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New Mexico Register

The official publication for all official notices of rulemaking
and filing of proposed, adopted and emergency rules.

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The New Mexico Register

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New Mexico Register

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March 23, 2021

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Notices of Rulemaking and Proposed Rules

TAXATION AND REVENUE, DEPARTMENT OF		
NOTICE OF PROPOSED RULEMAKING AND PUBLIC RULE HEARING	<p>Tangible Personal Property</p> <p>The New Mexico Taxation and Revenue Department proposes to enact the following rule(s):</p> <p>Gross Receipts and Compensating Tax Act, Section 7-9-3.5 NMSA 1978 3.2.1.20 NMAC – Gross Receipts of Marketplace Providers and Marketplace Sellers</p> <p>Gross Receipts and Compensating Tax Act, Section 7-9-7 NMSA 1978 3.2.10.23 NMAC Compensating Tax on Services Performed Outside the State 3.2.10.24 NMAC – Purchaser Entitled to Rely on Seller’s Statement as to Whether Tax Was Charged</p> <p>Gross Receipts and Compensating Tax Act, Section 7-9-12 NMSA 1978 3.2.100.10 NMAC – Exemptions of Gross Receipts of Marketplace Sellers and Marketplace Providers</p> <p>Gross Receipts and Compensating Tax Act, Section 7-9-45 NMSA 1978 3.2.203.11 NMAC – Deductions of Gross Receipts of Marketplace Providers and Marketplace Sellers</p> <p>The New Mexico Taxation and Revenue Department proposes to repeal the following rule(s):</p> <p>Gross Receipts and Compensating Tax Act, Section 7-9-7 NMSA 1978 3.2.10.10 NMAC – The Use in New Mexico of a Service Performed Entirely Outside New Mexico</p> <p>Gross Receipts and Compensating Tax Act, Section 7-9-10 NMSA 1978 3.2.13.8 NMAC – Guidelines for “Activity” 3.2.13.9 NMAC – Third Party Sales by Agents for Collection of Compensating Tax</p> <p>Technical Information: No technical information was consulted in drafting these proposed rule changes.</p>	<p>Purpose of Proposed Rule: The proposed rules are being enacted, amended, repealed, and repealed and replaced to align with current law and provide guidance on the new method of sourcing, and to marketplace providers and sellers.</p> <p>Notice of Public Rule Hearing: A public hearing will be held on the proposed rule changes on April 29, 2021 from 12:00 PM to 2:00PM through the internet, email, and telephonic means in response to concerns surrounding COVID-19 and in accordance with Executive Order 2020-004, Declaration of a Public Health Emergency, and the March 12, 2020 Public Health Emergency Order to Limit Mass Gatherings Due to COVID-19.</p> <p>The Public Hearing will be accessible via WebEx https://nm-tax.webex.com/nm-tax/j.php?MTID=mf62ce1c91ba6017f237a822566543bbb Meeting number (access code): 132 352 9832 Meeting password: 04292021 or by telephone by dialing 1-844-621-3956. Any oral comments made during this hearing will be recorded and any electronic written comments can be submitted during the hearing at policy.office@state.nm.us.</p> <p>The proposals were placed on file in the Office of the Secretary on March 12, 2021. Pursuant to Regulation 3.1.2.9 NMAC under Section 9-11-6.2 NMSA 1978 of the Taxation and Revenue Department Act, the final of the proposals, if filed, will be filed as required by law on or about May 27, 2021.</p> <p>Individuals with disabilities who need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Alicia Romero at alicia.romero@state.nm.us. The Taxation and Revenue Department will make every effort to accommodate all reasonable requests but cannot guarantee accommodation of a request that is not received at least ten calendar days prior to the scheduled hearing.</p>
<p>The New Mexico Taxation and Revenue Department hereby gives notice as required under Section 14-4-5.2 NMSA 1978 and 1.24.25.11 NMAC that it proposes to enact, amend, repeal and replace rules regarding destination based sourcing, marketplace providers and compensating tax as authorized by Section 9-11-6.2 NMSA 1978:</p> <p>Summary of Proposed Changes:</p> <p>The New Mexico Taxation and Revenue Department proposes to repeal and replace the following rule(s):</p> <p>Tax Administration Act, Section 7-1-14 NMSA 1978 3.1.4.13 NMAC – Reporting According to Business Location</p> <p>Gross Receipts and Compensating Tax Act, Section 7-9-6 NMSA 1978 3.2.6.8 NMAC – Separately Stating the Gross Receipts Tax</p> <p>The New Mexico Taxation and Revenue Department proposes to amend the following rule(s):</p> <p>Gross Receipts and Compensating Tax Act, Section 7-9-3 NMSA 1978 3.2.1.7 NMAC – Definitions</p> <p>Gross Receipts and Compensating Tax Act, Section 7-9-3.3 NMSA 1978 3.2.1.12 NMAC – Engaging in Business</p> <p>Gross Receipts and Compensating Tax Act, Section 7-9-3.5 NMSA 1978 3.2.1.14 NMAC – Gross Receipts – General 3.2.1.15 NMAC – Gross Receipts;</p>		

Copies of the proposed rules may be found at <https://www.tax.newmexico.gov/all-nm-taxes/proposed-regulations-hearing-notice/> or are available upon request by contacting the Tax Policy Office at policy.office@state.nm.us.

Notice of Acceptance of Written

Public Comment: Written comments on the proposals can be submitted by email to policy.office@state.nm.us or by mail to the Taxation and Revenue Department, Tax Information and Policy Office, Post Office Box 630, Santa Fe, New Mexico 87504-0630 on or before April 29, 2021 at 5:00 PM. All written comments received by the agency will be posted on www.tax.newmexico.gov no more than 3 business days following receipt to allow for public review.

TRANSPORTATION, DEPARTMENT OF NOTICE OF PROPOSED RULEMAKING

The New Mexico Department of Transportation (NMDOT) is proposing to repeal and replace 18.27.5 NMAC, Contractor Prequalification Rule.

Approval of the initial rulemaking action for the proposed new rule was granted to NMDOT by the New Mexico State Transportation Commission on January 16, 2020 pursuant to Sections 9-5-1, 67-3-8 and 67-3-11, NMSA 1978. The legal authority authorizing this rulemaking is Section 67-3-78, NMSA 1978.

Summary of Full Text: The Contractor Prequalification Rule was first promulgated in 2015. The operation of the rule rewards good contractor performance and encourages lesser quality contractor performance to improve.

Purpose: The purposes for this proposed repeal and replacement of the rule are to clarify the scoring method, to clarify the definition of

“project” and to rework the appeals procedure. Revisions are necessary to address these issues and to fine tune the rule to better accomplish the intended purpose of the program.

Full Text of the Proposed Rule: A copy of the full text of the proposed new rule 18.27.5 NMAC may be found on the NMDOT website at the following Internet link, under the *Public Notices* tab: <https://dot.state.nm.us/content/nmdot/en/public-notice.html>. To obtain a printed copy of the proposed amended rule, contact Mershawn Griego at (505)216-8831 or MershawnC.Griego@state.nm.us. A reasonable fee may be charged for printed copies.

Rulemaking Hearing: NMDOT will hold one statewide virtual public hearing for the purpose of receiving oral and written public comment from interested parties on the proposed repeal and replacement of 18.27.5 NMAC. This hearing will be held in conformance with the Governor’s directives regarding gatherings and social distancing. The hearing is scheduled on Thursday, April 22, 2021 from 1:00 p.m. to 3:00 p.m. To participate in this hearing:

Join Zoom Meeting:

<https://dot-state-nm-us.zoom.us/j/92340195327?pwd=MTJMcVRnYzhBK0VZQmlZWUFmZURsdz09>
Meeting ID: 923 4019 5327
Passcode: 080753
One tap mobile
12532158782,,92340195327#,,,,*080753# US (Tacoma)
13462487799,,92340195327#,,,,*080753# US (Houston)

Dial by your location:

1 253 215 8782 US (Tacoma)
1 346 248 7799 US (Houston)
1 669 900 6833 US (San Jose)
1 301 715 8592 US (Washington DC)
1 312 626 6799 US (Chicago)
1 929 436 2866 US (New York)
833 548 0282 US Toll-free
877 853 5257 US Toll-free
888 475 4499 US Toll-free
833 548 0276 US Toll-free
Meeting ID: 923 4019 5327

Passcode: 080753

Find your local number: <https://dot-state-nm-us.zoom.us/j/92340195327>

Written Comments: To submit written comments on or before the date of hearing, please send to: Mershawn Griego at New Mexico Department of Transportation, P.O. Box 1149, Santa Fe, New Mexico 87504 or submit via email to MershawnC.Griego@state.nm.us. Written comments will be accepted from the date this notice is published in the New Mexico Register, March 23, 2021 and until the close of the final hearing scheduled in this rulemaking, April 22, 2021. If you plan to submit written comments, argument or data, please make sure any documentation contains your name, phone number and email address. If submitting written comments by email, please indicate the rule number in the subject line. Oral comments will only be accepted at the public hearing, and may be subject to time limitations. After the close of the final hearing scheduled in this rulemaking, the rulemaking record will be closed and no other comments will be accepted. All written comments will be posted on the department’s website within three days of receipt.

Accommodations: Any individual with a disability who is in need of an auxiliary aid or service to attend or participate in the hearing, or who needs copies of the proposed rule revisions in an accessible form may contact Mershawn Griego at (505)216-8831 or MershawnC.Griego@state.nm.us at least ten days before the hearing.

VETERINARY MEDICINE, BOARD OF NOTICE OF RULEMAKING

The New Mexico Board of Veterinary Medicine (NMBVM) will hold a Rules Hearing on April 22, 2021. Following the Rules Hearing, the Board of Veterinary Medicine will

convene a regular meeting to adopt the rules and take care of regular business. The Board of Veterinary Medicine Rules Hearing will begin at 9:00 a.m. and the regular meeting will convene following the Rules Hearing. The Rules Hearing and regular meeting will be held via Zoom Teleconferencing.

Meeting ID: 861 6809 4404;
Passcode: 713706.

Copies of the proposed rules may be obtained in person from Frances R. Sowers, Executive Director, New Mexico Board of Veterinary Medicine, 7301 Jefferson Street, N.E., Suite H, Albuquerque, New Mexico 87109-4363, by calling (505) 553-7021 or by downloading from the board’s web site: www.NMBVM.org. Interested persons may submit their comments on the proposed rules in writing to Frances R. Sowers, Executive Director, New Mexico Board of Veterinary Medicine, 7301 Jefferson Street, N.E., Suite H, Albuquerque, New Mexico 87109-4363 or by email to director@NMBVM.org or by participating in the rules hearing.

The New Mexico Board of Veterinary Medicine, is adopting the following rules that are part of the New Mexico Administrative Code (NMAC): 16.24.7 – Minimum Standards – Animal Shelters.

Section 61-14-5. F. NMSA 1978, authorizes the board to promulgate rules and regulations that may be necessary to carry out the duties of the board.

Notice Date: 3/23/2021
Hearing Date: 4/22/2021
Adoption Date: Proposed as 6/1/2021
Technical Citations: HB219

The board is establishing rules as mandated by state legislation contained in House Bill (HB) 219. HB291 states, “The board shall provide for inspections of animal shelters and euthanasia agencies and adopt, promulgate and revise rules

necessary to carry out the provisions of the Animal Sheltering Act.”

The board through these rules promulgations is implementing minimum standards for animal shelters.

The board is proposing to adopt the rules as follows:

16.24.7.8 SHELTERING CAPACITY STANDARDS:

- A. The delivery of sheltering services shall be provided in a competent and humane matter.
- B. Sheltering services shall be performed in a manner ensuring the health and well-being of animals while in the care of sheltering providers. The recommended standard of care is 15 minutes per animal per day.

- C. Sheltering providers shall practice active population management within the balance of decisions and practices that support the overall population of the shelter. [16.24.7.8 NMAC - N, 5/1/2021]

16.24.7.9 PREMISES - STRUCTURAL:

- All exterior structures and fencing should:
- A. be constructed of building materials that will ensure a sound physical structure;
 - B. be maintained in good repair;
 - C. protect animals from injury and ensure containment within shelter;
 - D. prevent the entry of outside animals and unauthorized persons;
 - E. include four solid walls for animal weather protection
 - F. include fencing sufficiently constructed to prevent animals from jumping, climbing or digging to escape. [16.24.7.9 NMAC - N, 5/1/2021]

16.24.7.10 FACILITY STANDARDS:

- A. Animal housing areas should be physically apart from areas where food and drink for human consumption are prepared, served or stored.

- B. Interior building surfaces should be constructed and maintained to be water resistant to moisture and easily cleaned.

- C. Animal food storage and equipment cleaning areas should be physically apart from animal housing.

- D. Reliable, adequate electric power or gas should be provided for lighting, air circulation, heating, and cooling.

- E. Reliable and adequate potable water shall be provided. Back flow preventers may be installed on any threaded faucets with attached hoses for the purpose of cleaning the facility, or on the main water line serving the facility.

- F. Noise control should be considered for the well-being of animals as well as visitors. Noise mitigation may include:

- (1) Housing cats away from the sound of dogs.

