schedules.

F. “LRRDS” stands for legislative records retention and disposition schedules.

G. “LGRRDS” stands for local government records retention and disposition schedules.

H. “SRCA” stands for state records center and archives.

I. “SSN” stands for social security number.

J. “USC” stands for United States code.

[8/8/96; 5/19/97; 1.15.2.8 NMAC - Rn, 1 NMAC 3.2.90.8, 10/01/2000; A, 12/31/2012]

1.15.7.9 INSTRUCTIONS:

A. Records retention and disposition schedules identify the types of records maintained by local government and

educational institutions and specify a period of time which records must be retained. A retention period may be stated in terms of months or years and is sometimes expressed as contingent upon the occurrence of an event. There are several types of records retention and disposition schedules promulgated by the commission for local government and educational institutions. General schedules list records common to all local government and educational institutions and local government and educational schedules list records specific for that entity. Each record series will be represented in the format listed below.

(1) Program - describes the function of the records

(2) Maintenance system - describes how an agency files (organizes) records

(3) Description - describes the purpose and content of a record

(4) Retention - defines the length of time records must be kept before they are eligible for destruction or archival preservation.

B. For records of a general administrative nature, refer to the GRRDS, General Administrative (For Use By Local Government and Educational Institutions), 1.15.3 NMAC.

C. For records of a financial nature, refer to the GRRDS, General Financial (Interpretive), 1.15.5 NMAC.

D. For records of a personnel nature, refer to the GRRDS, General Personnel (Interpretive), 1.15.7 NMAC.

E. For records of a medical nature, refer to the GRRDS, General Medical, 1.15.8 NMAC.

F. Retention periods shall be extended until six months after all current or pending litigation; current claims, audit exceptions or court orders involving a record have been resolved or concluded.

G. The descriptions of files are intended to be evocative, not complete. For example, there will always be some documents that are included in a file that are not listed in the description, and similarly, not every file will contain an example of each document listed in the description.

H. Confidentiality is denoted for files likely to contain confidential materials or information; however files without a confidentiality note may contain confidential or privileged information. Failure to include a confidentiality note in the description of a record series does not waive confidentiality. Refer questions concerning the confidentiality of a file to legal counsel for the agency.

I. Access to confidential documents, information or files shall be only by authorization of the agency records custodian (Section 14-2-8 NMSA 1978), or

by the office of the attorney general or by court order, unless otherwise provided by law. Release of confidential documents to law enforcement and other government agencies, shall only be upon specific statutory authorization or court order.

J. Records may be photographed, microfilmed, digitized or converted to computer output microfilm provided a microphotography plan has been approved by the state records administrator (Section 14-3-17 NMSA 1978). Such photographs, microfilms, photographic film or microphotographs shall be deemed to be an original record for all purposes, including introduction as evidence in all courts or administrative agencies (Section 14-1-6 NMSA 1978).

K. Public records placed on magnetic tapes, disks or other data processing media shall be retained for the length of time specified in records retention and disposition schedules and are subject to the same confidentiality and access restrictions as paper records. See also 1.13.70 NMAC, Performance Guidelines for the Legal Acceptance of Public Records Produced by Information Technology Systems.

L. Email is a transmission medium for content that may or may not be a public record. Email messages that contain information sent or received by an agency in connection with the transaction of official state business or in pursuance of law are public records and are subject to retention requirements established in records retention and disposition schedules. Email messages are required to be categorized, filed and retained on the basis of content (1.13.4 NMAC, Records Management Requirements for Electronic Messaging). The content of email messages may vary considerably; therefore, each email shall be evaluated to determine if it meets the definition of a public record as defined in the Public Records Act. Non-records or transitory emails that do not provide evidence of official agency policies or business transactions may be deleted.

M. Non-scheduled public records created by an agency in pursuance of law or in connection with the transaction of public business shall have a retention period of permanent until such time the non-scheduled record has been scheduled and a retention period adhering to operational, legal, fiscal, historical or other purposes is established.
[1.15.7.9 NMAC – Rn & A; 1.15.7.8 NMAC, 12/31/2012]

1.15.7.120 [S T A T E GOVERNMENT INTERN POSITION REQUEST:

A. Program: personnel files
B. Maintenance system:[RESERVED]

C. Description: shows department identification, job description, preferred education/experience requirement, special requirements of job, department authorization and date

D. Retention:
(1) other department: three years after issued

(2) personnel department: three years after issued] EMPLOYEE ELIGIBILITY VERIFICATION, (FORM I-9) FILES:

A. Program: personnel files

B. Maintenance system: chronological by year, then numerical by identification number

C. Description: records documenting the employer's determination, verification and re-verification of eligibility that an employee is authorized to work in the United States. File may include form I-9 (i.e., employee name, address, date of birth, social security number, attestation of citizenship, etc.), copy of social security card, copy of employment authorization with photo, copy of driver's license, copy of birth certificate, copy of U.S. citizenship identification card, etc.

D. Retention: three years from date of hire or one year from date of separation of employment, whichever is later (8 CFR 274A.2)

E. Confidentiality: Portions of this record may be confidential pursuant, but not limited to, 5 USC, Section 552a (i.e., social security number). [7/30/97; 1.15.7.120 NMAC - Rn, 1 NMAC 3.2.90.31.P120, 10/01/2000; A, 12/31/2012]

NEW MEXICO COMMISSION OF PUBLIC RECORDS

November 26, 2012

Jackie Garcia, Agency Analysis Bureau Chief
NM Commission of Public Records
1205 Camino Carlos Rey
Santa Fe, New Mexico 87507

Ms. Garcia:

You recently requested to publish a synopsis in lieu of publishing the full content of the following rules:

- * 1.18.305 NMAC ERRDS, Office of the Attorney General,
- * 1.18.420 NMAC ERRDS, Regulation and Licensing,
- * 1.18.521 NMAC ERRDS, Energy Mineral and Natural Resources; and
- * 1.18.705 NMAC ERRDS, Office

of Military Affairs.

A review of the rules shows that their impact is limited to the individual agency to which it pertains, and it is "unduly cumbersome, expensive or otherwise inexpedient" to publish. Therefore, your request to publish a synopsis for each of the rules listed is approved.

Sincerely,

John Hyrum Martinez
State Records Administrator

JHM/JG

NEW MEXICO COMMISSION OF PUBLIC RECORDS

SYNOPSIS

1.18.305 NMAC ERRDS, Office of the Attorney General

1. Subject matter: 1.18.305 NMAC, Executive Records Retention and Disposition Schedule for the Office of the Attorney General. This is an amendment to 1.18.305 NMAC, ERRDS, Office of the Attorney General 3, 7, 8, 9 and 36. The records retention and disposition schedule is a timetable for the management of specific records series of the Office of the Attorney General. It describes each record series by record name, record function, record content, record filing system, record confidentiality, and record retention. The record retention is the life cycle of each records series. It indicates the retention or length of time a record series must be maintained by the department as well as its final disposition. The retention and disposition requirements in this rule are based on the legal and use requirements of the records as well as on their administrative, fiscal and archival value. This rule was developed by the Records Management Division of the State Records Center and Archives (New Mexico Commission of Public Records) and approved by the State Records Administrator, the New Mexico Commission of Public Records and the Office of the Attorney General.

2. Persons affected: The persons affected are the record producing and record keeping personnel of the Office of the Attorney General. Persons and entities normally subject to the rules and regulations of the Office of the Attorney General may also be directly or indirectly affected by this rule.

3. Interests of persons affected: Interests include the records produced and maintained by the Office of the Attorney General.

4. Geographical applicability: Geographical applicability is limited to areas within the State of New Mexico covered by the Office of the Attorney General. Any person or entity outside the covered geographical area that conducts business with or through the Office of the Attorney General may also be affected by this rule.

5. Commercially published materials incorporated: The New Mexico Statutes Annotated 1978 is used as reference in the development of this rule. However, they do not constitute a substantial portion of this rule.

6. Telephone number and address of issuing agency: New Mexico State Records Center and Archives, 1205 Camino Carlos Rey, Santa Fe, New Mexico 87505. Telephone number: (505) 476-7900.

7. Effective date of this rule: December 31, 2012.

Certification

As counsel for the State Records Center and Archives, I certify that this synopsis provides adequate notice of the content of 1.18.305 NMAC ERRDS, Office of the Attorney General.

 SRCA Legal Representative

 Date

**NEW MEXICO
 COMMISSION OF PUBLIC
 RECORDS**

SYNOPSIS

1.18.420 NMAC ERRDS, Regulation and Licensing Department

1. Subject matter: 1.18.420 NMAC, Executive Records Retention and Disposition Schedule for the Regulation and Licensing Department. This is an amendment to 1.18.420 NMAC, ERRDS, Regulation and Licensing Department amending Sections 9, 771, 778 and 779, repealing sections 773 thru 777 and adding Sections 1215 thru 1218. The records retention and disposition schedule is a timetable for the management of specific records series of the Regulation and Licensing Department. It describes each record series by record name, record function, record content, record filing system, record confidentiality, and record retention. The record retention is the life cycle of each records series. It indicates the retention or length of time a record series must be maintained by the department as well as its final disposition. The retention

and disposition requirements in this rule are based on the legal and use requirements of the records as well as on their administrative, fiscal and archival value. This rule was developed by the Records Management Division of the State Records Center and Archives (New Mexico Commission of Public Records) and approved by the State Records Administrator, the New Mexico Commission of Public Records and the Regulation and Licensing Department.

2. Persons affected: The persons affected are the record producing and record keeping personnel of the Regulation and Licensing Department. Persons and entities normally subject to the rules and regulations of the Regulation and Licensing Department may also be directly or indirectly affected by this rule.

3. Interests of persons affected: Interests include the records produced and maintained by the Regulation and Licensing Department.

4. Geographical applicability: Geographical applicability is limited to areas within the State of New Mexico covered by the Regulation and Licensing Department. Any person or entity outside the covered geographical area that conducts business with or through the Regulation and Licensing Department may also be affected by this rule.

5. Commercially published materials incorporated: The New Mexico Statutes Annotated 1978 is used as reference in the development of this rule. However, they do not constitute a substantial portion of this rule.

6. Telephone number and address of issuing agency: New Mexico State Records Center and Archives, 1205 Camino Carlos Rey, Santa Fe, New Mexico 87505. Telephone number: (505) 476-7900.

7. Effective date of this rule: December 31, 2012.

Certification

As counsel for the State Records Center and Archives, I certify that this synopsis provides adequate notice of the content of 1.18.420 NMAC ERRDS, Regulation and Licensing Department.

 SRCA Legal Representative

 Date

**NEW MEXICO
 COMMISSION OF PUBLIC
 RECORDS**

SYNOPSIS

1.18.521 NMAC ERRDS, Energy, Minerals and Natural Resources Department

1. Subject matter: 1.18.521 NMAC, Executive Records Retention and Disposition Schedule for Energy, Minerals and Natural Resources Department. This is an amendment to 1.18.521 NMAC, ERRDS, Energy, Minerals and Natural Resources Department amending Sections 8 and 9 and adding Sections 35 and 41. The records retention and disposition schedule is a timetable for the management of specific records series of the Energy, Minerals and Natural Resources Department. It describes each record series by record name, record function, record content, record filing system, record confidentiality, and record retention. The record retention is the life cycle of each records series. It indicates the retention or length of time a record series must be maintained by the department as well as its final disposition. The retention and disposition requirements in this rule are based on the legal and use requirements of the records as well as on their administrative, fiscal and archival value. This rule was developed by the Records Management Division of the State Records Center and Archives (New Mexico Commission of Public Records) and approved by the State Records Administrator, the New Mexico Commission of Public Records and the Energy, Minerals and Natural Resources Department.

2. Persons affected: The persons affected are the record producing and record keeping personnel of the Energy, Minerals and Natural Resources Department. Persons and entities normally subject to the rules and regulations of the Energy, Minerals and Natural Resources Department may also be directly or indirectly affected by this rule.