- (2) Facility modifications to minimize or contain barking.

- (3) Training staff to minimize slamming doors.

- (4) Using music to reduce animal stress.

- G. Readily accessible washrooms or sinks should be provided to maintain personal hygiene of animal caretakers.

- (1) A two-compartment sink in good repair should be provided for washing and sanitizing equipment used for animal care and feeding.

- (2) A tub or low-pressure hose should be available to wash any animal that becomes soiled to avoid the use of high-pressure hoses for cleaning animals.

- H. Indoor housing for animals shall be sufficiently heated or cooled to protect animals from extreme temperatures. The ambient temperature shall be consistent with the requirements of the specific species.

- I. Indoor housing for animals should be adequately ventilated with fresh air to minimize odors and moisture and to provide for the health of the animals.

J. Water supply should allow for hose hook up to readily reach all parts of animal housing. Water pressure shall be adequate for cleaning of animal housing areas.

K. A suitable method to rapidly eliminate excess water from animal housing areas should be provided. Drains shall be properly constructed and maintained in good repair. If closed drainage systems are used, wastewater shall be disposed of by connection to a sanitary sewer or approved sewage disposal system. [16.24.7.10 NMAC - N, 5/1/2021]

16.24.7.11 ANIMAL ENCLOSURE AND HOUSING STANDARDS:

A. General Indoor Enclosures.

(1) Primary enclosures shall provide sufficient space to allow each animal to make normal postural adjustments to:

(a) Turn freely.

(b) Easily stand.

(c) Sit.

(d) Stretch.

(e) Move their head without touching the top or sides of the enclosure.

(f) Lie in a comfortable position with limbs extended.

(g) Move about and assume a comfortable posture for feeding, drinking, urinating, and defecating.

(h) Dogs and cats shall be able to hold their tails erect when in a normal standing position.

(2) Primary enclosures may allow animals to be able to see out while avoiding visual contact.

(3) Animals housed shall be confined to a primary enclosure at all times unless under the direct supervision of shelter personnel or a designee.

(4) Primary

enclosures shall be structurally sound and maintained in good repair and sanitary condition to protect the animals from injury and disease.

(a)

Primary enclosures shall be constructed and maintained to enable the animals to remain dry and clean and to provide convenient access to food and clean water.

(b)

Latches shall be secure and in good working order so that animals cannot escape.

(5) Floors

of primary enclosures shall be constructed to prevent injury to animals, ensure adequate draining and prevent pooling of fluids. Wire mesh or slatted floors in cages shall not be used.

(6) Guillotine

or doors separating two enclosure section shall be in working order.

(7) Animals

shall not be able to escape from their primary enclosure.

(8) When

housing aggressive, under quarantine or protective custody animals, condition of all enclosures shall be monitored daily with various types of locks considered.

(9) Primary

enclosures may house one animal; if compatible, two altered animals per enclosure with the exceptions of litters housed with their dams or colony housing. Animals shall not be randomly housed in groups. Animals that fight shall not be grouped with other animals.

(10) Isolation

areas shall be provided for animals with infectious diseases. Ten percent of the total housing may be designated for this purpose. The isolation housing should be double-sided to facilitate cleaning without removing the animal. Handwashing stations should be available at all isolation areas. Isolation areas should have separate cleaning tools personal protective equipment.

(11) Dogs shall

not be tethered except in the short term to facilitate cleaning primary

enclosure or in the event of a fire or flood emergency. In emergency situations, short term tethering of dogs shall be used only until transport to another facility can be made. The safety of the dog shall be ensured while tethered. Cats shall not be tethered.

(12) Animals

placed in crates or carriers, even for a short time, shall have ample space to stand up, turn around and lie down. Crates and carriers shall be disinfected and dried after each use and before another animal is placed in the crate or carrier. Crates and carriers may not be used as primary enclosures.

B. Outdoor Primary Enclosures. It is not recommended that primary enclosures be exclusively outdoors and not for very young, old, sick, or injured animals.

(1)

Structurally sound, weatherproof enclosures should be made accessible to animals housed exclusively outdoors. Water resistant and windproof structure of suitable size shall be provided so animals stay warm and dry during cold weather; shaded and cool during hot weather. The structure may have a water-resistant door covering or offset doorway to minimize drafts, provide proper ventilation and made of durable materials with the floor raised off the ground to prevent water entry.

(2) A shaded

area should be provided to all animals housed in an outdoor primary enclosure. An animal shall be able to rest in the shade, outside of the interior structure, but within the fencing or run.

(3) Sufficient

clean, absorbent bedding material in addition to other means of protection from weather should be provided for the health and safety of the animals and may prevent strong orders from forming if replaced regularly.

(4) Floors

of outdoor enclosures may be constructed of gravel, sand or soil; a solid material such as concrete is preferable. It is not possible to sanitize or disinfect gravel, sand or soil.

C. Enclosure Requirements for Cats
(1) Cats shall be able to assume normal postures in primary enclosures. Space should be large enough to accommodate bedding, food and water dishes and a litter box. When there is more than one cat occupying a cage, additional floor and vertical space should be provided.

(2) Primary enclosures should be made of stainless steel, fiberglass, or other impervious material that is water-resistant and can be cleaned and sanitized. Chicken wire, barbed wire and wood shall not be used.

(3) Feral cat boxes, which allow for hiding places within the cage, reduce stress for all cats.

(4) Cats should be housed in a separate building or in a separate room far removed from rooms containing dog runs.

D. Enclosure Requirements for Dogs. Dogs shall be able to assume normal postures and engage in normal behaviors playing and moving freely without encountering another dog. Space should be large enough to accommodate bedding, food and water bowls.

(1) Enclosure height should be a minimum of one and one-half times the height of the dog at the shoulder.

(2) Floors in dog runs may slope to drain liquid out of runs to prevent pooling or puddling in runs or walkways. Slope may be one-quarter to one-half inch per linear foot.

(3) To prevent water and waste material from flowing from run to run, there should be solid walls between dog runs. Height of walls should be sufficient to prevent nose-to-nose contact of dogs between runs.

(4) Fencing or other materials that allow for airflow should be used, horizontally and vertically, above the solid walls

providing a protective barrier at least six feet high between runs to prevent dogs from jumping over.

(5) All solid surfaces of dog runs should be constructed of water-resistant concrete, stone, cement block, brick, metal, or non-porous synthetic material which can be cleaned and sanitized. Sealed floors can be cleaned and disinfected most effectively. Fencing materials may be water resistant which can be easily cleaned and sanitized. Fencing materials shall be gauged and spaced to avoid escape by or injury to dogs. Chicken wire, barbed wire and wood shall not be used.

(6) If more than one dog occupies the same primary enclosure, additional floor and vertical space should be provided.

E. Enclosure Requirements for Other Species. Species other than dogs and cats shall have special requirements for housing and care.

(1) Stray livestock. The New Mexico livestock board shall be contacted to help facilitate the identification and ownership.

(2) Exotic animals. A veterinarian or someone with expertise in handling and caring for the species may be contacted for guidance.

(3) Wild animals. The appropriate agency shall be contacted to take possession of the animal.

(a) Wild birds. The U.S. fish and wildlife service shall be contacted.

(b) For any other wild animals, N.M. department of game and fish shall be contacted.

F. Foster Housing Standards.

(1) Potential foster homes should go through an application process with background checks and home inspections.

(2) Guidelines addressing the following may be established:

(a) Vaccination and altered status of foster home animals.

(b) Maximum number of animals allowed.

(c) Housing and care standards.

(d) Maximum length of foster stay.

(3) Foster parents should be trained or educated on standards of care and potential health and wellness issues; emergency contact information may be provided.

(4) Care capacity within foster home should be considered before sending animals into the homes.

(5) Foster animals should be altered and have current vaccinations unless under the care of a veterinarian.

(6) Tag or microchip identification for foster animals should be provided to foster homes.

G. Colony/Group Housing Standards - Dogs. Dogs housed in the same primary enclosure may be maintained in compatible groups with the following restrictions:

(1) Primary enclosures may house one, or two, altered compatible dogs per enclosure. Litters should be housed with their dams.

(2) A female dog in season shall not be housed in the same primary enclosure with a male dog.

(3) An unaltered male dog shall not be housed in the same primary enclosure with an unaltered female other than under breeding age litter mates.

(4) An aggressive dog shall be housed individually in a primary enclosure; for protection of shelter personnel the enclosure shall be marked accordingly.

(5) Nursing mothers and their puppies should be removed from other animals. Removal will allow privacy, protection from unwanted intrusion and noise, alleviates fear/aggression,

and to promote general well-being.

(6) Dogs shall not be housed in the same primary enclosure as cats.

(7) Dogs shall not be housed in the same primary enclosure with any other species of animals.

H. Colony/Group Housing Standards – Cats. When housing cats in colony rooms, the following guidelines should be followed:

(1) Cats should have at least 18 square feet of floor space per cat to maintain a distance of three to ten feet between cats; non-inclusive of perches or walkways. In temperate climates, can include outdoor access with 24-hour access to indoors.

(2) Cats with unknown vaccination history should be evaluated for health and behavior, vaccinated, isolated, and observed for at least 24 hours before being placed in cat colony rooms.

(3) Unsterilized males shall be separated from females. A female in season shall not be housed in the same primary enclosure as a male.

(4) Nursing mothers and their kittens should not be housed with other cats.

(5) One 12” x 8” cat litter pan for every three cats or five kittens should be provided.

(6) Water and dry food should be available at all times.

(7) Colony rooms may be equipped with shelves, resting boxes and hiding boxes.

(8) Stainless steel, fiberglass or other materials that are water resistant and can be cleaned and sanitized should be used. Wood shall not be used.

(9) Any cat exhibiting aggressive behavior shall be housed individually in its primary enclosure; for the protection of shelter personnel the enclosure should be marked accordingly.

[16.24.7.11 NMAC - N, 5/1/2021]

16.24.7.12 SANITATION STANDARDS:

A. Written sanitation protocols shall be developed to provide consistent and thorough sanitation of the facilities. Protocols may be reviewed periodically in consultation with a veterinarian.

Protocols may be updated for best practices. During an outbreak, sanitation protocols should be revised as needed to address specific pathogens.

B. Animal housing units or kennels shall be cleaned once daily at minimum and shall be thoroughly cleaned and disinfected once an animal no longer occupies the unit or kennel.

C. Animal waste shall be removed from primary enclosures daily or more often to prevent contamination of animals and to reduce disease hazards and odors. Waste shall be disposed of in accordance with local ordinance.

D. Cages, kennels, containers, equipment, and other items shall be cleaned at least once daily to maintain sanitary conditions.

E. Kennels and cages shall not be hosed down while animals are inside the kennels and cages.

F. To minimize stress for an animal remaining in an enclosure, spot cleaning may be used as appropriate. The enclosure shall be thoroughly cleaned and disinfected once an animal leaves an enclosure.

G. Cleaning may be carried out in the following order: from first to last to minimize the spread of disease.

(1) Healthy puppies and kittens; healthy, nursing bitches and queens.

(2) Healthy adult animals.

(3) Unhealthy animals.

H. To minimize the spread of disease, water and food containers and all other utensils shall be cleaned and sanitized using generally accepted methods such as the use of heat and chemical sanitizing solution. Containers shall

be cleaned and sanitized as often as necessary to maintain sanitary conditions; food pans and bowls shall be cleaned between each use. If sinks are the method for cleaning, water and food pans or bowls shall be soaked and washed separately from litter pans with water and disinfectant changed between water and food pans or bowls and litter pans.

I. Product manufacturer instructions shall be followed precisely when cleaning, sanitizing and disinfecting.

Chemicals shall not be mixed. Pine products and fumes are extremely toxic to cats and birds and shall not be used near them or to clean cat enclosures, pans, bowls etc.

J. Mopping should be avoided to reduce the spread of pathogens. If hosing is not possible and mopping must be used, disinfectant solution shall not be used from one housing area to another.

K. Water and food pans or bowls may be made of metal or be disposable. Plastic should not be used because it may be chewed and ingested and may retain contaminants.

L. Litter boxes shall be provided for cats in their primary enclosures with soiled litter disposed of on an as needed basis, a minimum of once a day. Litter boxes may be disposable or reusable if they are cleaned daily and sanitized before used by another cat. The use of plastic litter boxes is not recommended because they cannot be sufficiently disinfected and may be a source of disease.

M. Animal and food waste, soiled bedding, debris, and other organic waste should be stored in closed containers and disposed of on an as needed basis to avoid vermin infestation, odors, disease, and nuisances. Waste should be removed at least weekly from the facility. All reusable trash containers should be regularly sanitized and disinfected. All clothing and bedding shall be laundered and thoroughly dried before reuse.

N. To maintain sanitary conditions, pens and runs with absorbent or loose flooring i.e., sand,

gravel or soil soiled with urine and fecal matter shall have such materials replaced as necessary. These types of organic materials cannot be sanitized or disinfected when the surface is muddy, water puddled or when odors and vermin are present.

O. Buildings and grounds shall be kept clean, in good repair and free of trash.

P. Weeds may be mowed or cut down where animals are kept or exercised.

Q. An effective program shall be maintained for the control of insects, fleas, avian, and mammalian pests.

R. Opened food supplies should be stored separately in closed waterproof containers. Unopened supplies of food should be stored off of the floor and adequately protected against contamination or infestation by vermin.

S. Animal bedding should be stored off of the floor and adequately protected against contamination or infestation.

T. Dead animals shall be stored and disposed of in strict compliance with state laws and local ordinances to avoid disease hazard or nuisance.

[16.24.7.12 NMAC - N, 5/1/2021]

16.24.7.13 ANIMAL CARE AND HANDLING STANDARDS:

A. Food and Water
(1) Animals should be fed twice daily except in cases of veterinary treatment or malnutrition. The food shall be free of contamination, palatable and of sufficient quality and nutritive value to meet normal daily requirements for the condition, size and age of the animal. Refrigeration should be provided for perishable food.

(2) Uneaten food shall be discarded after 24 hours. Food offered to an animal remaining uneaten shall not be fed to other animals.

(3) Care shall be taken not to underfeed or overfeed animals.

(4) Special consideration regarding types of

food and frequency of feeding shall be given to puppies, kittens, older animals, and nursing dams.

(5) Malnourished or emaciated animals may need an increased food intake; introduction of food shall be regulated and increased gradually preferably with veterinary guidance.

(6) Animals shall be provided potable water at all times.

(7) Food and water containers shall be accessible and located to minimize contamination by excrement or other material. Food and water containers shall be cleaned daily; disposable food containers may be used only if discarded after each use.

(8) Food and water containers should be of a size to ensure accessibility based on the size of the animal.

(9) Spoiled, moldy food or food contaminated with feces, droppings or insects shall never be used. Food left in food bowls from the previous day shall be disposed of, disposable bowls discarded and non-disposable bowls cleaned.

B. Enrichment
(1) Enrichment means improving the environment and behavioral care for confined animals. Enrichment reduces stress and improves well-being by providing physical and mental stimulation and encouraging species-typical behaviors. Enrichment shall not be considered optional.

(2) If the recommended space requirements for dogs cannot be met due to shelter configuration, dogs may be exercised twice daily. For dogs requiring an opportunity to exercise, a written plan may be on file with each exercise session noted.

(3) Behavioral health and care of each animal as well as the conditions experienced by the entire population shall be a consideration of the shelter.

C. Quarantine and Isolation
(1) Animals

that have bitten a human shall be quarantined pursuant to New Mexico State Law, local municipal or county ordinances.

(2) A veterinarian should be consulted.

(3) Animals under quarantine for observation of rabies symptoms after a bite incident shall be physically separated from all other animals and shall never be housed with animals under treatment for a communicable disease.

(4) Quarantine areas may have a separate ventilation system and should only be accessible to shelter personnel or owners accompanied by shelter personnel.

(5) Animals diagnosed or under treatment for a communicable disease should be isolated from healthy animals to minimize spread of disease. Areas may have a separate ventilation system. If isolation is impossible or inadequate to control the spread of pathogens, shelter shall weigh consequences of exposure to general population and the alternative, euthanasia.

D. Other Care Considerations

(1) Shelter animals shall always be handled safely and humanely to prevent injury, distress and spread of disease both to animals and personnel.

(2) Adequate animal handling equipment such as transfer cages, nets, catch poles, syringe poles shall be available, kept clean and in good repair to ensure the safety of personnel and animals.

(3) Shelter personnel should be trained in current humane and sanitary animal handling techniques.

(4) Long term confinement, including feral and aggressive animals, who cannot be provided with basic care, daily enrichment and exercise without inducing stress shall not be considered.

(5) The minimal amount of physical restraint needed without injury to people or animals shall be used.

(6) The use of catch poles for routine restraint of cats, including carrying or lifting, is inhumane and poses significant risk of injury to the animal and shall not be used. Humane traps, boxes or nets designed for restraint shall be used for handling fractious cats or cats who appear to be unaccustomed to handling.

(7) When cats are moved from one location to another, it is recommended to cover the carrier with a towel or sheet to reduce stress and susceptibility to disease.

(8) Cats should be provided with clean bedding in each cage. Bedding shall be replaced when soiled or wet and when a new animal is introduced to the enclosure.

(9) Bedding or platforms may be provided to dogs on an as needed basis. Clean bedding should be provided to old, young, ill, or injured dogs. Bedding shall be replaced when soiled or wet and when a new animal is introduced to the enclosure. Only single layer bedding should be used for puppies and kittens to prevent accidental suffocation.

(10) Nursing dams may be provided with a whelping box. If a shelter is unable to provide a whelping box, the shelter shall ensure nursing dams have adequate bedding, warmth and cleanliness. Bedding shall be provided in the whelping box and replaced when soiled or wet.

(11) Nursing mothers and their babies should be removed from other animals to allow for privacy, protect them from unwanted intrusion and noise, to alleviate fear/aggression, and to promote their general well-being.

(12) Animals may be cleaned and groomed on an as needed basis.

(13) Medical issues should be treated; matted coats can cause pain, skin or eye irritation, or trap fecal matter. Bathing may be necessary to prevent or treat parasites and insects.

(14) No animal shall be allowed to suffer while in the care of the shelter.

(15) Care shall be taken to ensure that animals are not squirted or hosed with water, not put in contact with chemicals and not placed back in wet or damp enclosures.

[16.24.7.13 NMAC - N, 5/1/2021]

16.24.7.14 DISEASE CONTROL, HEALTH AND VETERINARY CARE STANDARDS:

A. No animal shall be allowed to suffer due to lack of veterinary care.

B. Shelters shall not fail to provide treatment for pain.

C. Shelters shall ensure compliance with all federal, state and local laws concerning reportable diseases.

D. Animals should be examined for injury and signs of disease at the time of impound under the guidance of a veterinarian, if possible, and treated immediately if animal is in pain or distress. If injured or sick animals cannot be provided veterinary care in a timely manner to stop their pain and suffering, the animal shall be humanely euthanized.

E. Common signs of illness, injury or parasitic infestation in dogs and cats that warrant veterinary care:

(1) Eyes are watery, appear swollen or show discharge.

(2) Ears are red or inflamed, show discharge or have a foul odor.

(3) Nose shows mucous, blood or pus discharge, or is crusty, congested or blocked.

(4) Gums are swollen or inflamed, teeth are loose or brown, or mouth has a foul odor.

(5) Animal is sneezing, coughing or wheezing.

(6) Animal has fleas or ticks; skin shows swelling or lesions.

(7) Animal limps or does not place weight on a limb.

(8) Animal is thin or obese.

(9) Animal has wounds, abscesses, cuts, or abrasions.

(10) Body temperature is abnormal.

(11) Animal is vomiting or has diarrhea.

F. Shelter should have a trained and experienced staff member, a veterinary technician or a veterinarian available to check animals and to provide care. Symptoms of possible illness shall be noted, recorded and brought to a supervisor's attention immediately.

G. Animals should be observed daily for signs of disease or distress. An animal suspected of having an infectious disease may be physically separated from other susceptible animals until the animal is determined to be non-infectious.

H. A system should be in place to care for injured and sick animals brought to the shelter after normal working hours. Shelters may enter into a written contract with a local veterinarian to be available on call for treatment after hours.

I. Animals with obvious signs of serious disease, injury or distress that cannot be addressed, as well as aggressive animals, shall be humanely euthanized.

J. For humane reasons, it may be necessary to euthanize an animal despite the holding time requirements not having been met. An animal shall not be allowed to suffer while in the shelter's care.

K. Dogs and cats may be dipped or sprayed, top spotted or given oral treatment for fleas, ticks or internal parasites, as necessary. Methods shall be used according to the season, region of state and according to manufacturer's instructions concerning treatment strengths depending on size, age or health of animal.

[16.24.7.14 NMAC - N, 5/1/2021]

16.24.7.15 VACCINATIONS STANDARDS:

A. All dogs and cats should be vaccinated upon initial impound. A veterinarian or trained staff member may administer the following core vaccines:

(1) Dogs:
(a)

DA2PP or DHPP vaccine to provide protection against distemper, adenovirus-2, parvovirus, parainfluenza. Adult dogs may be vaccinated upon intake. Puppies may be vaccinated starting at 4-6 weeks of age and re-vaccinated every 2-4 weeks until 16-18 weeks of age.

(b)

Bordetella bronchiseptica vaccine to protect against kennel cough for puppies and adult dogs.

(2) Cats:

FVRCP vaccine to provide protection against feline herpesvirus, feline viral rhinotracheitis, feline calicivirus, and feline panleukopenia. Adult cats may be vaccinated once upon intake. Kittens may be vaccinated starting at 4-6 weeks of age and re-vaccinated every 2-4 weeks until 18 weeks of age. A modified live vaccine is recommended.

B. All animals shall be considered unvaccinated unless a documented medical record exists. Special consideration shall be given to animals with medical conditions, pregnant animals and animals less than four weeks old.

C. Core vaccines should be administered at the time of intake for optimum disease control.

D. Rabies vaccinations may be given at the time of adoption or by the adopter's veterinarian depending on local municipal or county ordinance.

E. Rabies vaccinations shall be administered pursuant to Section 77-1-3 NMSA 1978. [16.24.7.15 NMAC - N, 5/1/2021]

16.24.7.16 RECORD KEEPING STANDARDS:

A. Records shall be kept for each animal impounded, for each animal accepted as an owner-surrender, for each animal brought to

the shelter by a member of the public as a stray, and for each animal that is otherwise acquired.

B. Records shall include:

(1) Date of acquisition and manner of acquisition: animal control officer, public intake, owner surrender etc.

(2) Description and identifying characteristics including: species, breed, color, age, weight, gender, and any background information.

(3) Tag and microchip information.

(4) Reason for impoundment or relinquishment.

(5) Veterinary care.

(6) Disposition of the animal.

(7) Date of redemption of adoption, transfer of ownership or euthanasia.

(8) Name, address and telephone number of receiving person or entity.

C. Statistics should include monthly intake and outcomes by type for each species.

D. Collars, tags or other potential identification should be kept on the animal or in the animal's file during the impound time.

E. Each animal shall be identifiable by use of cage/run cards or identifying collars.

F. Photographs should be taken of each animal, maintained with the animal's records and posted on its cage to minimize the possibility of a mistaken euthanasia.

G. Shelters shall maintain records for a minimum of two years from the date of an animal's final disposition.

[16.24.7.16 NMAC - N, 5/1/2021]

16.24.7.17 COMMUNITY ACCESS AND SERVICE STANDARDS:

A. Shelters should be accessible to the public seeking to reclaim their animal or adopt an animal.

(1) Hours open to the public shall be clearly marked on the facility.

(2) The shelter's telephone number and address shall be listed in local telephone directories.

(3) The shelter should have internet presence with all pertinent information as well as listings of lost or found animals and animals available for adoption.

(4) Shelters should be open to the public at least one weekend day or two days until 6:00 p.m.

B. Shelters may have provisions for animals dropped off after hours. Care shall be taken so that animals are protected from injury, theft and the elements. Unattended drop boxes are not recommended. Provisions should be made for after hours entry, impoundment and treatment procedures for animal control officers to follow. Sick or injured animals shall be attended to by trained personnel immediately due to potential for unalleviated suffering of the animal as well as liability to the shelter.

C. When an animal has visible identification or a microchip upon impound, shelter personnel shall make every attempt to contact the owner. Each animal shall be scanned for a microchip and the number entered into the animal's record. If the owner surrenders a microchipped animal, the shelter shall determine if the surrendering owner matches the name on the microchip to ensure the animal is not stolen. In the case of stray animals, the shelter shall promptly attempt to contact the owner to whom the microchip is registered by telephone. In the event no contact can be made via telephone, then the shelter may send a letter to the address listed on the microchip registration. Attempts to trace microchip information and contact attempts with the registered owner shall be documented.

D. In addition to being scanned at intake, animals shall be re-scanned prior to final disposition. If the final disposition is by euthanasia, scanning shall be done pursuant to board of veterinary medicine rule 16.24.3.8 B Duties of Licensee and Certificate Holders.

E. Shelters shall refer to local, municipal or county ordinance which address the minimum stray holding time. Stray animals without identification should be held long enough to give owner sufficient time to reclaim the animal. Stray animals with identification i.e., tag, tattoo, or microchip should be held long enough to allow the shelter sufficient time for notification and owner reclaim.

F. Animals in law enforcement protective custody shall be in locked areas with appropriate signage that meet standards and are inaccessible to the public. Depending on the case type, owner may be allowed to visit the animal or animals. [16.24.7.17 NMAC - N, 5/1/2021]

16.24.7.18 SHELTER PERSONNEL STANDARDS:

A. The shelter shall maintain compliance with federal and state occupational safety regulations for chemical, biological and physical hazards in the workplace.