3. Interests of persons affected: Interests include the records produced and maintained by the Energy, Minerals and Natural Resources Department.

4. Geographical applicability: Geographical applicability is limited to areas within the State of New Mexico covered by the Energy, Minerals and Natural Resources Department. Any person or entity outside the covered geographical area that conducts business with or through the Energy, Minerals and Natural Resources Department may also be affected by this rule.

5. Commercially published materials incorporated: The New Mexico Statutes Annotated 1978 is used as reference in the development of this rule. However, they do not constitute a substantial portion of this rule.

6. Telephone number and address of issuing agency: New Mexico State Records Center and Archives, 1205 Camino Carlos Rey, Santa Fe, New Mexico 87505. Telephone number: (505) 476-7900.

7. Effective date of this rule: December 31, 2012.

Certification

As counsel for the State Records Center and Archives, I certify that this synopsis provides adequate notice of the content of 1.18.521 NMAC ERRDS, Energy, Minerals and Natural Resources Department.

SRCA Legal Representative

Date

**NEW MEXICO
COMMISSION OF PUBLIC
RECORDS**

**SYNOPSIS
1.18.705 NMAC ERRDS, Office of
Military Affairs**

1. Subject matter: 1.18.705 NMAC, Executive Records Retention and Disposition Schedule for the Office of Military Affairs. This is an amendment to 1.18.705 NMAC, ERRDS, Office of Military Affairs 3, 6, 7, 9 and 202 and adding Section 8. The records retention and disposition schedule is a timetable for the management of specific records series of the Office of Military Affairs. It describes each record series by record name, record function, record content, record filing system, record confidentiality, and record retention. The record retention is the life cycle of each records series. It indicates the retention or length of time a record series must be maintained by the department as well as its final disposition. The retention and disposition requirements in this rule are based on the legal and use requirements of the records as well as on their administrative, fiscal and archival value. This rule was developed by the Records Management Division of the State Records Center and Archives (New Mexico Commission of Public Records) and approved by the State Records Administrator, the New Mexico Commission of Public Records and the Office of Military Affairs.

2. Persons affected: The persons affected are the record producing and record keeping personnel of the Office of Military Affairs. Persons and entities normally subject to the rules and regulations of the Office of Military Affairs may also be directly or indirectly affected by this rule.

3. Interests of persons affected: Interests include the records produced and maintained by the Office of Military Affairs.

4. Geographical applicability: Geographical applicability is limited to areas within the State of New Mexico covered by the Office of Military Affairs. Any person or entity outside the covered geographical area that conducts business with or through the Office of Military Affairs may also be affected by this rule.

5. Commercially published materials incorporated: The New Mexico Statutes Annotated 1978 is used as reference in the development of this rule. However, they do not constitute a substantial portion of this rule.

6. Telephone number and address of issuing agency: New Mexico State Records Center and Archives, 1205 Camino Carlos Rey, Santa Fe, New Mexico 87505. Telephone number: (505) 476-7900.

7. Effective date of this rule: December 31, 2012.

Certification

As counsel for the State Records Center and Archives, I certify that this synopsis provides adequate notice of the content of 1.18.705 NMAC ERRDS, Office of Military Affairs.

SRCA Legal Representative

Date

**NEW MEXICO
PUBLIC REGULATION
COMMISSION**

This is an amendment to 17.11.18 NMAC Section 13, effective December 14, 2012.

**17.11.18.13 WHITE - P A G E S
TELEPHONE DIRECTORY LISTINGS:**

A. Interconnecting LECs shall ensure that all end users in their service territories have access to white-pages telephone directories and directory listing information from directory assistance operators for all listed end users in their service territories. An ILEC or a CLEC satisfies the requirement to provide "access

to white-pages telephone directories" if it, or its directory publisher, provides reasonable notice to end users of the option to receive such directories upon request, free of charge, and within a reasonable time of the request.

B. Each ILEC shall be designated the initial white-pages telephone directory provider ("white-pages provider") in its service territory and shall assume the responsibilities set forth in this section. With commission approval, a different LEC may be designated as the white-pages provider for the ILEC's service territory and may assume the responsibilities set forth in this section.

C. The white-pages provider shall cause to be published annually, in a white-pages telephone directory, the name, address, and telephone number for all listed end users within the territory served by the ILEC regardless of whether the end user subscribes to the local exchange service of the ILEC or another LEC. The white-pages provider shall publish all listings in alphabetical sequence by end user name with no distinctions made in the style, size, or format of listings supplied by CLECs and the ILEC.

(1) The white-pages provider shall not include in the white-pages directories or directory assistance databases the telephone numbers of end users who elect not to be published.

(2) The white-pages provider shall not include in the white-pages directories end users who elect not to be directory listed but shall include them in the directory assistance databases.

D. The white-pages provider shall include the same directory listings information in its directory assistance database, and shall provide all interconnecting LECs with access to that database for the purpose of providing directory assistance. The white-pages provider shall update its directory assistance database to include the listing for a new customer of a CLEC within seventy-two (72) hours of receipt of the listing from the CLEC.

E. The white-pages provider shall cause each CLEC to receive ~~[one white pages telephone directory for each access line the CLEC serves in the ILEC's service territory. Each CLEC shall, in turn, cause one white pages telephone directory per access line purchased to be delivered to its end users]~~ sufficient copies of the white-pages telephone directory to enable each CLEC to satisfy its obligations under Subsection A.

F. The white-pages provider shall provide space in the customer guide pages of the white-pages directory to a CLEC for the purpose of notifying customers how to reach the CLEC to request service, contact repair service, dial directory

assistance, reach an account representative, request buried cable local service and contact the special needs center for customers with disabilities.

G. The white-pages provider shall provide premium listings in its white-pages telephone directory to the end users of CLECs on the same terms and conditions it offers premium listings to its own customers.

H. The white-pages provider shall provide CLECs a minimum of ninety (90) days' notice of deadlines associated with publication of the white-pages telephone directory. Each CLEC shall be responsible for ensuring it provides the white-pages provider with its directory listings information in a timely and accurate fashion. CLECs shall bear all responsibility for errors or omissions in the directory listings information provided to the white-pages provider.

I. The white-pages provider shall provide accurate and current directory listings information and updates to non-affiliated publishers of yellow-pages advertising directories in a non-discriminatory manner.

[17.11.18.13 NMAC - N, 1-1-01; A, 08-15-06; A, 12-14-12]

NEW MEXICO RACING COMMISSION

Explanatory paragraph: This is an amendment to 15.2.6 NMAC, Section 9, effective 12/14/2012. In 15.2.6 NMAC, Section 9, Subsection A, Subsections C through K, Subsection M and O were not published as there were no changes.

15.2.6.9 MEDICATIONS AND PROHIBITED SUBSTANCES:

The "uniform classification guidelines for foreign substances and recommended penalties and model rule", revised [December 2011, version 3.00] October 2012, version 4.1 as issued by the association of racing commissioners international, is incorporated by reference. Upon a finding of a violation of any medication and prohibited substances rule, which includes the possession of contraband as listed in [Subsection I of] 15.2.6.9 NMAC, the stewards shall consider the classification level of the violation as listed at the time of the violation by the uniform classification guidelines of foreign substances as promulgated by the association of racing commissioners international and impose penalties and disciplinary measures as determined by the New Mexico racing commission.

B. PENALTIES:

(1) In issuing penalties against individuals found guilty of medication and drug violations, a regulatory distinction shall be made between the detection of therapeutic medications used routinely to treat racehorses and those drugs that have no reason to be found at any concentration in the test sample on race day.

(2) The stewards or the commission will use the association of racing commissioner's international recommended penalty as a starting place in the penalty stage of the deliberations for a rule violation for any drug listed in the association of racing commissioners international uniform classification guidelines for foreign substances.

(3) If a licensed veterinarian is administering or prescribing a drug not listed in the association of racing commissioners international uniform classification guidelines for foreign substances, the identity of the drug shall be forwarded to the New Mexico racing commission designee to be forwarded to the racing medication and testing consortium for classification.

(4) Any drug or metabolite thereof found to be presenting a pre- or post-race sample which is not classified in the association of racing commissioners international uniform classification guidelines for foreign substances shall be assumed to be an association of racing commissioners international class 1 drug and the trainer and owner shall be subject to those penalties as set forth in penalty category A unless satisfactorily demonstrated otherwise by the racing medication and testing consortium, with a penalty category assigned.

(5) The penalty categories and their related schedules, if applicable, shall be on the following criteria:

(a) whether the drug is approved by the U.S. food and drug administration for use in the horse;

(b) whether the drug is approved by the U.S. food and drug administration for use in any species;

(c) whether the drug as approved has any legitimate therapeutic application in the equine athlete;

(d) whether the drug was identified as "necessary" by the racing medication and testing consortium veterinary advisory committee;

(e) whether legitimate, recognized therapeutic alternate exist, and;

(f) the association of racing commissioners international classification of the drug.

(6) The penalty categories A, B, and C and their related schedules for trainers and owners are shown in [Subsection C of 15.2.6.8] 15.2.6.9 NMAC.

(7) The recommended penalty for a violation involving a drug that carries a

category "D" penalty is a written warning to the trainer and owner. Multiple violations may result in fines or suspensions.

(8) Any licensee of the commission, including veterinarians, found responsible for the improper or intentional administration of any drug resulting in a positive test may, after proper notice and hearing, be subject to the same penalties set forth for the licensed trainer.

(9) The licensed owner, veterinarian or any other licensed party involved in a positive laboratory finding shall be notified in writing of the hearing and any resulting action. In addition their presence may be required at any and all hearings relative to the case.

(10) Any veterinarian found to be involved in the administration of any drug carrying the penalty category of "A" shall be referred to the state licensing board of veterinary medicine for consideration of further disciplinary action or license revocation. This is in addition to any penalties issued by the stewards or the commission.

(11) Any person who the stewards or the commission believe may have committed acts in violation of criminal statutes may be referred to the appropriate law enforcement agency. Administrative action taken by the stewards or the commission does not prohibit a prosecution for a criminal act, nor does a potential criminal prosecution stall administrative action by the stewards or the commission.

(12) Procedures shall be established to ensure that a licensed trainer is not able to benefit financially during the period for which the individual has been suspended. This includes, but is not limited to, ensuring that horses are not transferred to a licensed person within the first degree of affinity (marriage relationship) or first degree of consanguinity (blood relationship):

(a) first degree of affinity shall mean license holder's spouse or spouse's mother, father brother, sister, son or daughter;

(b) first degree of consanguinity shall mean license holder's mother, father, brother, sister, son or daughter.

L. OUT OF COMPETITION TESTING:

(1) A horse may be subject to out of competition testing without advance notice if the horse is:

(a) on the grounds of a racetrack or training center under the jurisdiction of the commission;

(b) under the care or control of a trainer or owner licensed by the commission; or

(c) any horse whose papers are filed in the racing office; or

(d) has been nominated to a stakes race.

(2) This rule applies to prohibited substances, practices and procedures are as follows;

(a) class 1, class II and class III drugs as listed with the New Mexico racing commission;

(b) blood doping agents including, but not limited to, erythropoietin (EP), darbepoetin, oxyglobin, hempure, aranasep or any substance that abnormally enhances the oxygenation of body tissues; and

(c) gene doping agents or the non-therapeutic use of genes, genetic elements, or cells that have the capacity to enhance athletic performance or produce analgesia.

(3) The permitted quantitative test level of clenbuterol for out of competition horses shall be administered in such dosage amount that the official test sample shall not exceed 300 picograms per milliliter of serum or plasma.

(4) Horses to be tested may be selected at random, with probable cause or as determined by the commission or an agent of the commission.

(5) The commission veterinarian, or any licensed veterinarian or licensed veterinary technician authorized by the commission, may at any time take a urine, blood or hair sample from a horse for this purpose.