B. All shelter personnel should be trained in all aspects of their responsibilities. Training topics may be, at minimum:

- (1) Animal health and disease control.
- (2) Humane care and treatment of animals.
- (3) Control of animals in an animal shelter.
- (4) Transportation of animals.
- (5) Disease recognition.
- (6) Animal breed identification and behavior.
- (7) Pre-adoption evaluation and temperament testing.
- (8) Adoption policies and procedures.
- (9) Handling, capture and restraint techniques.
- (10) Personnel safety and use of equipment.
- (11) Euthanasia.
- (12) Compassion fatigue and self-care.

C. Shelter personnel should be provided with a

comprehensive standard operating procedures (SOP) manual. The SOP should outline all shelter policies and procedures and the duties for each position.

D. Shelter personnel shall adhere to New Mexico's anti-cruelty law at all times. See 30-18-1 et seq. NMSA 1978.

E. Protective gear and appropriate animal handling equipment shall be readily available to personnel.

F. Shelter personnel should wash their hands frequently to protect themselves and the animals. Hand sanitizers, first aid kits and eye wash stations may be made available to all employees, volunteers and visitors.

[16.24.7.18 NMAC - N, 5/1/2021]

16.24.7.19 ADOPTION STANDARDS:

A. Shelters should establish adoption fees. An adoption program may be developed and implemented. If the shelter waives specific adoption fees, the shelter guidelines shall not be waived.

B. Shelters should develop criteria for potential adopters and unsuitable adopters. Adopters may sign a contract under which they agree to provide a specified level of care.

C. Shelters should learn temperament testing procedures to ensure that animals are fit for adoption and to facilitate the best possible match between adopters and animals.

D. An adoption screening program may include discussion of suitability of adopter and animal.

E. When adopting out a sick animal or animal that is receiving medical treatment, full disclosure should be made to the person or organization receiving the animal.

F. In the event shelters offer animals for adoption that have not been sterilized, the shelter shall comply with New Mexico State law 77-1-20 A-F NMSA 1978.

G. Policies should be developed to avoid adopting out or

releasing unaltered animals.

H. Shelters should consider a program to microchip all adopted animals.

I. Reasonable care shall be taken to adopt out or transfer only those animals free of disease and untreatable injury.

J. Animals believed to be dangerous, potentially dangerous or have caused a serious injury resulting in same species or human death shall not be re-homed. Chapter 77 Section 1A NMSA 1978.

K. Shelters, in their due diligence, shall make every effort to place animals with recognized rescue organizations and responsible sanctuaries. Shelters should thoroughly research rescue organizations and sanctuaries prior to placement to avoid possible hoarding situations.

[16.24.7.19 NMAC - N, 5/1/2021]

16.24.7.20 SHELTER TRANSPORT STANDARD:

A. Transport vehicles and equipment shall be cleaned and sanitized prior to transport.

B. Animals shall not to be transported unrestrained in open beds of trucks.

C. Temperature extremes, below 45 degrees and above 80 degrees, during transport shall be avoided.

D. Compliance with state and local laws shall be followed for source and destination shelters.

E. Health certificates shall accompany animals crossing state lines as required.

F. Unfamiliar animals shall not be transported together in same enclosure.

G. Animals should be vaccinated and treated for internal and external parasites prior to transport.

H. Transport space should be adequate to allow the animal to turn around and lie down.

I. Transports anticipated longer than eight hours in duration should accommodate safe animal exercise and relief.

[16.24.7.20 NMAC - N, 5/1/2021]

**HISTORY OF 16.24.7 NMAC:
[RESERVED]**

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in the public hearing, please contact board of veterinary medicine t 505-553-7021. The board requests at least ten (10) days advance notice to provide requested alternative formats and special accommodations.

Copies of all comments will be made available by the board of veterinary medicine upon request by providing copies directly to a requestor or by making them available on the board of veterinary medicine website or at a location within the county of the requestor.

**End of Notices of
Rulemaking and
Proposed Rules**

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Adopted Rules

Effective Date and Validity of Rule Filings

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

FINANCE, DEPARTMENT OF

The New Mexico Department of Finance and Administration approved the emergency repeal of its rule 2 NMAC 20.2 - Execution of Contracts, Vouchers, Purchase Orders and Other Financial Commitments (Recompiled 10/1/2001) and replaced it with 2.20.2 NMAC - Execution of Contracts, Vouchers, Purchase Orders and Other Financial Commitments (adopted on 3/10//2021), effective 3/23/2021.

FINANCE, DEPARTMENT OF

TITLE 2 PUBLIC FINANCE CHAPTER 20 ACCOUNTING BY GOVERNMENTAL ENTITIES PART 2 EXECUTION OF CONTRACTS, VOUCHERS, PURCHASE ORDERS AND OTHER FINANCIAL COMMITMENTS

2.20.2.1 ISSUING
AGENCY: Department of Finance and Administration.
[2.20.2.1 NMAC - Rp, 2 NMAC 20.2.1, 3/23/2021]

2.20.2.2 SCOPE:
[RESERVED]
[2.20.2.2 NMAC - Rp, 2 NMAC 20.2.2., 3/23/2021]

2.20.2.3 STATUTORY AUTHORITY: In order to ascertain the authority and legality of contracts, purchase orders, vouchers, travel vouchers and other financial commitments for departments and other state agencies, pursuant to Section 6-5-3 NMSA 1978, it is necessary to determine whether the person executing the contract

has been properly delegated the authority to bind the department or state agency. In many instances there is no clear statutory power granted to an officer to sign on behalf of an agency. Generally the person who is ultimately responsible for the administration of the law has the implied power to execute legal documents for a state agency. Generally the power to execute may be delegated; however, some laws may require specific officers to execute contracts and vouchers on behalf of the agency. In such cases, no delegation is allowed by law.
[2.20.2.3 NMAC - Rp, 2 NMAC 20.2.3, 3/23/2021]

2.20.2.4 DURATION:
Permanent.
[2.20.2.4 NMAC - Rp, 2 NMAC 20.2.4, 3/23/2021]

2.20.2.5 EFFECTIVE DATE: March 23, 2021, unless a later date is cited at the end of a section.
[2.20.2.5 NMAC - Rp, 2 NMAC 20.2.5, 3/23/2021]

2.20.2.6 OBJECTIVE: The various acts creating departments pursuant to the Executive Reorganization Acts generally provide that the secretary of the department is responsible to the governor for the operation of the department and shall delegate authority to subordinates as the secretary deems necessary and appropriate, clearly delineating such delegated authority and the limitations thereto. It is the purpose of this rule to set forth those individuals who may legally bind state agencies which must submit their contracts or vouchers to the department of finance and administration.
[2.20.2.6 NMAC - Rp, 2 NMAC 20.2.6, 3/23/2021]

2.20.2.7 DEFINITIONS:

As used in this rule:

A. "Authorized officer" means a public officer or employee who is required or permitted by law or by lawful delegation of authority pursuant to this rule to sign contracts, vouchers, purchase orders or other financial commitments on behalf of a state agency.

B. "Contracts officer" means an employee of the department of finance and administration designated as contracts officer by the secretary of finance and administration.

C. "Facsimile signature" means a reproduction by engraving, imprinting, stamping, or other means of the manual signature of the authorized officer.

D. "Signed" or "executed" means affixed with any of the following:

- (1) the manual signature of an individual; and
- (2) the facsimile signature of an individual;
- (3) the electronic signature of an individual procured through a third-party document-signing service; or
- (4) the name of an individual, typewritten on the signature line of a document using word processing software and accompanied with another writing confirming that individual's approval of such document, including without limitation an e-mail to that effect.

E. "State agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities, or institutions required to submit contracts or vouchers to the department of finance and administration for approval.
[2.20.2.7 NMAC - Rp, 2 NMAC 20.2.7, 3/23/2021]

2.20.2.8 EXECUTION OF CONTRACTS, VOUCHERS AND PURCHASE ORDERS - AUTHORIZED SIGNATURES:

A. The department of finance and administration will not approve any contract, voucher, travel voucher, purchase order or other financial commitment of any state agency required pursuant to 2.20.3 NMAC and 2.40.2 NMAC, to submit its voucher or contract to the department for approval unless the contract, voucher, travel voucher, purchase order or other financial commitment has been executed by an authorized officer of the agency.

B. The authority to execute contracts, vouchers, purchase orders, travel vouchers or other financial commitments may be delegated unless provided otherwise by law to any officer or employee of the state agency, but such delegation shall:

- (1) be in writing;
- (2) state whether the delegated power may be subdelegated to another officer or employee of the state agency;
- (3) automatically terminate on whichever date occurs earliest:
 - (a) the date the term of office of the delegating secretary or other chief financial officer ends; or
 - (b) annually on June 30; and
- (4) be on file with the contracts officer of the department of finance and administration (for contracts); and
- (5) be on file with the financial control division of the department of finance and administration.

C. A written delegation of authority to execute contracts, vouchers, travel vouchers, purchase orders or other financial commitments may contain such limitations or conditions as the delegating authorized officer may deem appropriate.

D. No authorized officer shall delegate to any other

person authority to sign the authorized officer's signature.

E. Nothing in this rule shall prevent the use of facsimile, printed or typed signature of the secretary or chief financial officer on a copy of a contract, voucher, travel voucher, purchase order or other financial commitment.

[2.20.2.8 NMAC - Rp, 2 NMAC 20.2.8, 3/23/2021]

2.20.2.9 SIGNATURES REQUIRED: The two copies of every contract, voucher, travel voucher, purchase order or other financial commitment required to be submitted to the department shall be signed by an authorized officer. The department will retain at least one signed copy of every contract, voucher, travel voucher, purchase order or other financial commitment.

Alternatively, agencies may submit a single electronic version, in portable document format (PDF) or a comparable format and in such a manner as the department may direct, of an executed contract, voucher, travel voucher, purchase order or other financial commitment required to be submitted to the department.

[2.20.2.9 NMAC - Rp, 2 NMAC 20.2.9, 3/23/2021]

2.20.2.10 AUTHORIZED OFFICERS - DELEGATION:

A. The following public officers are authorized to execute contracts, vouchers, purchase orders and other financial commitments on behalf of the state agency under their control or supervision. Signatures must be on file at the financial control division of the department of finance and administration.

STATE AGENCY	OFFICER AUTHORIZED
office of the governor	governor
office of the lieutenant governor	lieutenant governor
office of the attorney general	attorney general
secretary of state	secretary of state
state auditor	state auditor
public regulation commission	commission
state fire marshal	state fire marshal
transportation department	director
office of the superintendent of insurance	superintendent of insurance
state land office	land commissioner
state treasurer	state treasurer
department of agriculture	secretary of department
N.M. livestock board	executive director
corrections department	secretary of department
children, youth and families dept.	secretary of department
public defender department	director
juvenile parole board	board
adult parole board	board
economic development department	secretary of department
state fair commission	commission
state racing commission	commission
energy, minerals and natural resources dept.	secretary of department
state game commission	commission
department of game and fish	director
department of finance and administration	secretary of department
general services department	secretary of department
state personnel board	director
state personnel office	director
department of health	secretary of department
department of environment	secretary of department
transportation department	secretary of department
human services department	secretary of department

commission on the status of women	commission
department of workforce solutions	secretary of department
department of public safety	secretary of department
taxation and revenue department	secretary of department
commission for the blind	commission
crime stoppers commission	commission
crime victims reparation commission	commission
public education department	secretary of department
division of vocational rehabilitation	director
state investment council	state investment officer
department of military affairs	adjutant general
state commission of public records	state records administrator
regulation and licensing department	superintendent
interstate stream commission	commission
office of the state engineer	state engineer
institutions of higher education	boards of regents or controllers
miners hospital	board
department of cultural affairs	secretary of department
office of african american affairs	executive director
tourism department	secretary of department
indian affairs department	secretary of department
veterans' services department	secretary of department
aging and long-term services department	secretary of department
public education commission	commission
higher education department	secretary of department
department of information technology	secretary of department
homeland security and emergency	
management department	secretary of department
state ethics commission	commission
early childhood education and care department	secretary of department
all executive departments not otherwise listed	secretary of department
all commissions	commission
all boards	board
all other state agencies not otherwise listed	as provided by applicable law, regulation, or governance

documents

LEGISLATIVE BRANCH

legislative council service	director
legislative finance committee	committee
legislative school study committee	chairman of committee
all other vouchers	director

JUDICIAL BRANCH

supreme court	chief justice
compilation commission	secretary of commission
building commission	commission
director, administrative office of courts	supreme court
court of appeals	chief Judge
district courts	presiding judge
magistrate courts	director, administrative office of the courts

(Continued Next Page)

district attorneys
judicial standards commission
judicial council

district attorney
executive director
council

B. If the authorized officer set forth in Subsection A of this section is a board or commission, the power to execute contracts, vouchers, purchase orders or other financial commitments may be delegated by a majority of a quorum of the board or commission acting in accordance with the provisions of law.
[2.20.2.10 NMAC - Rp, 2 NMAC 20.2.10, 3/23/2021]

HISTORY OF 2.20.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives:

DFA 78-5 Execution of Contracts, Vouchers, Purchase Orders and Other Financial Commitments, 6/30/1978.

DFA 78-5, Amendment No. 1, 12/20/1989.