(6) Split samples shall be collected in accordance with [~~Paragraphs (3) and (4) of~~] Subsection B of 15.2.6.10 NMAC and shall be secured and made available for further testing in accordance with [~~Subsection C~~] Subsection D of 15.2.6.10 NMAC.

(7) All horses selected for testing must report to the test barn within 24 hours, unless the trainer or owner provides verification of an extenuating circumstance that makes it impossible.

(8) Any licensee who does not comply with the rule or the commission veterinarian for a sample may be subject to disciplinary action.

(9) Cooperation with the commission veterinarian, or any licensed veterinarian or licensed veterinary technician authorized by the commission, includes:

(a) assisting in the immediate location and identification of the horse selected for out of competition testing; and

(b) assisting the veterinarian in properly procuring the samples.

(10) Out of competition samples will be sent to the official laboratory of the commission, or another laboratory as designated by the commission, with reports made in accordance with the provisions of the medication rules and the penalty provisions therefore.

N. CONTRABAND:

(1) No person on association grounds where horses are lodged or kept, excluding licensed veterinarians, shall have in that person's care, custody or control, a drug, medication, chemical, foreign substance or other substance that is prohibited in a horse on a race day unless the product is labeled in accordance with [~~Subsection E~~] Subsection J of 15.2.6.9 NMAC. This restriction includes, but is not limited to, locations on the association grounds where that person occupies, in that person's personal property, effects or vehicle.

(2) The New Mexico racing commission may confiscate any contraband named in [~~Paragraph (1) of Subsection H~~] Subsection J of 15.2.6.9 NMAC and any drug or illegal substance that is found on association premises which a licensed trainer occupies or has the right to occupy, or in that trainer's personal property, effects or vehicle in that trainer's care, custody or control.

(3) Upon finding a violation of this subsection the stewards shall consider the classification level of the violation as it is listed in the uniform classification guidelines and recommended penalties of foreign substances as promulgated by the association of racing commissioners international and impose penalties and disciplinary measures adopted by the New Mexico racing commission.

(4) If the contraband is required to be tested by the official laboratory, payment of all costs for testing shall be borne by the licensee upon final decision by the stewards that the substance is prohibited pursuant to these rules.

P. SUSPENSION OF AUTHORIZED MEDICATION:

(1) After a public meeting that has been noticed in accordance with the Open Meetings Act, Sections 10-15-1 through 10-15-4 NMSA, 1978, the commission may, for any cause, temporarily suspend the authorized administration to a horse entered to race of any drug, substance or medication that is otherwise permitted under [~~Subsection C of 15.2.6.9 NMAC~~] the commission rules.

(2) The temporary suspension of the authorized administration of a drug, substance or medication may be for a race, breed, or race meeting, provided all horses in the same race compete under the same conditions.

(3) The commission shall notify in writing the racing association, the trainer's organization, and licensed veterinarians of any temporary suspension of authorization to administer a drug, substance or medication to a horse entered to race. The written notification shall at minimum:

(a) state the authorized medication whose use is temporarily suspended,

(b) the period of time for which the use of the authorized medication is temporarily suspended, and

(c) whether the temporary suspension is for a specific breed or a race meeting.

(4) A suspension of authorization to administer a drug, substance or medication to a horse entered to race shall not exceed 12 months.

[15.2.6.9 NMAC - Rp, 15 NMAC 2.6.9, 04/13/2001; A, 08/30/2001; A, 07/15/2002; A, 08/15/2002; A, 09/29/2006; A, 10/31/2006; A, 08/30/2007; A, 01/31/2008; A, 03/01/2009; A, 06/15/2009; A, 06/30/2009; A, 09/15/2009; A, 12/15/2009; A, 03/16/2010; A, 07/05/2010; A, 09/01/2010; A, 12/01/2010; A, 11/01/2011; A, 02/15/2012; A, 04/30/2012; A, 07/31/2012; A, 12/14/2012]

NEW MEXICO RACING COMMISSION

This is an amendment to 16.47.1 NMAC Section 12, effective 12/14/2012.

16.47.1.12 JOCKEYS

A. ELIGIBILITY:

(1) A jockey must pass a physical examination given within the previous twelve months by a licensed physician affirming fitness to participate as a jockey. The stewards may require that any jockey be reexamined and may refuse to allow any jockey to ride pending completion of such examination.

(2) An applicant must demonstrate by prior licensing, and the demonstration of riding ability which may include participation in up to five races with the stewards' prior approval and the consideration of the recommendations from the starter, the head outrider, and the designated representatives of the jockeys and the horsemen at the track. The demonstration of riding competence and ability is defined as a minimum of:

(a) breaking a horse in company from the starting gate;

(b) working a horse in company from the starting gate;

(c) switching the whip from one hand to the other while maintaining control of the horse in a stretch drive; and

(d) causing the horse to switch leads coming out of a turn.

(3) The stewards may authorize a temporary license to ascertain the applicant's riding competence and ability.

(4) A jockey shall not be an owner or trainer of any horse competing at the race meeting where the jockey is riding.

B. APPRENTICE JOCKEYS:

(1) An apprentice jockey must

be 16 years of age and if less than the age of 18, a parent or guardian must sign the license application assuming full financial responsibility for the applicant.

(2) An applicant for an apprentice jockey license shall provide a certified copy of the applicant's birth certificate or other satisfactory evidence of date of birth.

(3) An apprentice jockey license does not apply to quarter horse racing.

(4) An applicant with an approved apprentice certificate may be licensed as an apprentice jockey.

(5) An apprentice certificate may be obtained from the stewards on a form provided by the commission.

(6) An apprentice jockey shall ride with a five pound weight allowance beginning with his/her first mount and for one full year from the date of his/her fifth winning mount. If after riding one year from the date of his/her fifth winning mount, the apprentice jockey has failed to ride a total of forty winners, he/she shall continue to ride with a five pound weight allowance for one more year from the date of his/her fifth winning mount or until he/she has ridden forty winners, whichever comes first. In no event may a weight allowance be claimed for more than two years from the date of the fifth winning mount unless an apprentice jockey is unable to ride for a period of seven consecutive days or more after the date of his/her fifth winning mount because of service in national armed forces, enrollment in high school or an institution of secondary education, or because of physical disablement, or restriction on racing or other valid reasons, the commission may extend the time during which such apprentice weight allowance may be claimed for a period not to exceed the period such apprentice jockey was unable to ride. The stewards or commission may issue apprentice extensions with proper documentation.

(7) An apprentice jockey must meet the conditions set forth in Subsection A of 16.47.1.12 NMAC.

C. FOREIGN JOCKEYS: Whenever a jockey from a foreign country rides in this jurisdiction, the jockey must declare that he/she is a holder of a valid license in his/her country and currently not under suspension. To facilitate this process, the jockey shall present a declaration sheet in a language recognized in this jurisdiction to the commission. The jockey must complete a license application and be fingerprinted to be maintained in the files of the commission.

D. JOCKEYS RESPONSIBILITY:

(1) A jockey shall not have a valet-attendant except one provided and compensated by the association.

(2) No person other than the licensed contract employer, or a licensed

jockey agent, may make riding engagements for a rider, except that a jockey not represented by a jockey agent may make his own riding engagements.

(3) A jockey shall have no more than one jockey agent.

(4) No revocation of a jockey agent's authority is effective until the jockey notifies the stewards in writing of the revocation of the jockey agent's authority.

E. COLORS, NUMBERS, ADVERTISING:

(1) A jockey shall be properly attired for riding in a race, wearing the colors of the owner of the horse he or she is riding, and exhibiting a number on the saddlecloth that corresponds to the number of the horse on the program.

(2) Advertising or promotional material may be worn by a jockey upon approval from the board of stewards and racetrack management. Approval is discretionary and may be denied for just cause.

(3) Jockeys shall submit a commission approved form, including a description of the advertisement or promotional material to be worn with the name of the brands and sponsors.

(4) The form must be submitted to the board of stewards at the time of entry before the applicable race.

(5) Advertising, including logos, labels or product endorsements shall be permitted on jockey attire from the point of weighing out for a race to weighing in after its conclusion.

(6) Advertisement on jockey clothing is limited to.

(a) A maximum of 32 square inches on each thigh of the pants on the outer sides between the hip and knee and 10 square inches on the rear at the base of the spine.

(b) A maximum of 24 square inches on boots and leggings on the outside of each, nearest the top of the boot.

(c) A maximum of six square inches on the front center in the neck area.

(7) A sponsorship shall not be permitted by a person or entity whose message, business reputation, or ongoing business activity may be considered as obscene or indecent to a reasonable person.

(8) Advertising or promotional material displayed on jockey clothing shall not compete with, conflict with, or infringe upon sponsorship agreements applicable to the racing association race or to the race meet in progress.

(9) A jockey may wear the following advertising or promotional materials within the parameters outlined in the size restrictions above without obtaining prior approval.

(a) Materials advertising or promotion the *jockey's guild* in the form of

the picture of a jockey's boot or the picture of a wheelchair, with no additional picture of logo.

(b) The *permanently disabled jockey's fund* (PDJF) in the form of the pictures of its logo, with no additional picture or log.

[E:] E. JOCKEY BETTING: No jockey shall be allowed to bet before or during any live racing program.

[16.47.1.12 NMAC - Rp, 16 NMAC 47.1.12, 03/15/2001; A, 08/31/2004; A, 10/31/2006; A, 06/15/2009; A, 12/14/2012]

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

TITLE 3: TAXATION
CHAPTER 2: GROSS RECEIPTS TAXES

PART 249: DEDUCTION - GROSS RECEIPTS TAX - LEASING OF CONSTRUCTION EQUIPMENT

3.2.249.1 ISSUING AGENCY: Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe NM 87504-0630.

[3.2.249.1 NMAC - N, 12/14/12]

3.2.249.2 SCOPE: This part applies to each person engaging in business in New Mexico.

[3.2.249.2 NMAC - N, 12/14/12]

3.2.249.3 STATUTORY AUTHORITY: Section 9-11-6.2 NMSA 1978.

[3.2.249.3 NMAC - N, 12/14/12]

3.2.249.4 DURATION: Permanent.

[3.2.249.4 NMAC - N, 12/14/12]

3.2.249.5 EFFECTIVE DATE: December 14, 2012, unless a later date is cited at the end of a section, in which case the later date is the effective date.

[3.2.249.5 NMAC - N, 12/14/12]

3.2.249.6 OBJECTIVE: The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Gross Receipts and Compensating Tax Act.

[3.2.249.6 NMAC - N, 12/14/12]

3.2.249.7 DEFINITIONS: [Reserved]

3.2.249.8 LEASE OF CONSTRUCTION EQUIPMENT - GENERAL:

A. Receipts from leasing

construction equipment, with or without operators, on or after January 1, 2013, to a person engaged in the construction business may be deducted from the lessor's gross receipts pursuant to Section 7-9-52.1 NMSA 1978.

B. Example 1: A is regularly engaged in the lease and rental of construction equipment. A enters into an agreement to lease a crane with an operator to a contractor engaged in the construction business to be used on a construction project. The contractor will direct all of the activity of the crane and operator on the construction site. A's receipts from the lease of the crane with an operator are receipts from leasing construction equipment pursuant to Section 7-9-52.1 NMSA 1978 and are deductible.

C. Example 2: X is a heating and air conditioning subcontractor on a construction project. X owns a crane which X regularly uses to lift equipment onto the roof of buildings on which X works. X's receipts for construction services includes payment for using the crane. X may deduct those receipts under Section 7-9-52 NMSA 1978. If, however, X agrees to lease the crane with an operator to the prime contractor for work unrelated to the subcontract, which work is performed at the direction of the prime contractor, X would not be able to deduct the receipts for the leasing of the crane under Section 7-9-52 NMSA 1978, but could deduct the receipts under Section 7-9-52.1 NMSA 1978 as receipts from the lease of construction equipment.

D. Example 3: C is engaged in the construction business. C hires S, a scaffolding-rental company, to deliver scaffolding to a specific construction project, erect the scaffolding, inspect the equipment daily for continued safety compliance, disassemble the scaffolding and transport it away from the construction site upon completion of the project. C may execute a nontaxable transaction certificate to S for the lease of the scaffolding pursuant to Section 7-9-52.1 NMSA 1978.

E. This version of 3.2.249.8 NMAC applies to transactions occurring on or after January 1, 2013.
[3.2.249.8 NMAC - N, 12/14/12]

3.2.249.9 LEASE OF CONSTRUCTION EQUIPMENT - OIL FIELD:

A. Receipts from the lease of construction equipment on or after January 1, 2013, may be deducted from gross receipts tax if the leased items are used on a construction project and the requirements of Section 7-9-52.1 NMSA 1978 are met. The following are some examples of items that if leased to a person engaged in the construction business would be deductible under Section 7-9-52.1 NMSA 1978:

(1) drilling equipment, including

derricks, blocks, substructures, draw-works, flooring, rotary tables, engines, mud pumps, pipe racks, tanks, doghouses, hoses, water and fuel lines, water well equipment, blowout preventers and other drilling equipment and tools;

(2) drill stems, drill collars, subs and kelly; and

(3) fishing tools.

B. Receipts from the lease of the above items that remain on the oil field after the completion of the construction project, once the well is operational, do not qualify for the deduction under Section 7-9-52.1 NMSA 1978.

C. This version of 3.2.249.9 NMAC applies to transactions occurring on or after January 1, 2013.

[3.2.249.9 NMAC - N, 12/14/12]

History of 3.2.249 NMAC: [Reserved]

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.1 NMAC, Sections 7, 11, 16, 17 and 18 effective 12/14/2012.

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

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

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

C. **Detriment:** A "detriment" is a forbearance of either party of a right which the party is entitled to exercise or any consideration flowing from either party, not limited to payment of money or transfer of property.

D. **Financial corporations:**

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

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

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

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

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

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

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

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

E. **Franchise:**

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

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

F. **Computer-related terms:**

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

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

includes the modification of existing computer programming.

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

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

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

H. Person engaged in the construction business: A "person engaged in the construction business" is a person who performs construction services as defined in Section 7-9-3.4 NMSA 1978.

[12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 12/29/89, 11/26/90, 11/15/96, 4/30/97, 1/15/98; 3.2.1.7 NMAC - Rn & A, 3 NMAC 2.1.7, 4/30/01; A, 12/30/03; A, 12/14/12]

3.2.1.11 CONSTRUCTION

A. Construction service as distinguished from other services.

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

(2) "Construction" does not include services that do not physically change the land or physically create, change or demolish a building, structure or other facility as part of a construction project, even though they may be related to a construction project. The fact that a service may be a necessary prerequisite or ancillary to construction or a construction project does not in itself make the service a construction service. Excluded from the meaning of "construction" are activities such as, but not limited to: hauling to or from the construction site [except as otherwise provided in Subsection C of Section 3.2.52.10 NMAC], maintenance work, landscape upkeep, the repair of equipment or appliances, laboratory work or accounting, architectural, engineering, surveying, traffic safety or legal services. Some of these activities may qualify as construction-related services; see Section 7-9-52 NMSA 1978.

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

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

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

~~[D.] C. Construction does not include.~~

~~(1) [Pursuant to Section 7-9-3.4 NMSA 1978] The term "construction" does not include the installation of carpets or the installation of draperies, but see 3.2.209.25 NMAC.~~

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

~~(3) Even though receipts from selling carpet installation services or drapery installation services to a person engaged in the construction business are receipts from the sale of a service for resale, a person engaged in the construction business may deliver a Type 7 nontaxable transaction certificate for the purchase of carpet installation services or drapery installation services.] The term "construction", as defined in Section 7-9-3.4 NMSA 1978, does not include leasing or renting tangible personal property, such as construction equipment, with or without an operator but see Section 7-9-52.1 NMSA 1978 for transactions on or after January 1, 2013.~~

~~[E:] D. Oil and gas industry construction.~~

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

~~(a) building and altering of gas compression plant facilities and pump stations, including: clearing of property sites; excavating for foundations; building and setting foundation forms; mixing, pouring, and finishing concrete foundations for buildings and plant equipment on foundations; fabricating and installing piping; installing electrical equipment, insulation, and instruments; erecting buildings; placing sidewalks, drives, parking areas; installing storage tanks; and dismantling equipment and reinstalling elsewhere;~~

~~(b) building of or extension of gas-gathering pipelines, including: connecting gathering lines to lease separators, fabricating and installing meter runs, digging trenches, beveling pipe, welding pipe, wrapping pipe, backfilling trenches, testing pipelines,~~

~~fabricating and installing pipeline drips and installing conduit for pipelines crossing roads or railroads;~~

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) rental of equipment such as: power tongs, blowout preventors, tanks, pipe racks, core barrels, integral parts of a drilling rig or integral parts of a circulation unit, for transactions on or after January 1, 2013, see Section 7-9-52.1 NMSA 1978;

(f) measuring, "logging" and surveying services in connection with the drilling of an oil or gas well are construction-related services as of January 1, 2013, see Section 7-9-52 NMSA 1978. "Logging" as that term is used in this subsection is a method of testing or measuring an oil or gas well by recording various aspects of the geological formations penetrated by the well.

[F-] E. Construction includes prefabricated buildings; prefabricated versus modular buildings.

(1) The sale of prefabricated buildings, whether constructed from metal or other material, is the sale of construction. A prefabricated building is a building designed to be permanently affixed to land and manufactured (usually off-site) in components or sub-assemblies which are then assembled at the building site. Prefabricated buildings are not designed to be portable [or-relocatable] nor are they capable of being relocated.

(2) A portable building or a modular [relocatable] building is a building manufactured (usually off-site) which is designed to be [relocatable] moveable or is capable of being relocated and, when delivered to the installation site, generally requires only blocking, levelling and, in the case of modular [relocatable] buildings, joining of modules. For the purposes of Subsection F of [Section] 3.2.1.11 NMAC, neither portable buildings, modular [relocatable] buildings nor manufactured homes defined as vehicles by Section 66-1-4.11 NMSA 1978 are prefabricated buildings.

[G-] E. Construction materials and services; landscaping.

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

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

[H-] G. Nontaxable transaction certificates.

(1) Nontaxable transaction certificates are available from the department for persons who are [performing construction as set forth in Section 7-9-3.4 NMSA 1978 to issue] engaged in the construction business and performing activities, as set forth in Sections 7-9-3.4, 7-9-52 and 7-9-52.1 NMSA 1978 to execute to providers of construction materials, [and] construction services, construction-related services and lessors of construction equipment. See 3.2.201.11 NMAC for additional requirements on construction contractors to obtain nontaxable transaction certificates.

(2) Only persons who are licensed by the state of New Mexico as construction contractors may apply for and [use] execute nontaxable transaction certificates under the provisions of Sections 7-9-51 NMSA 1978, [and] 7-9-52 NMSA 1978, and 7-9-52.1 NMSA 1978, except that a person who performs construction activities as defined in Section 7-9-3.4 NMSA 1978 in the ordinary course of business, and who is exempt from the laws of the state of New Mexico requiring licensing as a contractor may [issue] apply for and execute such certificates.

[I-] H. Fixtures.

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

(2) Receipts from the sale of furniture, kitchen equipment, library shelves and other furniture or equipment sold on an assembled basis that does not become a "fixture" is a sale of tangible personal

property and not construction.

[J-] I. Construction materials; general.

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

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

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

[K-] J. Meaning of "building".

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

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

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

(a) elevators and escalators used in whole or in part to move people;

(b) heating, cooling and air conditioning systems except for air conditioning and air handling systems and components, separately depreciated under Section 168, installed to meet temperature,

humidity or cleanliness requirements for the operation of machinery or equipment or the manufacture, processing or storage of products;

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

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

[9/29/67, 12/5/69, 3/9/72, 3/20/74, 7/26/76, 6/18/79, 11/8/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 3/19/92, 1/13/96, 11/15/96, 5/15/97, 9/15/97, 3.2.1.11 NMAC - Rn & A, 3 NMAC 2.1.11, 10/31/2000; A, 12/30/03; A, 12/14/12]

3.2.1.16 GROSS RECEIPTS - REAL ESTATE AND INTANGIBLE PROPERTY

A. Insurance proceeds

(1) Receipts of an insured derived from payments made by an insurer pursuant to an insurance policy are not subject to the gross receipts tax. Such receipts are not receipts derived from the sale of property in New Mexico, the leasing of property employed in New Mexico, or the performance of a service.

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

[B.] ~~Speculative housing sales~~

~~(1) Receipts of a person in the business of constructing improvements on real property owned and sold in the ordinary~~

~~course of that person's construction business do not include amounts retained by financial institutions as prepaid finance charges or discounts, if these amounts are not received by the real estate vendor. It is immaterial whether or not such amounts are included in the quoted real estate sales price.~~

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

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

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

~~(5) Example 2: The same facts as Example 1 above are used except that the loan company Z made payment to a title insurance company, legal fees to a lawyer, escrow fees to a bank and also paid the real estate brokerage commission. These payments referred to are part of the gross receipts of the speculative builder and are not deductible under Subsection B of Section 3.2.1.16 NMAC, whether or not actually paid over to the speculative builder.~~

[C.] ~~B. Receipts from sale of automotive service contracts:~~

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

~~(2) The receipts of a person from selling an automotive service contract are not gross receipts. The undertaking, promise or obligation of the promisor under the automotive service contract to pay for or to furnish parts and service if an uncertain future event (breakdown) occurs is not within the definition of property under~~

Subsection J of Section 7-9-3 NMSA 1978. Since the receipts from selling an automotive service contract do not arise "from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico", the receipts are not gross receipts as defined in Section 7-9-3.5 NMSA 1978 and are not subject to the tax imposed by Section 7-9-4 NMSA 1978.

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

[D:] ~~C. Receipts from insurance company under an automotive service contract program:~~

The receipts of a New Mexico automotive dealer from an insurance company are not taxable gross receipts if the payments by the insurance company are to reimburse the dealer, who is promisor under an automotive service contract as that term is defined in Subsection C of [Section] 3.2.1.16 NMAC, for all parts and labor furnished by the dealer under the contract or for parts and labor furnished by the dealer under the contract in an amount in excess of a specified reserve established by the dealer under an agreement with the insurance company. The receipt of the payments from the insurance company are not receipts from the sale of parts and labor but are payments to indemnify the dealer for the dealer's expense in fulfilling the dealer's obligation. The value of parts and labor furnished to make the repairs was subject to the gross receipts tax when the parts and labor were furnished to discharge the dealer's obligation as the promisor under the automotive service contracts.

[E:] ~~D. Gift certificates:~~

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

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

(3) When a gift certificate is purchased during the time period set out in Laws 2005, Chapter 104, Section 25 subsequent redemption of the gift certificate for the purchase of qualified tangible personal property after that period is not deductible under Laws 2005, Chapter 104, Section 25.

(4) When a gift certificate is redeemed during the time period set out in Laws 2005, Chapter 104, Section 25 for the purchase of qualified tangible personal property, the receipts from the sale are

deductible under Laws 2005, Chapter 104, Section 25.

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

[G.] E. **Prepaid telephone cards - "calling cards"**

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

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

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

[3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 6/12/89, 6/28/89, 11/26/90, 2/1/95, 11/15/96, 9/15/98, 1/29/99; 3.2.1.16 NMAC - Rn & A, 3 NMAC 2.1.16, 4/30/01; A, 12/30/03; A, 8/15/05; A, 12/14/12]

3.2.1.17 GROSS RECEIPTS – LEASING

A. **Leasing of property employed in New Mexico:**

(1) Receipts derived from the rental or leasing of property employed in New Mexico are subject to the gross receipts tax.