History of Repealed Material: 2.20.2 NMAC, Execution of Contracts, Vouchers, Purchase Orders and Other Financial Commitments, repealed to amend as emergency Sections 7 and 9, effective August 25, 2020.

2 NMAC 20.2 - Execution of Contracts, Vouchers, Purchase Orders and Other Financial Commitments (Recompiled 10/1/2001) Repealed 3/23/2021.

NMAC History: 2 NMAC 20.2 - Execution of Contracts, Vouchers, Purchase Orders and Other Financial Commitments (Recompiled 10/1/2001) was replaced by 2.20.2 NMAC - Execution of Contracts, Vouchers, Purchase Orders and Other Financial Commitments (Recompiled 10/1/2001), effective 3/23/2021.

**HEALTH,
DEPARTMENT OF**

**This is an amendment to 7.34.4
NMAC, Section 28 effective
3/23/2021.**

7.34.4.28 RECIPROCITY:
Beginning July 1, 2020, an individual who holds proof of authorization to participate in the medical cannabis program of another state of the United States, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo may lawfully purchase and possess cannabis, provided that the quantity of cannabis does not exceed the reciprocal limit identified in this section. A qualified patient may not be registered or participate as a reciprocal participant in the New Mexico medical cannabis program.

A. Reciprocal participation:

(1) General requirements: A reciprocal participant:

(a) may participate in the medical cannabis program in accordance with department rules;

(b) shall not be required to comply

with the registry identification card application and renewal requirements established pursuant to this section and department rules;

(c) shall at all times possess proof of authorization to participate in the medical cannabis program of another state, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo and shall present proof of that authorization when purchasing cannabis from a licensee; and

(d) shall register with a licensed non-profit producer for the purpose of tracking sales to the reciprocal participant in an electronic system specified by the department.

(2) Minors:
In the event that a reciprocal participant is a minor, a licensed non-profit producer shall not sell or transfer cannabis to the minor, but may sell or transfer cannabis to a parent or legal guardian of the minor who holds proof of authorization to purchase cannabis on the minor's behalf that was issued by another state of the United States, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo.

(3) Residency requirements:

(a)
Non-residents: A person who is not a resident of New Mexico may participate in the medical cannabis program as a reciprocal participant, provided that the reciprocal participant's place of residence is consistent with their place of enrollment. (For example: a Colorado resident shall not be registered or otherwise participate as a reciprocal participant on the basis that he or she is enrolled in the medical cannabis program of a state or other jurisdiction other than Colorado.)

(b)
New Mexico residents: A New Mexico resident who is not a member of a New Mexico Indian nation, tribe, or pueblo shall not participate in the medical cannabis program as a reciprocal participant, but may pursue enrollment as a qualified patient in accordance with rule 7.34.3 NMAC. A member of a New Mexico Indian nation, tribe or pueblo medical cannabis program may participate as a reciprocal participant, provided that the individual has proof of authorization to participate in the New Mexico Indian nation, tribe or pueblo's medical cannabis program.

B. Reciprocal

limit: A reciprocal participant may collectively possess within any three-month period a quantity of usable cannabis no greater than 230 total units. For purposes of department rules, this quantity is deemed the reciprocal limit. (For ease of reference: 230 units is equivalent to 230 grams, or approximately eight ounces, of dried usable cannabis plant material.)

C. Registration;

verification; tracking: A licensed non-profit producer shall require the submittal of a reciprocal participant's contact information for registration purposes, to include the individual's full name, date of birth, mailing address, and the enrollment number specified in the individual's medical cannabis program enrollment card (if applicable); and shall record that information in an electronic tracking system specified by the department.

(1) The

licensed non-profit producer shall confirm the accuracy of a reciprocal participant's contact information prior to each transaction.

(2) A

licensed non-profit producer that registers a reciprocal participant or that sells or transfers cannabis or a cannabis product to a reciprocal participant shall first verify the reciprocal participant's identity by [~~viewing~~] comparing the individual's proof of authorization from the other state, territory or tribe, [~~and also viewing~~] to the reciprocal participant's government-issued photo identification card, and verifying that the information, including but not limited to place of residence, is consistent.

(3) A licensed

non-profit producer that sells or otherwise transfers cannabis or a cannabis product to a reciprocal participant shall track the sale or transfer using an electronic system specified for that purpose by the department.

(4) A licensed

non-profit producer shall not register an employee or board member of the producer as a reciprocal participant.

(5) At the time of registration, a licensed non-profit producer shall electronically upload a copy of the reciprocal participant's proof of authorization, and a copy of the reciprocal participant's government issued photo identification which indicates the person's place of residence, into the electronic tracking system specified by the department.

(6) A

licensed non-profit producer shall ensure that the individual registering as a reciprocal participant is not already registered as a reciprocal participant or a qualified patient in the New Mexico medical cannabis program, before entering registration information for the individual. Registration of a reciprocal participant who was previously registered may result in disciplinary action in accordance with this rule.

(7) At the

time of registration, a licensed non-profit producer shall ensure that the reciprocal participant signs the participant's registration in the electronic tracking system specified by the department and acknowledges that they understand the requirements of participation in the program, including but not limited to acknowledging the time and quantity limits for reciprocal participation under this rule, as well as the notice concerning state and federal prohibitions against the transport of cannabis across state and international boundaries. A licensed non-profit producer shall ensure that the acknowledgement is signed by the reciprocal participant, and is not substituted by the signature of another person. A licensed non-profit producer that fails to comply with these requirements may be subject to disciplinary action in accordance with this rule.

D. Proof of

authorization: Proof of authorization to participate in the medical cannabis program of another jurisdiction (an "originating jurisdiction") shall consist of a card or other physical document issued by a governmental entity authorized

by law to enroll the applicant in the medical cannabis program in the originating jurisdiction. For purposes of reciprocal participation in the New Mexico medical cannabis program, permission from a medical practitioner shall not in itself be deemed proof of authorization to participate in the medical cannabis program of another jurisdiction, but shall be accompanied by a card or other proof of enrollment issued by an authorized governmental entity of the originating jurisdiction. (For example, a written letter from a physician authorizing the individual to participate in the California medical cannabis program shall not be deemed proof of authorization for the purpose of participating in the New Mexico medical cannabis program.)

[D] E. Refusal of service:

A non-profit producer that reasonably suspects that either a person's proof of authorization or identification card is falsified may refuse to dispense cannabis to that individual.

[E] E. Informational

materials: At the time of a sale or transfer of cannabis to a reciprocal participant, a non-profit producer shall provide informational materials to the reciprocal participant that include, at a minimum, a notice of the time and quantity limits for reciprocity under this section, and a notice concerning state and federal prohibitions against the transport of cannabis across state and international boundaries.

[7.34.4.28 NMAC - Rp. 7.34.4.28 NMAC, 6/23/2020; A/E, 10/8/2020; A, 3/23/2021]

**HUMAN SERVICES
DEPARTMENT
MEDICAL ASSISTANCE
DIVISION**

The New Mexico Human Services Department approved the repeal of 8.326.10 NMAC - Traumatic Brain Injury Trust Fund Program (filed 10/25/2007) and replaced it with 8.326.10 NMAC - Brain Injury Services Fund Program (adopted on 3/3/2021), effective 4/1/2021.

**HUMAN SERVICES
DEPARTMENT
MEDICAL ASSISTANCE
DIVISION**

**TITLE 8 SOCIAL
SERVICES
CHAPTER 326 CASE
MANAGEMENT SERVICES
PART 10 BRAIN INJURY
SERVICES FUND PROGRAM**

8.326.10.1 ISSUING

AGENCY: Human Services Department.

[8.326.10.1 NMAC - Rp, 8.326.10.1 NMAC, 4/1/2021]

8.326.10.2 SCOPE: This rule applies to the general public.

[8.326.10.2 NMAC - Rp, 8.326.10.2 NMAC, 4/1/2021]

8.326.10.3 STATUTORY

AUTHORITY: Subsection E of Section 9-23-6 NMSA 1978

[8.326.10.3 NMAC - Rp, 8.326.10.3 NMAC, 4/1/2021]

8.326.10.4 DURATION:

Permanent.

[8.326.10.4 NMAC - Rp, 8.326.10.4 NMAC, 4/1/2021]

8.326.10.5 EFFECTIVE

DATE: April 1, 2021, unless a later date is cited at the end of a section.

[8.326.10.5 NMAC - Rp, 8.326.10.5 NMAC, 4/1/2021]

8.326.10.6 OBJECTIVE: The

objective of this rule is to establish policies and procedures and define standards of the New Mexico human services department (HSD) brain injury services fund program. The brain injury services fund program provides timely short term in-state non-medicare services for persons with qualifying brain injuries that are of traumatic or other acquired origin in order to promote independence and to assist the individual in resolving a brain-injury related crisis need and access available payer sources and community resources, when there is no other funding available.

[8.326.10.6 NMAC - Rp, 8.326.10.6 NMAC, 4/1/2021]

8.326.10.7 DEFINITIONS:

A. “Acquired brain injury” (ABI) means a brain injury that is the result of trauma arising from an insult to the brain from an outside physical force via open or closed head injury; shaken baby syndrome; anoxia; near-drowning; electrical shock; brain infection; brain tumors; cerebrovascular lesions or insults, including stroke and aneurysm; or unintended toxic or chemical exposure. The definition excludes conditions that are congenital, degenerative, induced by birth trauma, or resulting from abuse of alcohol or other substances. The injury may be focal or diffuse, causing temporary or permanent impairments in cognitive, psychosocial or physical functioning affecting one or more areas of the brain and result in partial or total functional disability. Brain injury related impairments may affect one or more areas of functioning such as: cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; information processing; sensory, perceptual, and motor abilities; physical functioning; sleep; psychosocial and behavioral functioning; and, or speech.

B. “Activities of daily living” (ADL) means the basic tasks that are necessary for independent functioning to care for one’s personal needs and may include bathing and showering, personal hygiene and grooming, dressing, toileting, transferring or moving the physical body in space while performing activities, and self-feeding.

Instrumental activities of daily living (IADLs) are not necessary for fundamental functioning but do allow an individual to live independently in their home or community; these include cleaning and maintaining the home, doing laundry, managing personal finances, preparing meals, shopping for groceries, taking prescribed medications, and using the telephone or other communication devices.

C. “Brain injury”.

See definition for acquired brain injury and traumatic brain injury.

D. “Brain injury services fund (BISF) program”

means a non-medicare program administered by HSD through programmatic oversight and contractual management of agencies, providing short-term crisis interim home and community-based services for eligible individuals living with brain injury, who have a defined crisis related to living with brain injury and no responsible funding source to pay for needed services or goods. Direct participant care services are provided through service coordination or BISF home and community-based services.

E. “Crisis” means an emergency or unstable situation that has reached a critical phase with a distinct possibility of adverse outcome and poses a serious potential danger. As related to a brain injury, a crisis may include homeless status, unemployment, substantial loss of income, lack of health insurance or means to pay for brain-injury related healthcare, separation from support systems, abandonment or other endangering circumstances. For the purposes of the BISF, the absence of service coordination, long-term care, long-term case management or need for long-term case management does not constitute a crisis.

F. “Crisis interim period” means a short-term period of six months upon which an enrolled participant can be reassessed to extend approved services for another six month period depending upon available funding and limited to no more than one consecutive year, if the crisis has not resolved and goals for independent living have not reached completion, or until another funding source has been obtained. Time limitations on services apply to both service coordination and to BISF HCBS.

G. “Education” means providing individuals living with brain injury training and understanding of brain injury, acquiring life skills or fulfilling activities of daily living, which can be applied day to day, to assist in the attainment of an independent lifestyle.

H. “Fiscal intermediary agency” means an

agency that arranges for BISF home and community-based services and goods and processes payment or reimbursement for services and goods for eligible participants of the New Mexico human services department brain injury services fund program.

I. “Formulary” or “BISF formulary” means the list of medications approved by the BISF program for treatment of specific categories of brain injury symptoms and related conditions. Coverage is in the form of copayments for participants who have no other responsible payer sources. Approved generic and brand name medications are categorized by class or function. BISF service coordinators are authorized to review prescribed participant medications against the formulary in the event that other responsible payer sources to cover the medication do not exist prior to referral for BISF HCBS.

J. “Grievance” means a complaint or disagreement with regard to how or whether a service provided through the program is or can be provided.

K. “Home and community-based services” (HCBS) are defined as services to promote independent living that are provided in a person’s home or community, i.e., those not provided under institutional care. BISF HCBS are those that may be required when there is an imminent risk to a participant’s health and safety; there has been a sudden change in the medical, psychological or physical condition of a participant; when there is acceleration in the amount of services needed; when needs have suddenly changed; or when another payer source will not pay for the unique brain injury services assessed as a need.

L. “Human services department (HSD)” is the New Mexico state government agency that administers services to New Mexico’s more vulnerable populations to improve health outcomes through state and federal funding. The brain injury services fund is administered through the medical assistance

division and receives only state funding.

M. “ICD code” means an international classification of diseases diagnosis, which includes codes for traumatic and other acquired brain injuries and has been documented in writing by a duly licensed medical professional or psychologist for the purpose of assisting an individual with brain injury to qualify for the BISF program. Current ICD codes may be accepted from medical doctors (MDs), osteopathic doctors (DOs), certified nurse practitioners (CNPs), physician assistants (PAs), and Ph.D. psychologists.

N. “Imminent” means impending and threatening, referring to a crisis that is bound to happen with a clear and present danger to the health and safety of a person who has sustained a brain injury and who has exhausted all available resources.

O. “Independence” means the ability to live in a home and community setting and perform activities of daily living with little or no assistance from others while having access to available community resources.

P. “Individual” means a person living with brain injury and may be an applicant or a program participant.

Q. “Independent living plan” (ILP) means a written person-centered plan that outlines definite goals for resolving a participant’s identified crisis which is designed to assist the participant toward greater independence; lists measurable objectives in the form of action steps and strategies that are targeted to comprehensively address and resolve each identified crisis; and specifies a plan for discharge. The ILP identifies all services and supports as well as payer sources that are assisting the participant toward greater independence, specifying those that pertain directly to service coordination and BISF HCBS. It must also list ancillary services and supports, not paid for by the BISF program, noting related payer sources, as well as services refused but needed

to resolve or address identified crises.

R. “Interim” means a time period defined by the BISF program in which temporary services are provided. The interim period for the BISF program is six months.

S. “Legal resident of New Mexico” means a person residing in New Mexico at the time of application.

T. “Life skills coach” means a person, who may be defined as a “life coach”, is certified through an accredited organization, and provides targeted customized training to an individual with brain injury to assist in relearning and completing activities of daily living while addressing related cognitive, behavioral or social impairments that are preventing the return to independent functioning.

U. “Participant” means a person living with brain injury, who has qualified for, been approved for, and is actively receiving BISF program services, while working toward greater independence and resolution of crisis needs.

V. “Payer of last resort” refers to the BISF Program as a source of funding available to pay for BISF HCBS only after all payer sources with responsibility to pay have been denied or exhausted including private insurance, medicaid, medicare, Indian health services, veterans administration, adult protective services and other state or federal programs, or community programs in which the participant participates voluntarily.

W. “Residency” means the status of a person who is a legal resident of New Mexico and is able to produce documentation of a physical address within New Mexico at which the person resides within a home and community setting. It does not include residence in an institution wherein the individual is unable to function independently.

X. “Risk” means a possible loss or injury, a hazard increasing the probability or chance that loss or injury will occur.

Y. “Self-determination” means the right of

individuals to make decisions that direct the path their life follows with regard to medical, financial and all other matters, including the right to refuse measures needed to improve their outcome.

Z. “Service coordination” means the goal-oriented initiation, organization and management of a BISF participant’s services, including determination of eligibility, initial and interim assessments, development and monitoring of the participant’s independent living plan (ILP), referrals for BISF program and community resources, assistance with benefits applications for other payer sources, and problem-solving to assist in the resolution of the crisis that motivated entry to the BISF program, while moving the participant toward greater independence in daily living. Service coordination may continue during resolution of an identified crisis need. Service coordination is not defined as case management, and the need for long-term case management does not constitute a qualifying crisis for remaining on the BISF.

AA. “Short-term” means an intervention period with beginning and end points within which BISF funding for service coordination or BISF HCBS may be used to prevent or alleviate a crisis situation until circumstances stabilize or other funding is obtained.

BB. “Traumatic brain injury (TBI)” means an insult to the brain from an outside physical force that may or may not have produced a diminished or altered state of consciousness causing temporary or permanent impairments in one or more areas of the brain and resulting in partial or total functional disability and or psychosocial disorientation. The term applies to open or closed head injuries resulting in an impairment of cognitive, psychosocial or physical functions. Brain injury related impairments may occur in one or more areas such as: cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-

solving; information processing, sensory, perceptual, and motor abilities; physical functioning; sleep; psychosocial and behavioral functioning; and speech.
[8.326.10.7 NMAC - Rp, 8.326.10.7 NMAC, 4/1/2021]

8.326.10.8 MISSION

STATEMENT: To transform lives. Working with our partners, we design and deliver innovative, high quality health and human services that improve the security and promote independence for New Mexicans in their communities.
[8.326.10.8 NMAC - Rp, 8.326.10.8 NMAC, 4/1/2021]

8.326.10.9 BISF

ELIGIBILITY REQUIREMENTS: Enrollment into the BISF, as a non-entitlement program, is on a voluntary basis and occurs in up to six month increments. To be eligible for the BISF program, an applicant with a crisis need must meet the following requirements:

A. Diagnosis:
Individuals are eligible for BISF services if they have a qualifying diagnosis of brain injury of ABI or TBI which has been documented in writing by a duly licensed medical professional or psychologist. A qualifying diagnosis of brain injury is confirmed by the licensed health practitioner’s assignment of the current international classification of diseases (ICD) code.

B. Residency:
Eligible individuals must be legal residents of the state of New Mexico. Eligible participants must be able to produce documentation of the physical location of their New Mexico residence. Those residing in an institution or are in the process of transitioning to an institutional setting are not eligible for services through the BISF program. Those participants who have a confirmed discharge date from an institutional setting and are transitioning into the community are eligible for BISF services for a 30-day period prior to the planned discharge date to assist with setting up needed supports and services.

For homeless participants with brain injury, the physical address constitutes the agreed-upon location at which the participant routinely meets with the BISF service coordinator and at least one other community case manager, if available.

C. Service

Coordination Duplication: Those participants served by other service coordination programs, care coordination or case management systems are not eligible to receive service coordination through the BISF program, unless transitioning between programs and with HSD approval. Such programs might include comparable services offered through any of the following:

- (1) medicaid managed care organization (MCO), including community benefit;
- (2) medicaid home and community-based services waivers;
- (3) early and periodic screening, diagnosis and treatment;
- (4) family infant toddler;
- (5) program of all-inclusive care for the elderly (PACE);
- (6) health management organizations (HMOs); and
- (7) other private insurances.

D. Determination of eligibility: The service coordination contractor is responsible for determining eligibility for the BISF program and maintaining documentation of eligibility status. Proof of eligibility status including current qualifying ICD codes must be provided to the HSD or its designee upon request.

E. Re-enrollment into the BISF for reactivation of services: Former program participants, who disenrolled from the program due to resolution of their crisis needs, may seek to re-enroll in the BISF, in the event that a new crisis arises with which they require the program’s assistance. Re-enrollment allows for the reactivation of service

coordination and BISF HCBS without providing a new ICD code, in the event that a qualifying code continues to be on file.

F. Continuation of BISF services beyond one consecutive service year. Program participants who have not experienced a resolution of their crisis need(s) within two consecutive six month interims of service may be eligible to continue service coordination or BISF HCBS for additional interim periods for up to another service year as funding allows. The petition for continuation of services requires written justification by the service coordination agency, following the standards established by HSD. In no case will continuation of services be permitted without written approval by HSD to extend services beyond one service year.

G. Disenrollment from the BISF: Disenrollment from the BISF may be voluntary or involuntary.

(1) Voluntary disenrollment: Participants may voluntarily disenroll from the program without cause at any time. In addition, participants are no longer eligible to receive service coordination or BISF HCBS services when any of the following apply:

(a) other responsible payer sources have been identified and have begun coverage;

(b) the crisis or crises that caused the participant to seek enrollment have been resolved; or

(c) upon a permanent move out of the state of New Mexico. The service coordination agency will give such participants reasonable advance notice of pending disenrollment and continue furnishing any needed services until the terms for disenrollment have been met and the disenrollment is complete. Upon disenrollment, all services will be inactivated.

(2) Involuntary disenrollment: Participants of the BISF may be disenrolled involuntarily if any of

the following circumstances apply, subsequent to reasonable efforts of the service coordination agency to provide technical assistance to improve the participant's understanding of program expectations and as noted below:

(a) The participant refuses to act in accordance with the requirements of their independent living plan (ILP) or otherwise participate in the resolution of their crisis needs, exercising the capabilities that remain within their power or that of their authorized representative. This describes participants who repeatedly fail to follow through with keeping appointments with the service coordinator or access needed and recommended services;

(b) The participant refuses to act in accordance with the program's participant rights and responsibilities, as explained by the service coordination agency and signed by the participant upon program intake;

(c) The participant's physical, behavioral, psychosocial or service needs exceed that which can be reasonably provided by the program or be met with available funding;

(d) The participant engages in disruptive or threatening behavior. This describes a participant whose behavior jeopardizes his or her health or safety, or the safety of others. In these cases, and with justifiable cause for the service coordinator's safety, the service coordination agency may elect to disenroll such participant without providing further remedy or technical assistance.

(e) Prior to disenrollment for any of the above, the service coordination agency proposing to disenroll a participant involuntarily is required to:

(i) document the reasons for proposing to disenroll the participant as well as any and all efforts to remedy the situation; and

(ii) submit the written request to involuntarily disenroll the participant to HSD, along with supporting documentation for HSD's review and determination that the service coordination agency has provided acceptable grounds for the participant's disenrollment. [8.326.10.9 NMAC - Rp, 8.326.10.9 NMAC, 4/1/2021]

8.326.10.10 BISF CONTRACTED ENTITIES AND CONTRACTORS: Brain injury services fund (BISF) services are provided through two contractor components, service coordination and fiscal intermediary agent for BISF HCBS.

A. Service coordination services: Service coordination services serve a problem-solving function. They are intended to resolve a participant's stated crisis need, ensure service continuity, prevent fragmentation of services and endeavor to tap into any and all resources that are appropriate and accessible, including community-based supports, while resolving the crisis that brought the participant into the program. The intent of service coordination is to augment, not replace, the participant's natural supports in a manner that facilitates independent living and self-determination. All participants must have a BISF program service coordinator before they can receive any other BISF program services.

(1) Qualifications for service coordination: Service coordination agencies serving the BISF program must ensure the following pertaining to staff qualifications:

(a) have a current social worker license in good standing with the New Mexico board of social work examiners; or

(b) have a current registered nurse license, in good standing from the New Mexico board of nursing; or

(c) have a bachelor's degree in social work, counseling, nursing, special

education or closely related field plus one-year clinical experience related to the brain injury population working in any of the following settings:

- (i) home health or community health program;
- (ii) hospital;
- (iii) private practice;
- (iv) publicly funded institution or long-term care program;
- (v) mental health program;
- (vi) school or school health setting;
- (vii) community-based social service program; or
- (viii) other programs addressing the needs of individuals with brain injury.

(d)

With prior approval from the HSD BISF program manager or designee, exceptions to service coordinator qualifications can be made; contractors requesting qualification exceptions must demonstrate that applicant candidates have relevant education, internships or volunteer experience. Other qualifications may be:

- (i) associates degree and a minimum of three years of experience in the mental health or brain injury field; or
- (ii) high school graduation or general educational development (GED) test and a minimum of five years of experience in the mental health or brain injury field.

(e)

All BISF service coordinators whether subcontracting or employed by a BISF program contracted agency must meet these requirements and attend continuing education as determined by HSD.

(2) Scope

of services: Service coordination includes but is not limited to facilitating eligibility determination for individuals applying to the BISF; conducting an in-person

assessment; developing an independent living plan (ILP); coordination and documentation of the delivery of services; maintaining a complete permanent case record for each participant which includes documentation as prescribed by HSD; and creating a transition plan for discharge from the BISF program, coordinating with other case managers, as needed.

(a)

Service coordinators must identify, and resolve known or suspected issues that may have an impact on the safety and well-being of the participant.

(b)

Service coordinators must evaluate and monitor direct service and implementation of the ILP through face-to-face contact with the participant at a frequency prescribed by HSD.

(c)

Service coordination agencies are required to maintain a 24-hour emergency response system that allows participants to contact the agency and respond to individual emergency situations within a reasonable amount of time after notification on a 24-hour basis. An emergency response written policy is to be provided to all program participants.

B. Fiscal intermediary

agent (FIA): The fiscal intermediary agent (FIA) serves as the intermediary for the arrangement and payment of brain injury specific home and community-based services (HCBS).

BISF services are only accessible through the coordination of a BISF program service coordination agency and are limited to filling a participant's needs as outlined in the participant's independent living plan (ILP), when there is an imminent risk to the participant's health and safety.

(1)

Qualifications for FIA: FIA service staff must demonstrate the following qualifications:

(a)

have a bachelor's degree in business, social work, counseling, nursing, special education or closely related field; and

(b)

have experience related to the brain injury population, working in any of the following settings:

- (i) home health or community health program;
- (ii) hospital;
- (iii) private practice;
- (iv) publicly funded institution or long-term care program;
- (v) mental health program; or
- (vi) community-based social service program; or other program addressing the needs of individuals with brain injuries.

(c)

With prior approval from the BISF program manager or designee, exceptions to FIA personnel qualifications can be made.

Contractors requesting qualification exceptions must demonstrate relevant education internships or volunteer experience. Other qualifications may be:

- (i) associate degree and experience in the mental health or brain injury field; or
- (ii) high school graduation or general educational development (GED) test and extensive experience in the mental health or traumatic brain injury field.