(2) Example 1: A is in the business of leasing heavy equipment used in construction projects. The receipts from the leasing of such equipment employed in New Mexico prior to January 1, 2013, are subject to the gross receipts tax. See Section 7-9-52.1 NMSA 1978 for deductibility of receipts from such leases on or after January 1, 2013.

(3) Example 2: Y, a New York corporation, leases four blockmaking machines to X who uses the machines in X's blockmaking business in New Mexico. The rental contract is signed in Nebraska. The receipts which Y receives from the rental of the equipment employed in New Mexico are taxable.

(4) Example 3: P corporation leases photocopying machines to Q, a state

agency. The receipts of P corporation from leasing these machines to the state agency are subject to the gross receipts tax.

B. **Additional charges**

(1) Receipts derived from additional charges made in conjunction with the rental or leasing of property employed in New Mexico are subject to the gross receipts tax.

(2) Example 1: C owns and operates a business which leases gas cylinders. There is a clause in the lease whereby the lessee will be liable for an additional charge if the gas cylinders are kept past a specific date provided in the lease contract. Receipts from these penalties or demurrage charges for keeping the gas cylinders past the specified date provided are receipts from leasing property employed in New Mexico and are subject to the gross receipts tax.

(3) Example 2: D is in the business of leasing concrete forms which are employed in New Mexico. The terms of the lease agreement require that the property leased be returned to the lessor in the condition in which it was leased. Any receipts from charges for repairing and cleaning concrete forms returned to the lessor in a damaged condition, for any material used in repair of such forms, or from charges for the purchase price of forms which are not returned to the lessor, are receipts from leasing property employed in New Mexico and are subject to the gross receipts tax.

C. **Lease of license – franchise agreement:** Receipts derived from the lease of a license, such as a liquor license, or from a franchise agreement, are subject to the gross receipts tax.

D. **Multistate use of leased equipment**

(1) Where property is rented or leased for employment both within and outside New Mexico the renter or lessor will be subject to the gross receipts tax on that portion of the receipts which is derived from the renting or leasing of property employed in New Mexico.

(2) In order to determine the portion of the receipts which are subject to the gross receipts tax, the total receipts from the lease are to be multiplied by whichever of the following fractions more accurately reflects the receipts from the period of employment of the leased item inside New Mexico:

(a) the numerator is the total miles traveled by the leased items in New Mexico and the denominator is the total miles traveled by the leased items during the lease period; or

(b) the numerator is the total time the leased items were employed in New Mexico and the denominator is the total time of the lease period.

(3) The department will allow a

person engaged in the business of leasing property employed both within and without New Mexico to use other methods of apportioning the receipts of such leasing activities upon showing that the other methods more accurately reflect the portion of employment of leased items within New Mexico.

(4) Example: B owns and operates a business located in Santa Fe, New Mexico, which rents or leases vehicles, airplanes, and mobile equipment. The items leased are employed both within and without New Mexico. B is subject to the gross receipts tax on that portion of the receipts which is from employment of the vehicles, airplanes, and mobile equipment within New Mexico.

E. **Leasing of property employed outside New Mexico**

(1) Receipts derived from the rental or leasing of property employed outside New Mexico are not subject to the gross receipts tax.

(2) Example: L, a resident of Hobbs, New Mexico, owns a sawmill in Wyoming which is leased to S for \$3,000 per year. These receipts are not derived from selling property in New Mexico, leasing property employed in New Mexico, performing services outside of New Mexico the product of which is initially used in New Mexico, or performing services in New Mexico. These receipts are not includable in L's gross receipts.

F. **Use of vehicles in New Mexico**

(1) Receipts from the rental or leasing of vehicles, airplanes, or mobile equipment which are employed both within and outside New Mexico are subject to the gross receipts tax on that portion of the receipts which are from employment of the vehicles, airplanes, or mobile equipment within New Mexico.

(2) In order to determine the portion of receipts described in the above paragraph which are subject to the gross receipts tax, the total receipts from the lease are to be multiplied by whichever of the following fractions more accurately reflects the receipts from the period of employment of the leased item inside New Mexico:

(a) the numerator is the total miles traveled by the leased items in New Mexico and the denominator is the total miles traveled by the leased items during the period of lease; or

(b) the numerator is the total time the leased items were physically present in New Mexico and the denominator is the total time of the lease period.

(3) The department will allow a person engaged in leasing the above described items to use other methods of apportionment upon a showing that the other methods will more accurately reflect the period of employment of the leased item

within New Mexico.

G. Safe harbor lease - purchaser/lessor: A purchaser/lessor who enters into a qualified "safe harbor lease" transaction as defined in Section 168 of the Internal Revenue Code will be subject to the gross receipts tax on the receipts if the property being leased is located in New Mexico.

H. Leasing computers: Receipts from renting or leasing the use of computers or related equipment in New Mexico, on either a part-time or a full-time basis, are subject to the gross receipts tax. [12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.1.17 NMAC - Rn & A, 3 NMAC 2.1.17, 4/30/01; A, 12/14/12]

3.2.1.18 GROSS RECEIPTS; SERVICES

A. Receipts from performing a service in New Mexico. Receipts derived from performing a service in New Mexico are subject to the gross receipts tax unless a specific exemption or deduction provided for in the Gross Receipts and Compensating Tax Act applies.

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

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

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

(2) Services subcontracted to third parties under a single contract by a prime contractor and used or consumed by the prime contractor in the performance of the contract shall be prorated by the prime contractor on the same basis, i.e.,

based either on allocated costs using cost accounting records or on the percentage of the total service actually performed within New Mexico by the prime contractor or other reasonable method approved by the department.

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

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

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

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

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

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

E. Receipts from performing services outside New Mexico.

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

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

(3) *Example 2:* D is a data processing bureau located in Lone Tree, Iowa. X, a New Mexico accounting and bookkeeping firm, mails accounting data

to D. D then processes this material into general ledgers, payroll journals and other journals and then returns this material by mail to X. The receipts of D are receipts from performing services entirely outside New Mexico and therefore are not subject to the gross receipts tax.

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

F. Sales of state licenses by nongovernmental entities.

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

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

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

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

I. Directors' or trustees' fees.

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

(2) *Example:* X is on the board of directors of a New Mexico corporation and a Texas corporation. X attends directors' meetings in Texas and New Mexico. For each directors' meeting that X attends, X is paid a fee of \$50.00. X is performing a service.

The fee which X receives from performing this service in New Mexico is subject to the gross receipts tax. The fee which X receives from performing the service in Texas is not subject to the gross receipts tax. However, the burden is on X to segregate receipts which are not taxable from those which are taxable.

(3) *Example:* Y is on the board of trustees of Z, a New Mexico electric cooperative organized under the provisions of the Rural Electric Cooperative Act. Y receives \$85 a day for Y to attend Z's regular meetings in New Mexico, plus reimbursement for mileage to and from the meeting at the standard IRS rate. Y also receives \$85 a day for Y to attend no more than one other meeting, conference or training inside or outside New Mexico within any one month, plus reimbursement of actual expenses, including hotel, transportation, tips and reasonable expenses for meals and entertainment. Y is performing a service. The fees and reimbursements Y receives for attending meetings, conferences and trainings in New Mexico are subject to gross receipts tax. The fees and reimbursements Y receives for attending meetings, conferences and trainings outside New Mexico are not subject to gross receipts tax.

(a) See Paragraph (1) of Subsection C of 3.2.1.19 NMAC regarding reimbursed expenditures.

(b) Y is not a volunteer as defined in Paragraph (2) of Subsection D of 3.2.1.19 NMAC because Y receives compensation for Y's services in addition to reimbursement of Y's out-of-pocket expenses incurred in the performance of Y's services.

J. Anesthetists' fees.

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

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

(3) *Example:* A is an anesthetist who is employed by a hospital and also performs services for and receives compensation from a surgeon who is not associated with the hospital. The surgeon does not consider the anesthetist to be an employee and does not withhold income or other taxes from the anesthetist's compensation. Although the surgeon may exercise some control over the services performed by the anesthetist, the

surgeon relies on the anesthetist's training and experience to accomplish the result desired. The receipts of the anesthetist from this service performed are subject to the gross receipts tax.

K. Athletic officials.

(1) Receipts from refereeing, umpiring, scoring or other officiating at school events sanctioned by the New Mexico activities association are exempt from gross receipts tax pursuant to Section 7-9-41.4 NMSA 1978.

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

L. Racing receipts.

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

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

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

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

M. Advertising receipts of a newspaper or broadcaster.

(1) The receipts of a New Mexico newspaper or a person engaged in the business of radio or television broadcasting from performing advertising services in New Mexico do not include the customary commission paid to or received by a nonemployee advertising agency or a nonemployee solicitation representative, when said advertising services are performed pursuant to an allocation or apportionment agreement entered into between them prior to the date of payment.

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

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

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

P. Day care centers.

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

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

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

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

Q. Child care.

(1) Receipts derived by a corporation for providing child care facilities for its employees are subject to the gross receipts tax on the amount received from its employees.

(2) *Example:* The X corporation operates a licensed child care facility to accommodate dependent children of its employees. In order to defray a portion

of the cost of the facility, the corporation charges each employee two dollars (\$2.00) per child per week for the use of the facility. All receipts from the two-dollar charge per child per week are subject to the gross receipts tax.

R. Service charges; tips.

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

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

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

(4) *Examples:*

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

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

S. Real estate brokers.

(1) Receipts of a person engaged in the construction business from the sale of the completed construction project include amounts which the person has received and then paid to a real estate broker. The total receipts from the sale of the construction project are subject to the gross receipts.

(2) Receipts of a real estate broker from the performance of services for a person engaged in the construction business

may not be deducted from gross receipts pursuant to Section 7-9-52 NMSA 1978.

(3) See Sections 7-9-53 and 7-9-66.1 NMSA 1978 for deductibility of receipts from certain real estate broker transactions.

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

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

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

W. Utilities; installation charges.

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

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

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

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

Y. Star route contractors. Receipts of a person holding a contract for transportation of United States mail, as a "Star Route Contractor", from points within New Mexico to other points within New Mexico and to points outside of New Mexico, are subject to the gross receipts tax on that portion of the receipts from transportation

from a point within New Mexico to a point within New Mexico. See Paragraph (2) of Subsection B of [Section] 3.2.55.10 NMAC for deducting receipts from the portion in interstate commerce.

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

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

BB. Specialty software package. [Repealed]

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

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

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

from performing a service.

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

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

GG. Receipts of collection agencies.

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

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

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

(4) *Example 2:* X, a cash basis taxpayer, sells its delinquent accounts receivable to Z, a collection agency, for a percentage of the face amount of the accounts. X's gross receipts include the full amount of the receivables, excluding any time-price differential. The amount subsequently collected by Z from those accounts, however, is not subject to gross receipts tax because the amount is not included within the definition of gross receipts. In this situation Z is buying and selling intangible property of a type not

included within the definition of property in Subsection J of Section 7-9-3 NMSA 1978.

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

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

(2) *Example 1:* S is a national purveyor of tangible personal property. S has stores and employees in New Mexico. S also has catalogue stores in less populated parts of New Mexico. Catalogue stores maintain minimal inventories; their primary purpose is to make S's catalogues available to customers, to take orders of merchandise selected from the catalogues, to place the orders with S and to provide general customer service. The catalogue stores are operated by independent contractors and not by S. S pays the contractors commissions based on the orders placed. In charging its customers, S charges the amount shown in the catalogue and does not add any separate amount to cover the cost of the contractors' commissions. S pays gross receipts tax on its receipts from the sale of catalogue merchandise. The contractors contend that the cost of their selling services is included in the amount S charges for its merchandise and so their commissions are not gross receipts. The contention is erroneous. The contractors have receipts from performing a service in New Mexico; it is immaterial that S paid the amount of gross receipts tax S owed on S's receipts. See, however, the deduction at Subsection B of Section 7-9-66 NMSA 1978.