(d)

All BISF FIA staff employed by the agent, must meet these requirements and attend continuing education as determined by HSD. Contracted FIA service providers must have the required education and be duly licensed by the state of New Mexico within their respective disciplines.

(2) Scope of

services: Fiscal intermediary agent services include but are not limited to the following activities: maintain a network of providers of brain injury related services and goods and ensure that subcontracted providers are duly licensed by the state of New Mexico or otherwise certified within

their respective disciplines; procure goods and arrange contracts and letters of agreement with vendors and contractors who provide the goods, services and supports; receive service and goods referral requests submitted by BISF service coordinators for prior authorization; and arrange for delivery of BISF goods and services.

(a) Prior to arranging for and funding requested services or goods, the FIA must verify that other responsible payer source coverage is not available to pay for services or goods and that the participant has exhausted any other financial resources.

(b) The FIA must monitor and document service expenditures for participants receiving BISF HCBS and ensure that coverage does not exceed the allowable limits set by HSD;

(c) The FIA must assure that subcontracted providers and vendors are providing the services and goods as contracted and ensure timely reimbursement to such providers and vendors.

C. General administrative requirements:

Agencies contracted to provide BISF service coordination or fiscal intermediary services are required to:

(1) have and follow confidentiality standards;

(2) maintain a current business license issued by the state, county or city government if required;

(3) comply with all applicable federal or state regulations, policies and procedures that apply to their business and to their contract with HSD;

(4) demonstrate financial solvency;

(5) maintain full professional liability insurance coverage;

(6) establish and maintain written policies and procedures related to:

(a) service provision and appropriate supervision;

(b) professional documentation standards;

(c) training and education on brain injury; and

(d) grievances and appeals as outlined in 8.326.10.15 NMAC in a manner that is accommodating to those living with brain injury and agreeable to the HSD BISF program; and

(7) have a governing board with at least one external member with a brain injury, a family member with a brain injury or professional working with brain injury;

(8) maintain an in-house directory of brain injury resources for each region served. [8.326.10.10 NMAC - Rp, 8.326.10.10 NMAC, 4/1/2021]

8.326.10.11 CONFLICT OF INTEREST: Contracted entities and providers, who provide direct BISF services, must avoid conflict of interest or duplication of services and may not:

A. provide direct intervention services, such as individual therapy, group therapy, support groups, homemaker services, personal attendant services, life skills coaching services, psychosocial rehabilitation services, or duplicate BISF HCBS or fiscal intermediary services for enrolled BISF participants, when they are also contracted to provide service coordination services;

B. accept gifts from existing or potential vendors in exchange for a contract relationship or other favorable treatment;

C. charge BISF program participants for their services; and

D. in no instance shall a service coordination agency or fiscal intermediary agent, contracted by HSD for BISF program services, direct the provider, vendor or contractor that shall provide a participant's services or goods.

[8.326.10.11 NMAC - Rp, 8.326.10.11 NMAC, 4/1/2021]

8.326.10.12 INDEPENDENT LIVING PLAN: An independent living plan (ILP) is required for each interim service period that includes all the services, goods, and supports recommended to the participant including referrals to BISF HCBS and any other potential resources available in the local community that are needed to resolve the identified crisis. BISF HCBS cannot be initiated until the service coordinator has included the services in the ILP and completed the appropriate referrals. The ILP is to be written and developed by the service coordinator with the participation of the participant and shall include:

A. person-centered goals and action steps needed to complete goals;

B. education and support necessary to reach goals and objectives;

C. number of hours per month the participant will receive BISF service coordination and other identified BISF services;

D. expected measurable outcomes;

E. time frames for reaching goals and meeting objectives;

F. plans for discharge or transference to another program or payer source;

G. identification of all persons, services or products necessary to reach the participant's goals and accomplish their objectives; and

H. estimation of cost of services or goods provided by HCBS. [8.326.10.12 NMAC - Rp, 8.326.10.12 NMAC, 4/1/2021]

8.326.10.13 BRAIN INJURY SERVICES FUND HOME AND COMMUNITY-BASED SERVICES: BISF home and community-based services (HCBS) and goods are for outpatient care administered within the state of New Mexico and must address the participant's assessed needs and include the expectation of individual and family participation. BISF HCBS are designed to resolve a participant's

identified crisis, enhance the individual's self-determination and promote independence. BISF HCBS funding can only be used for services and goods that are documented in the participant's ILP and or substantiated by physician's orders or other required documentation, as appropriate. As the payer of last resort, BISF funding may be used for the purchase of authorized services or goods that are not covered by medicaid, medicare, the special education-individuals with disability education act (IDEA) program, department of vocational rehabilitation (DVR), private insurance or other responsible payer sources. The delivery of all BISF HCBS will be in accordance with the standards set by HSD.

A. BISF HCBS

eligibility requirements: BISF HCBS can only be provided to program participants who have a current BISF service coordinator and have met BISF program requirements. Eligibility for BISF HCBS is based upon the service coordinator's assessment of participant needs, verification that no responsible payer source exists, and receipt of supporting medical documentation, as appropriate to justify the need for a requested service or good. Referrals for qualifying participants are submitted to the FIA, who arranges and pays for authorized goods and services in 90-day increments.

B. Funding limits per participant: There is a maximum yearly and lifetime coverage for eligible participants as determined by their assessed needs. Funding is also limited by legislative or departmental appropriation. Coverage limitations for qualifying participants are as follows:

(1) No more than the annual budgetary cap per participant as prescribed by HSD, unless through approved written exception by HSD; this value represents a maximum amount that may be budgeted and is not a guaranteed annual budget assignment.

(2) \$75,000 lifetime maximum for combined services and goods;

(3) \$10,000 lifetime limit on environmental modifications; and

(4) only one emergency housing assistance per participant in a lifetime, unless an exception is made in writing by the BISF program manager at the HSD.

C. Duration of services: BISF HCBS funding and approved services are provided in six month increments with the following provisions:

(1) BISF HCBS are provided as funding limits allow only until other responsible payer sources are available, or the crisis has been otherwise resolved.

(2) BISF HCBS can only be continued for one additional interim, up to one year with documentation that the needs being addressed still exist and cannot be provided by another responsible payer. Continuation of BISF HCBS for requested services is contingent upon completion of a six-month written recertification conducted by the participant's service coordinator in accordance with program standards. As applicable, this will include orders from a physician or licensed medical provider stating support for ongoing services.

(3) BISF HCBS may be extended or continue past the six-month duration, until a necessary product can be obtained or in the case of environmental modification and retrofit automobile services, the modification to the participant's environment or automobile can be completed. Any cause for delay must be recorded by the service provider in the participant's record and provided to the service coordination agency. The record must be updated, until completion of the project or modification has been completed or the goods ordered are delivered.

(4) Exceptions to the six-month interim timeline beyond two consecutive interims, may be requested by the service coordination agency in writing through HSD's process for extending services and referrals on the basis

of one or more unresolved crises, ongoing participant needs and available funding.

(5) After a participant's BISF HCBS have been inactivated, services may be reestablished through the BISF service coordinator due to an exacerbated condition or situation that has caused a critical need that cannot be covered by other responsible payer sources.

(6) Participants who are receiving BISF HCBS may be eligible to access additional BISF HCBS funding, beyond the prescribed limits, if the person has experienced a sudden, drastic and accelerated change in needs impacting health and safety, such as an exacerbated medical or psychological condition. Participants accessing BISF HCBS on an escalated basis will require medical documentation to establish a higher order of need. Escalated services may or may not be provided as funding allows on a short-term basis, per program requirements.

D. Freedom of choice: Each participant receiving BISF HCBS shall be informed of all available service providers, vendors or contractors that are eligible to provide the needed services or goods in their region. The participant shall be the sole decision maker of who is to provide services or goods from all eligible entities that could fill his or her needs. The BISF program cannot guarantee that all services will be available in all regions or that a preferred provider will agree to work with the program.

E. Service descriptions: Services that require physician's orders include but are not limited to home health aide, nursing services, neuropsychological evaluations, novel or unconventional therapies, durable medical equipment over \$250, and other non-standard services and goods. Requested services and goods cannot be accessed until authorized in writing by the FIA, who arranges and pays for approved BISF HCBS and goods. BISF HCBS funding may be used to

pay for services and goods that meet the noted criteria in the following categories, with special requirements, as noted:

(1) Assistive technology assessment services: Assistive technology assessment services are the systematic application of technologies to assist persons diagnosed with brain injury to improve communication skills and the ability to perform activities of daily living. An assistive technology assessment is required to justify the purchase of assistive technology or adaptive equipment that is needed to address symptoms of the participant's brain injury. Services shall be provided by an individual or agency with a minimum of a master's degree in assistive technologies; an individual or agency certified by the rehabilitation engineering and assistive technologies society of North America (RESNA); an individual or agency demonstrating a working knowledge of assistive technologies; or a licensed physician or rehabilitation provider agency. Services shall include assessment, recommendations and training by a qualified healthcare professional.

(2) Durable medical equipment and assistive technology: Durable medical equipment (DME) refers to any equipment that is used to serve a medical purpose or provides therapeutic benefits to a patient in need because of certain medical conditions, related to a participant's brain injury. Assistive or adaptive technology refers to any "product, device, or equipment, whether acquired commercially, modified or customized, that is used to maintain, increase, or improve the functional capabilities" of a person living with brain injury. DME or adaptive equipment is intended to fill the assessed medical, therapeutic or functional needs of participant and a prescription and a written assessment provided by a physician or licensed therapist must be submitted to justify the equipment requested if the cost of the DME is more than \$250.

(3) Environmental modifications: Environmental modifications refer to alterations required to make the participant's home more accessible because of their brain injury and related physical limitations. Environmental modifications include but are not limited to, widening doorways, installing ramps and modifying bathrooms. Funds cannot be used to cover home improvements; expenses related to home maintenance or other repairs that would otherwise be incurred as a responsible homeowner or tenant; or be applied toward the purchase of a home. The following criteria for environmental modifications must be adhered to:

- (a)** An assessment for the proposed environmental modification must be done by a licensed physical or occupational therapist to justify the service.
- (b)** For any modification over \$250, contractor bids must be obtained by the service coordinator which must include blueprint, written description of plan and price itemization for materials and labor, along with any other supporting documentation.
- (c)** Only contractors with a current license in good standing can be engaged to do environmental modifications.
- (d)** Funds for environmental modifications are limited to a \$10,000 lifetime maximum.
- (e)** The participant shall provide proof of property ownership, and, if residing in or renting property owned by another party, provide written permission from the landlord prior to pursuing any BISF funded environmental modification;
- (f)** The FIA in collaboration with the participant's service coordinator shall show evidence that BISF funding was the most appropriate payer source to fund the requested environmental modification;

(g) For instances when costs related to a needed environmental modification cannot be covered in total by another funding source, documentation of collaboration with other funding sources must be submitted to the FIA and include:

- (i)** a detailed description and plan for the project including total cost;
- (ii)** the specific portion to be funded by the BISF program as the payer of last resort; and
- (iii)** the contractor's written acknowledgment of the specific portion and amount of the project for which the BISF program is responsible.

(h) All requests, plans and related documentation for environmental modifications shall be submitted by the BISF service coordinator for review and written approval by HSD, prior to submitting a referral.

(4) Home health aide, homemaker or companion: A home health aide, homemaker or companion from a licensed agency may be contracted to assist participants in gaining functional independence with activities of daily living, performance of general household tasks, and enable the eligible participant to accomplish tasks he or she would normally do for himself or herself if he or she did not have a brain injury. Providers of these services must meet the quality personnel standards as stipulated by the agency and state licensing. The required license of contractors providing these services must be in good standing and current. Provision of authorized services must adhere to the following requirements:

- (a)** Participants must require regular assistance with activities and or instrumental activities of daily living, as prescribed by the HSD BISF program.
- (b)** Family members, who reside in the same household, cannot serve as paid caregivers, unless:

(i) the participant and family member reside in a remote area, where no professional caregiver or respite services are available, and the needs of the participant prevent the in-home caregiver from engaging in employment outside the home; or

(ii) the intensiveness of the participant's behavioral or mental health needs prevent outside caregivers from entering the home and administering effective care. These needs shall be justified in writing through a signed letter from the participant's licensed medical or mental health care providers and submitted to HSD or designated representative for review and approval. Such justification shall be updated annually, for as long as the participant remains eligible for BISF services.

(c) In-home family caregivers who meet the criteria noted in Subparagraphs (a) and (b) of Paragraph (4) of Subsection E of 8.326.10.13 NMAC must be trained and employed by a licensed agency that meets the quality personnel standards, as stipulated by the agency and state licensing, and timesheets shall be submitted, as requested.

(5) Initial and emergency housing costs: Assistance to pay initial or emergency rent, security deposit and utility start-of-service or one-month maintenance of service charges may be provided as once in a lifetime occurrence. Documentation submitted by BISF service coordinators with any housing referral to the FIA shall adhere to the guidelines below and be maintained in the participant's BISF record:

(a) a completed housing plan worksheet and budget, which includes documentation that the participant has sufficient resources to sustain ongoing housing expenses for the chosen housing; documentation that no other payer source was available to cover the housing expenses; the rental price range that would be sustainable for the participant; and detail regarding the manner in which initial housing or utility costs will be paid.