(3) *Example 2:* M is a nationwide, multi-level sales company with presence in New Mexico. M sells products to households mainly through a network of individual, independent contractors. The network of sellers is controlled by one or more sets of individuals, also independent contractors, who train and supervise the individuals selling the merchandise; these supervisory contractors may also sell merchandise. The

sellers display, promote and take orders for M's products. Payment for orders are sent to M along with the orders. M ships the merchandise directly to the final customers. M has agreed to, and does, pay the gross receipts tax on the retail value of the merchandise sold, whether sold by M or one of the independent contractors. Based on the volume and value of merchandise sold, M pays both the selling and supervisory independent contractors a commission. The commissions received by the independent contractors engaging in business in New Mexico with respect to merchandise sold in New Mexico are gross receipts subject to the gross receipts tax. The commissions are receipts from performing a service in New Mexico. The fact that M pays gross receipts tax on M's receipts from the sale of the property is immaterial in determining the liability of the independent contractors.

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

(5) *Example 3:* P is the publisher of a magazine published in New Mexico. P enters into arrangements with independent contractors to solicit ads to be placed in P's publication. P pays each contractor a percentage of the billings for the ads placed by the contractor as a commission. The independent contractors claim that they owe no gross receipts tax with respect to ads solicited in New Mexico because P has paid gross receipts tax on P's advertising revenues. The contractors are incorrect. There are two transactions in this situation, P's service of publishing advertisements and the contractors' service of soliciting ads for P. The fact that P paid the amount of gross receipts tax due on P's advertising revenues is immaterial regarding the contractors' gross receipts tax obligations on their receipts.

(6) If the receipts from the underlying sale of the tangible property are exempt or deductible, the commission received by an independent contractor from selling the tangible property of another may

be subject to the deduction provided by Section 7-9-66 NMSA 1978.

II. Receipts from winning contest.

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

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

[9/29/67, 12/5/69, 3/3/71, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 3/16/79, 6/18/79, 11/20/79, 4/7/82, 1/6/84, 5/4/84, 10/16/84, 4/2/86, 10/21/86, 6/28/89, 11/26/90, 11/15/96, 1/31/97, 4/30/97; R, 3 NMAC 2.1.18.28, 4/30/97; 3 NMAC 2.1.18.31, 4/30/97; 10/31/97, 7/31/98; R, 4/30/99, 11/15/99, 3.2.1.18 NMAC - Rn & A, 3 NMAC 2.1.18, 10/31/2000; A, 5/31/02; A, 12/30/03; A, 3/15/10; A, 10/15/10; A, 12/14/12]

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.10 NMAC, Section 13 effective 12/14/2012.

3.2.10.13 CONSTRUCTION PROJECTS OCCUPIED OR LEASED PRIOR TO SALE:

A. A person engaged in the construction business who purchases construction materials, ~~[and] construction services, construction-related services or who leases construction equipment~~ using nontaxable transaction certificates (nttcs) provided by the department for use under Sections 7-9-51, ~~[and] 7-9-52 and 7-9-52.1~~ NMSA 1978 is liable for the compensating tax on the value of the materials and services purchased at the time when the construction project is initially leased or otherwise occupied prior to the sale. It is immaterial that the construction project is leased to enhance its value for sale as is the case with so-called income producing property.

B. Example 1: Y is a company which constructs office buildings for sale to investors as income producing property. Y has issued ~~[nontaxable transaction certificates]~~ nttcs to material suppliers and subcontractors. Upon completion of the building, Y leases office

space to tenants in order to enhance the salability of the building. Y is liable for the compensating tax at the time it leases the first office.

C. Example 2: Z is building an apartment complex consisting of five separate buildings with twenty apartments in each building. Z begins renting apartments in each building as the building is completed. If Z issued ~~[nontaxable transaction certificates]~~ nttcs to purchase construction materials and construction services for incorporation into these apartment buildings, Z will be liable for compensating tax on the value of the materials and services purchased for each building when any apartment in the building is rented. The rental of the apartments is a conversion to use by Z. When Z subsequently sells any or all of the five buildings, the compensating tax previously paid by Z on construction materials and construction services which became an ingredient or component part of each building may be credited against the gross receipts tax due on the sale.

D. Example 3: R is a homebuilder who typically sells the homes he builds either prior to the start of construction, or on a speculative basis prior to the completion of the home. R has executed nttcs to material suppliers and subcontractors for a specific home. Upon completion of the home, R is unable to find a buyer, and decides to retain title to the home and use it as his personal home or rent the home to a third party until a buyer can be found. R is liable for the compensating tax on the value of the construction materials, construction services and construction-related services purchased with the nttcs at the time the home is initially rented or occupied by the homebuilder prior to the sale.

[7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96, 3.2.10.13 NMAC - Rn & A, 3 NMAC 2.7.13, 4/30/01; A, 12/14/12]

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.201 NMAC, Sections 8 and 11 effective 12/14/2012.

3.2.201.8 POSSESSION AND DELIVERY OF NONTAXABLE TRANSACTION CERTIFICATES - TYPES OF CERTIFICATES:

A. With respect to receipts and transactions ~~[occurring prior to July 1, 1992 or after June 30, 1997]~~ deductible under the Gross Receipts and Compensating Tax Act:

(1) The taxpayer should be in possession of all nontaxable transaction certificates (nttcs) at the time the deductible transaction occurs.

(2) The taxpayer must be in

possession of and have available for inspection all nttcs for the period of an audit within 60 days of notice by the department requiring such possession. This notice may be sent out or delivered no earlier than the commencement of an audit of the taxpayer claiming the deduction.

(3) An nttc acquired by the taxpayer after the 60 days following notice have expired will not be honored by the department for the period covered by the audit.

(4) An nttc executed using the department's online system, and that is recorded on the online system, will be considered to be in the possession of the taxpayer to whom the nttc has been executed.

~~[B-With respect to receipts and transactions occurring on or after July 1, 1992 and prior to July 1, 1997, the taxpayer is required to possess the appropriate nontaxable transaction certificate by the time the return is due for receipts from the transaction, except as otherwise provided herein. A certificate received after that time does not substantiate the deduction. The taxpayer must demonstrate possession of all certificates at the commencement of an audit. In the alternative, upon receipt of a notice requiring possession of the certificates, the taxpayer has sixty days to demonstrate that the taxpayer did in fact possess the certificates at the time the receipts were required to be reported. In the case where a notice requiring possession of the certificates has been given prior to July 1, 1997, demonstration that the certificates were possessed at the time the audit commenced or the notice was received is not adequate. In the case where notice requiring possession of the nttcs expired on or after July 1, 1997, the taxpayer must be in possession of and have available for inspection all nttcs for the period of an audit within 60 days of notice by the department requiring such possession.~~

~~C.] B.~~ An audit of such a taxpayer commences when one of the following occurs:

(1) a department auditor physically gives a dated letter of introduction which states the auditor is commencing an authorized audit of the taxpayer or states the auditor requires the production of the taxpayer's books and records for examination; or

(2) a department employee begins an authorized office examination of files, books or records pertaining to the taxpayer, provided that the taxpayer or the taxpayer's representative is informed reasonably promptly by letter or in person that an audit has commenced.

~~[D.—The department issues different types of nttcs. Each type is of limited usage and relates to a particular deduction allowed by possession of that certificate. An nttc is valid only if it contains~~

the information and is in a form prescribed by the department. All other types of proof of deductibility are invalid and will not be accepted by the department, unless the deduction provision explicitly permits other proof.]

C. The department issues different types of nttcs. Each type is of limited usage and relates only to one or more particular deductions. An nttc is not valid if it does not contain the information or is not in a form prescribed by the department. For a deduction that requires possession of the appropriate nttc, other types of proof of deductibility may not and will not be accepted by the department, unless other proof is permitted explicitly by the deduction or another provision of the Gross Receipts and Compensating Tax Act with respect to that deduction.

[E.] D. The taxpayer need be in possession of only one nttc of the type required by the department from each buyer or lessee in order to claim the particular deduction allowed by that type of nttc. A taxpayer need be in possession of only one nttc of the type required by the department in order to claim a particular deduction from a buyer which has several places of business, provided the buyer is operating under only one department identification number.

[F.] E. Nothing shall prevent the department from changing the substance, form or type of nttcs to be used. Nothing shall prevent the department from changing the form of notification requiring the possession of nttcs.

[9/29/67, 12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 9/20/93, 11/15/96, 4/30/99; 3.2.201.8 NMAC - Rn, 3 NMAC 2.43.1.8, 5/31/01; A, 12/14/12]

3.2.201.11 CONSTRUCTION CONTRACTORS:

A. Any person applying to execute nontaxable transaction certificates (nttcs) related to ~~[construction as defined in Section 7-9-3 NMSA 1978]~~ deductions found under Sections 7-9-51, 7-9-52 or 7-9-52.1 NMSA 1978 must indicate the applicant's New Mexico contractor's license number or furnish proof that no contractor's license is required by the construction industries division of the regulations and licensing department in order to engage in one of the construction activities listed in 7-9-3.4 NMSA 1978. Failure to comply with ~~[Section]~~ 3.2.201.11 NMAC will result in denial of the requested certificates.

B. A person ~~[performing construction services]~~ engaged in the construction business who makes any false or misleading representations in any material respect in an application for nttcs may become subject to the penalties imposed by Section 7-1-73 NMSA 1978 as well as other

penalties, civil or criminal, prescribed in the Tax Administration Act. False or misleading representations include, but are not confined to:

(1) indicating a contractor's license number on the application which is not issued to the applicant or which cannot lawfully be used by the applicant;

(2) applying for nttcs which someone other than the applicant will execute; or

(3) furnishing false or misleading documentation that a contractor's license is not required of the applicant by the construction industries division.

C. Any person who has previously applied for and been issued nttcs related to construction as defined in Section ~~[7-9-3]~~ 7-9-3.4 NMSA 1978, under circumstances wherein the person would not have been entitled to obtain such certificates pursuant to ~~[Section]~~ 3.2.201.11 NMAC, will be assessed gross receipts or compensating tax, as appropriate, based on the representations actually made in the application for nttcs.

D. Any person engaged in the ~~[business of construction, as defined by Section 7-9-3.4 NMSA 1978; is presumed to be engaged solely in the business of construction and]~~ construction business is presumed not to be engaged in reselling services other than construction services, or, on or after January 1, 2013, construction-related services, in the ordinary course of business. Except as provided in Subsection E of this section, this person will not be issued ~~[nontaxable transaction certificates (nttcs)]~~ nttcs other than those appropriate for the deductions under Sections 7-9-51, [and] 7-9-52 and 7-9-52.1 NMSA 1978.

E. A person who can demonstrate to the department's satisfaction that the person is engaged in the ~~[business of construction and]~~ construction business and also in the business of selling property other than construction materials or performing or selling one or more services, [such as engineering or architectural design,] that are not construction services or, on or after January 1, 2013, construction-related services, may qualify for and be issued nttcs in addition to those appropriate for the deductions under Sections 7-9-51, ~~[and]~~ 7-9-52 and 7-9-52.1 NMSA 1978. The additional types of nttc may be executed by the person only when the person is acquiring tangible personal property other than construction material, ~~[or]~~ a service other than a construction service or, on or after January 1, 2013, a construction-related service, in a manner meeting the conditions for execution of the additional type of nttc. In determining whether the person engaged in the construction business is engaged in a business in addition to the construction business, the department will consider these

factors:

(1) whether the person possesses, when possession is required, a current license to sell or lease the nonconstruction property or to perform or sell the nonconstruction service;

(2) whether the person has entered into a contract requiring the sale or lease of the nonconstruction property or the performance or sale of the nonconstruction service;

(3) whether the person holds himself out to be in the business; and

(4) other factors deemed appropriate by the secretary.

[7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 9/20/93, 11/15/96, 4/30/99; 3.2.201.11 NMAC - Rn, 3 NMAC 2.43.1.11 & A, 5/31/01; A, 11/30/05; A, 12/14/12]

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.206 NMAC, Section 12 effective 12/14/2012.

3.2.206.12 NONCONSTRUCTION SERVICES [NOT RESOLD BY] SOLD TO CONSTRUCTION CONTRACTORS:

A. Prior to January 1, 2013, any person engaged solely in the business of construction ~~[, as defined by Section 7-9-3.4 NMSA 1978,]~~ is not engaged in reselling services other than construction services in the ordinary course of business and may not ~~[issue]~~ execute a nontaxable transaction certificate (nttc) to purchase services for resale in connection with the construction business under the provisions of Section 7-9-48 NMSA 1978.

B. On or after January 1, 2013, any person engaged in the construction business who purchases construction-related services as defined in Section 7-9-52 NMSA 1978 and is engaged in reselling those construction-related services may execute an nttc to support the deduction under Section 7-9-52 NMSA 1978.

[3/11/88, 11/26/90, 11/15/96; 3.2.206.12 NMAC - Rn, 3 NMAC 2.48.12 & A; 5/31/01; A, 11/30/05; A, 12/14/12]

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.209 NMAC, Section 25 effective 12/14/2012.

3.2.209.25 CARPETS AND DRAPERIES INSTALLED IN A CONSTRUCTION PROJECT: When carpets or draperies are to be installed as an ingredient or component part of a construction project a person engaged in

the construction business may deliver a nontaxable transaction certificate for the purchase of carpet or draperies, or the installation of carpets or draperies, to the seller and the seller may deduct receipts from the sale pursuant to Section 7-9-51 NMSA 1978.

[3.2.209.25 NMAC - N, 12/14/12]

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.210 NMAC, Sections 7 through 10, 12, 14 through 16, 18 through 22, and 24 through 25 effective 12/14/2012.

3.2.210.7 DEFINITIONS:

~~[HAULING AND SPREADING DEFINED: For purposes of Subsection C of Section 3.2.210.10 NMAC, hauling and spreading means the transporting of material from a location on or in proximity to a construction site and applying the material to the point of usage required as a step in completing the construction project.]~~
~~[RESERVED]~~

[11/15/96; 3.2.210.7 NMAC - Rn, 3 NMAC 2.52.7, 5/31/01; A, 11/30/05; Repealed, 12/14/12]

3.2.210.8 [INDIRECT SERVICES ARE NOT CONSTRUCTION SERVICES]

A. Indirect services, such as accounting, architectural, engineering, drafting, bid depository services and plan room services are not construction services within the definition of construction under Section 7-9-3 NMSA 1978.

B. Example 1: K is a surveying company that contracts with C, a contractor, to survey the site. K incorrectly maintains that it is selling a construction service to C and that its receipts are deductible. Surveying and related services other than construction staking are not included as construction under the definition of construction under Section 7-9-3 NMSA 1978. Therefore, they are not construction services as that term is used in Section 7952 NMSA 1978.

C. Example 2: E, an excavator, contracts with B, a prime contractor, to dig the trenches for the water and sewer lines from the city mains to the building site in connection with a building project. E is performing a construction service that is immediately adjacent to the project and is therefore entitled to the deduction providing B delivers a nontaxable transaction certificate.]
GENERAL BUSINESS SERVICES ARE NOT CONSTRUCTION SERVICES OR CONSTRUCTION-RELATED SERVICES:

A. General business services, such as accounting, legal services, real estate brokering, telecommunications and plan room services are not construction services within the definition of construction under Section 7-9-3.4 NMSA 1978 nor are they construction-related services as defined in Section 7-9-52 NMSA 1978. Receipts from performing these types of services to a construction contractor are subject to gross receipts tax.

B. Example 1: K is a law firm that contracts with C, a contractor, to provide legal services. K maintains that it is selling a legal service to C that is necessary for the completion of the construction project and that its receipts should not be subject to gross receipts tax. Legal services are not included under the definition of construction under Section 7-9-3.4 NMSA 1978 or under the definition of construction-related services under Section 7-9-52 NMSA 1978. There is no deduction available for K's receipts from providing legal services to C.

C. Example 2: C provides B with telecommunications services through which B can maintain contact with B's construction crew working at a remote site. C's receipts from this service are not deductible under Section 7-9-52 NMSA 1978.

D. Example 3: C is engaged in the construction business and undertakes a project where the builder has no pre-paid client, and the project is speculative. C acquires the land and obtains a construction loan to fund the improvements on the land. The construction loan documents include charges for banking fees that are not pre-paid interest or interest on the loan balance. The banking fees are for a general business service and not considered a construction-related service and therefore not deductible under Section 7-9-52 NMSA 1978.

E. This version of 3.2.210.8 NMAC applies to transactions occurring on or after January 1, 2013.

[12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96, 10/31/97; 3.2.210.8 NMAC - Rn, 3 NMAC 2.52.8 & A, 5/31/01; A, 12/14/12]

3.2.210.9 W E L L CONSTRUCTION SERVICES:

A. Receipts from the sale of the following services in connection with well drilling are receipts from the sale of construction services as defined in Section [7-9-3] 7-9-3.4 NMSA 1978, and may be deducted from gross receipts if all other requirements of Section 7952 NMSA 1978, are met:

- (1) dirt work and surfacing;
- (2) digging cellars and pits;
- (3) drilling ratholes;
- (4) drilling water wells;

- (5) laying water and fuel lines;
- (6) directional drilling services;
- (7) casing crew services;
- (8) cementing services;
- (9) drill stem testing; and
- (10) fishing jobs.

B. Receipts from the sale of the following services in connection with well drilling are not receipts from the sale of construction services within the meaning of Section [7-9-3] 7-9-3.4 NMSA 1978 and may not be deducted from gross receipts:

- (1) repairing drilling equipment;
- (2) hauling water and mud;
- (3) hauling drilling equipment, rigging-up and rigging-down;
- (4) field inspecting drill collars and drill stems; and
- (5) furnishing compressed air.

C. On or after January 1, 2013, receipts from the sale of the following services in connection with well drilling are receipts from the sale of construction-related services as defined in Section 7-9-52 NMSA 1978 and are deductible under Section 7-9-52 NMSA 1978 if all the requirements of that section are met:

- (1) hauling water and drilling mud;
- (2) hauling drilling equipment, rigging-up and rigging-down;
- (3) field inspecting drill collars and drill stems; and
- (4) furnishing compressed air.

[12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.210.9 NMAC - Rn, 3 NMAC 2.52.9 & A, 5/31/01; A, 12/14/12]

3.2.210.10

[TRANSPORTATION] HAULING SERVICES:

[A. ~~HAULING:~~] Receipts from hauling materials, prefabricated buildings and supplies to and from a building site on or after January 1, 2013, for a person engaged in the construction business are ~~[not]~~ construction-related services and are deductible from the hauler's gross receipts pursuant to Section 7-9-52 NMSA 1978 [because hauling materials and supplies to and from a construction site is not a construction service pursuant to Subsection A of Section 7-9-3.4 NMSA 1978] if all requirements of Section 7-9-52 NMSA 1978 are met.

[B. ~~HAULING PREFABRICATED BUILDINGS:~~] A builder of prefabricated buildings may not issue a type 7 nontaxable transaction certificate to a company hired to move completed buildings from the builder's lot to the permanent site. Haulers are not engaged in construction as defined under Section 7-9-3 NMSA 1978. A deduction may be available under Section 7-9-48 NMSA 1978 if all the criteria of that section are met.

~~C. **HAULING AND SPREADING MATERIALS WITHIN CONSTRUCTION PROJECT:** Receipts of a person from hauling and spreading dirt, sand, gravel and rock, treated or untreated, for the purpose of furnishing materials to a construction project when such materials have been obtained from a source which is on or in the proximity of that construction project are receipts from performing a construction service. Such receipts may be deducted from the seller's gross receipts if the buyer delivers a nontaxable transaction certificate to the seller.]~~

~~[12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 3/16/79, 6/18/79, 11/8/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.210.10 NMAC - Rn, 3 NMAC 2.52.10 & A, 5/31/01; A, 11/30/05; A, 12/14/12]~~

~~3.2.210.12 **["SWEAT LABOR CONTRACT"]:** Receipts of a person who performs construction services pursuant to a "sweat labor contract" include the value of the consideration received from the sale of construction services pursuant to the "sweat labor contract". However, such a person may deduct the receipts from the sale of these construction services to a person engaged in the construction business if the person engaged in the construction business delivers a nontaxable transaction certificate pursuant to Section 7952 NMSA 1978.]~~

~~[RESERVED]
[3/9/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.210.12 NMAC - Rn, 3 NMAC 2.52.12 & A, 5/31/01; Repealed, 12/14/12]~~

~~3.2.210.14 **SALVAGING OF A "PRODUCTION UNIT":** Receipts of a person engaged in the business of servicing "production units" as defined in the Oil and Gas Emergency School Tax Act, Section 7-31-2 NMSA 1978, from performing services in connection with salvaging of materials from a "production unit" are not receipts from the sale of construction services or from construction-related services within the meaning of Section 7-9-52 NMSA 1978 and may not be deducted from gross receipts.~~

~~[3/9/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.210.14 NMAC - Rn, 3 NMAC 2.52.14 & A, 5/31/01; A, 12/14/12]~~

~~3.2.210.15 **CLEANING THE CONSTRUCTION SITE:**~~

~~A. Receipts from cleaning a building upon completion of a construction project; from cleaning masonry upon the completion of a construction project; from making an earth fill for drainage purposes; from providing an earth fill of a granular type required by specifications; and from replacing construction rejected by the~~

architects, the engineers or the owners are receipts from performing construction services. Such receipts may be deducted from gross receipts if the buyer delivers a nontaxable transaction certificate to the seller.

B. Receipts from cleaning the building at any time other than during or immediately after completion of the construction project or cleaning masonry in a standing building in order to restore its appearance [from performing concrete and soil tests and from charges for maintaining a watchman on a construction project during the construction period are not receipts from performing construction services as that term is used in Section 7-9-52 NMSA 1978 and may not be deducted from gross receipts] are not deductible under Section 7-9-52 NMSA 1978.

~~[3/9/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.210.15 NMAC - Rn, 3 NMAC 2.52.15 & A, 5/31/01; A, 12/14/12]~~

~~3.2.210.16 **DAMAGE TO A CONSTRUCTION PROJECT BY SUBCONTRACTOR:**~~

~~A. Charges by a contractor to a subcontractor for damages to a construction site caused by the subcontractor are not gross receipts to the contractor, but constitute a reduction in the amount of consideration paid to the subcontractor for the service performed by the subcontractor.~~

~~B. Example: A, a prime contractor, contracts with C, an independent contractor, to repair a part of a construction project damaged by B, a subcontractor on the project. B is responsible to A for the cost of such repair. A also contracts with D, a person engaged in the business of hauling trash, to remove trash and debris left by B after completion of B's portion of the project. B is obligated by the terms of the contract to remove the trash and debris. A charges B for the cost of repair paid to C and for the cost of hauling paid to D, either by deducting such cost from the amount A will pay B upon completion of B's work or by billing B directly for them.~~

~~(1) A's charges to B for the cost of repair is a reduction in the cost of A's subcontract with B. A, therefore, derives no receipts from the charge to B, regardless of whether A subtracts the cost of work done by C from the amount A pays B or whether B pays A the cost of the work performed by C.~~

~~(2) A may deliver a nontaxable transaction certificate (nttc) to C, the independent contractor, if the service performed by C is a construction service within the meaning of Section 7-9-52 NMSA 1978.~~

~~(3) On or after January 1, 2013, A may [not] deliver an nttc to D for hauling trash, since hauling is [not a construction~~

~~service] a construction-related service within the meaning of Section 7-9-52 NMSA 1978 if all the requirements of that section are met.~~

~~[3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.210.16 NMAC - Rn, 3 NMAC 2.52.16 & A, 5/31/01; A, 12/14/12]~~

~~3.2.210.18 **CONSTRUCTION-RELATED SERVICES - LABORATORY WORK AND ENVIRONMENTAL TESTING:**~~

~~A. Prior to January 1, 2013, receipts of a person engaged in the business of performing laboratory work, such as the design or testing of dirt or concrete work, from the sale of these services to a person engaged in the construction business are not construction services within the meaning of Section 7-9-52 NMSA 1978 and may not be deducted from the seller's gross receipts pursuant to Section 7-9-52 NMSA 1978.~~

~~B. Receipts for laboratory work or environmental testing performed on or after January 1, 2013, are receipts from performing construction-related services as defined in Section 7-9-52 NMSA 1978 and are deductible if the requirements of Section 7-9-52 NMSA 1978 are met.~~

~~C. Example: X is engaged in the construction business. In order to comply with the requirements of the federal environmental protection agency, X must obtain the services of Y, a certified lead paint consultant. Y will test for the existence of lead paint in any building being demolished or remodeled by X, prepare a federally required report, suggesting additional best management practices, and send samples to a testing lab. Services provided by Y on or after January 1, 2013, are construction-related services and are deductible under Section 7-9-52 NMSA 1978 as long as all the requirements in the statute are met.~~

~~[3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.210.18 NMAC - Rn, 3 NMAC 2.52.18 & A, 5/31/01; A, 12/14/12]~~

~~3.2.210.19 **[BLUEPRINTS] PHOTOSTATS:** Receipts from the sale of blueprints or photostats to a person engaged in the construction business are subject to the gross receipts tax. These receipts may not be deducted pursuant to Section 7-9-52 NMSA 1978 because they are not construction services.] **CONSTRUCTION-RELATED SERVICES AND ASSOCIATED PRODUCTS:**~~

~~A. Receipts from the sale of design services and special inspections that are required to verify specifications in design criteria to a person engaged in the construction business, are construction-related services and deductible under Section~~

7-9-52 NMSA 1978.

B. Receipts from the sale of building plans, professional stamps, or similar products to a person engaged in the construction business are construction-related services as defined in Section 7-9-52. Receipts from such sales that are contracted for or billed to a construction project may be deducted from the seller's gross receipts pursuant to Section 7-9-52 NMSA 1978 if the buyer is engaged in the construction business and delivers a nontaxable transaction certificate to the seller.

C. Example 1: C is engaged in the construction business. In order to begin the construction project C obtains the services of A, a design/architectural firm, to draw the plans necessary to obtain the building permit. Under Section 7-9-52 NMSA 1978, the plan preparations are a construction-related service. As long as the construction project is subject to gross receipts tax upon its completion, or located on tribal land, C may execute an nttc to A and A's receipts will be deductible under Section 7-9-52 NMSA 1978 as construction-related services.

D. Example 2: X is engaged in the construction business and contracts with Y, who is also engaged in the construction business, for the design and construction of the mechanical ducting system on X's construction project. Building code requires certain portions of the mechanical system to be designed by a mechanical engineer. Y enters into a contract for the services of E, an engineering firm, to perform the calculations, design a portion of the system, and place an engineer's "seal" on E's part of the mechanical ducting design. E is able to accept an nttc from Y as E's service is a construction-related service as defined in Section 7-9-52 NMSA 1978. X may also execute an nttc under Section 7-9-52 NMSA 1978 to Y so long as the X's completed project is subject to gross receipts tax.

E. This version of 3.2.210.19 NMAC applies to transactions occurring on or after January 1, 2013. [3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.210.19 NMAC - Rn, 3 NMAC 2.52.19 & A, 5/31/01; A, 11/30/05; A, 12/14/12]

3.2.210.20 COMPENSATING TAX ON CONSTRUCTION SERVICES:

When a person engaged in the construction business leases out or otherwise uses a construction project for which construction services or construction-related services were purchased using a nontaxable transaction certificate (nttc), the compensating tax is due if the project is occupied or leased prior to sale. The value of the construction services or construction-related services to be reported is the actual cost of the construction services purchased using nttcs, and the tax is

due at the time of occupancy.

[7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.210.20 NMAC - Rn, 3 NMAC 2.52.20, 5/31/01; A, 12/14/12]

3.2.210.21 MUDE ENGINEERING SERVICES:

Gross receipts from providing a mud engineering service at the well site to supervise the mixing of various agents and to make recommendations as to the type of fluids needed for the particular formations encountered in drilling wells are ~~not~~ receipts from providing construction-related services as defined in Section 7-9-52 NMSA 1978 and are deductible pursuant to Section 7-9-52 NMSA 1978. ~~Mud engineering service is a professional service; not a construction service.~~ Receipts from mud engineering services performed on or after January 1, 2013, may be deductible pursuant to Section 7-9-52 NMSA 1978 if a buyer engaged in the construction business delivers a nontaxable transaction certificate to the seller.

[3/16/79, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.210.21 NMAC - Rn, 3 NMAC 2.52.21 & A, 5/31/01; A, 12/14/12]

3.2.210.22 LEASE OF CONSTRUCTION EQUIPMENT:

A. This version of 3.2.210.22 NMAC applies to transactions prior to January 1, 2013. Receipts from the lease of construction equipment on or after January 1, 2013, may be deductible under Section 7-9-52.1 NMSA 1978, if all requirements set out in Section 7-9-52.1 NMSA 1978 and 3.2.249.8 and 9 NMAC are met.

~~[A.] B.~~ Receipts from leasing construction equipment, with or without operators, to a person engaged in the construction business may not be deducted from the lessor's gross receipts pursuant to Section 7-9-52 NMSA 1978. Leasing of construction equipment is not a construction service as defined in Subsection A of Section 7-9-3.4 NMSA 1978.

~~[B.] C.~~ In contrast, when a person who is regularly engaged in the selling of construction services, such as a subcontractor, uses the subcontractor's own construction equipment to perform construction services for a person engaged in the construction business, the subcontractor may deduct the receipts for the services and equipment under Section 7-9-52 NMSA 1978 if:

(1) the subcontractor is an independent contractor and not an employee of the person engaged in the construction business; and

(2) the subcontractor exercises control over the use of the property in performing the services; the controlling factor is whether the equipment owner has control over the performance of the

construction service which involves using the equipment or is simply operating the equipment at the direction of some other person engaged in the construction business.

~~[C.] D.~~ Example 1: A is regularly engaged in the lease and rental of construction equipment. A enters into an agreement to lease a crane with an operator to a contractor engaged in the construction business to be used on a construction project. The contractor will direct all of the activity of the crane and operator on the construction site. A's receipts from the lease of the crane with an operator are not receipts from performing construction services. A cannot deduct such receipts.

~~[D.] E.~~ Example 2: X is a heating and air conditioning subcontractor on a construction project. X owns a crane which X regularly uses to lift equipment onto the roof of buildings on which X works. X's receipts for construction services includes payment for using the crane. X may deduct those receipts under Section 7-9-52 NMSA 1978. If, however, X agrees to lease the crane with an operator to the prime contractor for work unrelated to the subcontract, which work is performed at the direction of the prime contractor, X would not be able to deduct the receipts for the leasing of the crane.

[11/8/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.210.22 NMAC - Rn, 3 NMAC 2.52.22 & A, 5/31/01; A, 11/30/05; A, 12/14/12]

3.2.210.24 CONSTRUCTION-RELATED INSPECTION SERVICES:

A. The receipts from the sale of inspection services to a person engaged in the construction business may be deducted from the seller's gross receipts pursuant to Section 7-9-52 NMSA 1978 when they are directly contracted for or billed to a specific construction project and if all the requirements of Section 7-9-52 NMSA 1978 are met. These inspection services include but are not limited to:

(1) field sampling or testing of construction components in order to comply with building codes; and

(2) stormwater runoff testing and routine inspections for compliance with permits required under the federal Clean Water or Clean Air Acts.

B. Example 1: C is engaged in the construction business. C obtains the services of either H, a certified home energy rating system (HERS) or L, a leadership in energy and environmental design (LEED) consultant to perform inspections and make recommendations for compliance with the state's energy conservation code. The receipts from the services performed by H or L are deductible under Section 7-9-52 NMSA 1978 when they are directly contracted for or billed to a specific construction project

and if all the requirements of Section 7-9-52 NMSA 1978 are met.

C. Example 2: X is engaged in the construction business. X obtains the services of Y, an engineering service company to perform the weld inspection and testing required as a “special inspection” under provisions of the state’s commercial building code. Y also provides a “special inspection” service that includes inspecting forming and reinforcing rods, and observing concrete being poured. Both of these services are deductible under Section 7-9-52 NMSA 1978 when they are directly contracted for or billed to a specific construction project and if all the requirements of Section 7-9-52 NMSA 1978 are met.

D. Example 3: S is engaged in the construction business. S obtains the services of W, a stormwater professional, to prepare a federally-required SWPPP and monitor the quality of stormwater runoff by writing reports, suggesting additional best management practices, and sending samples to a testing lab. Even though S is not in the business of selling construction-related services, S may issue nttcs to W, and the testing laboratories (if they bill separately) as those are construction-related services deductible under Section 7-9-52 NMSA 1978 when they are directly contracted for or billed to a specific construction project and if all the requirements of Section 7-9-52 NMSA 1978 are met.

E. This version of 3.2.210.23 NMAC applies to transactions occurring on or after January 1, 2013. [3.2.210.24 NMAC - N, 12/14/12]

3.2.210.25 TRANSACTIONS INVOLVING CONSTRUCTION-RELATED SERVICES: The following are examples of transactions that involve construction-related services and how the deduction for these services under Section 7-9-52 NMSA 1978 may or may not apply to the specific facts of these transactions.

A. Example 1: X is a general contractor who has been hired to design and build an office building. In addition to the typical construction service subcontractors, X also hires an Y, an engineering firm and Z, an architect, to perform construction-related services that are directly contracted for this particular construction project. If X provides Y and Z with an appropriate nontaxable transaction certificate, Y and Z can take the deduction for construction-related services under Section 7-9-52 NMSA 1978.

B. Example 2: T, a construction contractor, hires S, a security firm, to provide security services at T’s ten construction sites. S has experienced some recent employment turnover and does not have enough employees to provide security services for all of T’s construction sites. As a result, S is required to subcontract with

W, an independent security company for two of the construction sites. T executes a nontaxable transaction certificate (nttc) pursuant to Section 7-9-52 NMSA 1978 to S for the security services for the ten construction sites which allows S to take the construction-related service deduction under Section 7-9-52 NMSA 1978. The receipts from the services provided by W to S are subject to gross receipts tax unless a specific exemption or deduction applies. The deduction under Section 7-9-52 NMSA 1978 does not apply to this transaction, because S is not a person engaged in the construction business and therefore not authorized to execute an nttc under that section. The general service for resale deduction under Section 7-9-48 NMSA 1978 also does not apply because this deduction requires that the resale of the security services by S to T must be subject to gross receipts tax. Since S is taking the deduction under Section 7-9-52 NMSA 1978 this requirement in Section 7-9-48 NMSA 1978 cannot be met. W’s receipts from providing security services to S are subject to gross receipts tax.

C. Example 3: Same facts as in Example 2 except S does not enter into a subcontract with W. Instead, T amends the contract with S to provide security services for only eight of the construction sites and T enters into a separate contract with W to provide security services for the remaining two sites. So long as T provides nttcs to S and W, both security providers can take the construction related service deduction under Section 7-9-52 NMSA 1978.

[3.2.210.25 NMAC - N, 12/14/12]

End of Adopted Rules Section

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