(b) a copy of a lease or rental agreement letter that contains the name of the leaser, the address of the property and a contact name and phone number for verification of rental intent.

(c) start up and or emergency utility costs shall be submitted to the FIA to be paid within 90 days of the signed rental agreement.

(6) Nursing care: Brain injury related private duty nursing services covered by BISF HCBS must be in compliance with the New Mexico Nurse Practice Act and provided in the participant's home under the orders of the participant's physician. These services may be provided by a licensed registered nurse (RN) or a licensed practical nurse (LPN).

(7) Nutritional consultation: Coverage includes consultation and follow-up with a registered dietician or nutritionist, who is licensed with the New Mexico board of nutrition and dietetics; qualified providers may include specialists such as MDs, DOs, Ph.D.s, RDs, LDs, or DCs.

(8) Physician or medical provider services for outpatient health insurance: Coverage of copayments for physician services or the treatment of a participant's brain injury or conditions directly related to the brain injury requires treatment verification by the office of the licensed medical professional or therapist. Payments of insurance premiums and or deductibles are not covered by the BISF program.

(9) Prescribed medications: Copayment assistance may be used to cover prescription medications that are medically necessary to treat symptoms arising from a participant's brain injury or directly related conditions. Reimbursement for this service requires adherence to the following guidelines:

(a) prescription medications eligible for reimbursement must be listed in the approved BISF program formulary.

Exceptions to the BISF program formulary must be approved in writing from the HSD BISF program manager or designee;

(b) participants may not be reimbursed for prescription medications in cases where the receipt evidencing purchase is submitted more than 90 days past the date the prescription was filled;

(c) the participant must submit the pharmacy print out, which identifies the participant's name, the date, doctor's name, name of the medication and the price paid; and

(d) if feasible, and the FIA is able to set up an agreement with certain pharmacies, participants may have scripts filled with the billing sent directly to the FIA for payment; the service coordinator is responsible for checking receipts submitted by participants to avoid duplicate payments on those submitted through the pharmacy.

(10) Professional life skills coaching and organizer services: This interim service may be accessed to assist a participant in learning or re-learning life skills that are required in order to function independently in their home environment, in their job or in their community. These services are provided by individuals with appropriate certification and require the provider to address the cognitive, behavioral or social impairments that are preventing the return to independent functioning. The service may include assistance with home organization or management, time management, records management, and organization and management of finances, as well as coaching in appropriate social interactions; effective communication skills; anger management; self-care/health management; pursuit of education or employment; childcare and parenting skills; accessing and navigating community resources; mindfulness training and any other cognitive, social, or behavioral skills identified in the participant's ILP. The services of the life skills coach

are not to be used as a substitute for the participant’s task performance. The services are customized for each participant and are usually provided in the person’s home, place of work or wherever an activity would normally occur. Services are to be provided at a frequency that will best facilitate the transfer of needed skills, following an evaluation conducted by the coach. Life skills may also be provided to family members to help them adjust to their changed roles and circumstances following the brain injury of their family member. Service limitations apply as prescribed by HSD.

(11) Respite

care: A participant’s primary caregiver may be provided temporary respite, if the caregiver lives in the same household as the participant. Respite may be provided for a period up to 72 hours per week and may or may not include overnight hours. BISF HCBS funds cannot be used to pay for respite care provided by home health aides or salaried employees.

(12) Retrofit

automobile: This service is used to modify an automobile specifically for the use of a participant with brain injury. The service is limited to installation of a van lift; hand or pedal controls; and modified seating. Funds cannot be used for the purchase of an automobile or be applied toward the cost of auto repairs or maintenance that would be otherwise incurred by the responsible vehicle owner or lessee. Any request for retrofit of an automobile will begin with a referral by the service coordinator identifying a certified driver rehabilitation specialist (CDRS), who will assess the abilities of the participant with brain injury, complete an evaluation, make recommendations for the vendor who will perform the installation, and provide any training on the use of specialized equipment or controls, once the installation is completed. The CDRS may or may not be affiliated with the vendor who completes the installation; a separate referral may be needed for the vendor completing the installation.

(13)

Transportation (public or private):

Requests to cover private or public in-state transportation for participants with brain injury must adhere to the following guidelines:

(a)

Funds may be authorized for mileage reimbursements for the use of the participant’s private vehicle for the purpose of getting to medical and therapy care for treatment of conditions directly related to the brain injury. Approved mileage reimbursements will:

(i)

require prior approval by the BISF service coordinator for identified destinations and be authorized for payment by the BISF FIA;

(ii)

cover costs of actual mileage at no more than the current state approved rates;

(iii)

not be authorized to pay for gas, mileage or wear and tear on any other vehicle not privately owned by the participant with brain injury;

(iv)

not cover overnight costs for participant or caregiver lodging or per diem; and

(v)

not be covered for requests submitted more than 90 days past the date the transportation was provided, or the trip was taken.

(b)

Funds may be used to purchase public transportation in the form of bus, van or rail passes for participants and their caregivers.

(14) Therapies

and alternative therapies: All therapists providing traditional and alternative therapy services must hold a current license and be in good standing from their respective licensing authority. Service limitations on alternative therapies, such as massage, acupuncture and chiropractic care may apply, as specified by the HSD. BISF HCBS funds may be used to cover copayments for medically necessary therapies, as listed below:

(a)

outpatient mental or behavioral health;

physical therapy; **(b)**

occupational therapy; **(c)**

speech and language therapy; **(d)**

massage therapy; **(e)**

acupuncture; and **(f)**

chiropractic care. **(g)**

(15) Other use

of BISF HCBS funds: BISF HCBS funds may be used to provide other limited services in the absence of another payer source. Those services provided by a licensed practitioner may require an order or a letter of recommendation from a licensed physician or therapist. Requests for these services must be submitted by the service coordinator in writing for written authorization by the HSD BISF program manager or designee and include:

(a)

Special training and education to the participant and family in the use of tools and methods needed to promote recovery and independence of the participant.

(b)

Neuropsychological evaluations to determine a course of treatment for a participant who has already met the BISF program’s eligibility criteria. The participant must present a physician’s order or letter of recommendation for prior authorization, before accessing the service.

(c)

Special health and dietary items that are needed because of conditions directly related to the brain injury.

(d)

Health and housing advocate through independent contractors or peer mentors for attendance and advocacy at medical or therapy appointments or providing assistance in locating safe and affordable housing.

F. Providers or

vendors of BISF HCBS sub-contracted by the FIA may not charge program participants for services already arranged and authorized

through the BISF, unless the program has authorized direct reimbursement to the participant.

G. Only the HSD BISF program manager or designee can make exceptions or waivers of requirements regarding the provision of BISF HCBS with the following stipulations:

(1) requests for waivers to the provisions and services provided by the BISF program must be made by the service coordination agency in writing;

(2) requests must have accompanying documentation justifying the exception; and

(3) written approval from HSD must be placed in the participant's record by both the FIA and the service coordination agency.

[8.326.10.13 NMAC - Rp,
8.326.10.13 NMAC, 4/1/2021]

8.326.10.14 NON-COVERED SERVICES AND GOODS: Costs not covered by BISF HCBS include:

A. Dental exams, visits, procedures or equipment;

B. Optical exams, visits, glasses, lenses or other equipment;

C. Hearing exams, visits or aids or other equipment;

D. Experimental therapies;

E. Computers and internet;

F. Cell phones or cell phone carrier service;

G. Organizational supplies;

H. Service animals, certification or training of service animals, veterinary, grooming, boarding or maintenance costs;

I. Health insurance deductibles or premiums; and

J. Institutional care, nursing facility or hospital care costs.

[8.326.10.14 NMAC - Rp,
8.326.10.14 NMAC, 4/1/2021]

8.326.10.15 SERVICE AUTHORIZATION AND REIMBURSEMENT: Funding

for BISF service coordination, BISF HCBS and fiscal intermediary agent services is based upon trust fund revenues and legislative or departmental appropriation. Billings and receipts for all approved goods, services and supports, shall be submitted for payment or reimbursement within 90 days of the service date, by the participant, service coordinator or vendor, following all HSD BISF program instructions. Reimbursement for goods, services and supports are made at a predetermined reimbursement rate. The HSD reserves the right to approve or disapprove any and all vendors or subcontractors used by the BISF HCBS fiscal intermediary agent. [8.326.10.15 NMAC - Rp,
8.326.10.15 NMAC, 4/1/2021]

8.326.10.16 GRIEVANCE AND APPEALS PROCESSES FOR THE BRAIN INJURY SERVICES FUND PROGRAM: The BISF

program allows for a grievance or complaint process that affords program participants the opportunity to register grievances or complaints concerning the provision of services that are administered through the BISF program.

A. Grievances:

(1) Program participants may register complaints with the service coordination and FIA contractors.

(2) Individual BISF contractors will have written grievance procedures approved by HSD, which provide the participant or their representative with a process for expressing dissatisfaction with the program services.

(3) The contractor's written grievance procedure is to be available upon request by program participants, HSD or its assigns.

B. Appeals:

(1) If the participant or their representative do not agree with the outcome of a formal grievance filed and reviewed at the BISF contracted agency, they may appeal, in writing, to the HSD BISF program manager.

(2) The HSD BISF program manager or designee will review the written appeal along with any supporting documentation as applicable and will respond in writing to the participant filing the appeal within 30 days with notification of the outcome to the provider agencies involved.

[8.326.10.16 NMAC - Rp,
8.326.10.15 NMAC, 4/1/2021]

HISTORY OF 8.326.10 NMAC: [RESERVED]

History of Repealed Material:

8.326.10 NMAC - Traumatic Brain Injury Trust Fund Program (filed 10/25/2007) repealed effective 4/1/2021.

Other History:

8.326.10 NMAC - Traumatic Brain Injury Trust Fund Program (filed 10/25/2007) was replaced by 8.326.10 NMAC - Brain Injury Services Fund Program, effective 4/1/2021.

**HUMAN SERVICES
DEPARTMENT
MEDICAL ASSISTANCE
DIVISION**

**TITLE 8 SOCIAL
SERVICES
CHAPTER 314 LONG TERM
CARE SERVICES - WAIVERS
PART 7 SUPPORTS
WAIVER**

**8.314.7.1 ISSUING
AGENCY:** New Mexico Human Services Department (HSD).
[8.314.7.1 NMAC - N, 4/1/2021]

8.314.7.2 SCOPE: The rule applies to the general public.
[8.314.7.2 NMAC - N, 4/1/2021]

**8.314.7.3 STATUTORY
AUTHORITY:** The New Mexico medicaid program and other health care programs are administered pursuant to regulations promulgated by the federal department of health and human services under Titles XI, XIX, and XXI of the Social Security

Act as amended or by state statute. See Section 27-2-12 et seq. NMSA 1978.

[8.314.7.3 NMAC - N, 4/1/2021]

8.314.7.4 DURATION:

Permanent.

[8.314.7.4 NMAC - N, 4/1/2021]

8.314.7.5 EFFECTIVE

DATE: April 1, 2021, unless a later date is cited at the end of a section.

[8.314.7.5 NMAC - N, 4/1/2021]

8.314.7.6 OBJECTIVE: The

objective of this rule is to provide instructions for the service portion of the New Mexico medical assistance programs (MAP).

[8.314.7.6 NMAC - N, 4/1/2021]

8.314.7.7 DEFINITIONS:

A. Activities of daily living (ADLs): Basic personal everyday activities that include bathing, dressing, transferring (e.g., from bed to chair), toileting, mobility and eating.

B. Adult: An individual who is 18 years of age or older.

C. Agency-based: Supports waiver service delivery model offered to an eligible recipient who does not want to direct their supports waiver services. Agency-based services are provided by an agency with an approved agreement with department of health (DOH) to provide supports waiver services.

D. Authorized annual budget (AAB): The total approved annual amount of the community support services and goods which includes the frequency, the amount, and the duration of the waiver services and the cost of waiver goods approved by the third-party assessor (TPA).

E. Authorized representative: The individual designated to represent and act on the recipient's behalf. The authorized representative does not have budget or employer authority. The eligible recipient or authorized representative must provide legal documentation authorizing the named individual or

individuals for a specified purpose and time frame. An authorized representative may be an attorney representing a person or household, a person acting under the authority of a valid power of attorney, a guardian, or other legal designation. The eligible recipient's authorized representative may not be a service provider. The authorized representative may not approve their own timesheets. The authorized representative cannot serve as the eligible recipient's community supports coordinator.

F. Category of eligibility (COE): To qualify for a medical assistance program (MAP), an applicant must meet financial criteria and belong to one of the groups that the New Mexico medical assistance division (MAD) has defined as eligible. An eligible recipient in the supports waiver program must belong to the MAP categories of eligibility (COE) described in 8.314.7.9 NMAC.

G. Centers for medicare and medicaid services (CMS): Federal agency within the United States department of health and human services that works in partnership with New Mexico to administer medicaid and MAP services under HSD.

H. Child: An individual under the age of 18. For purpose of early periodic screening, diagnosis, and treatment (EPSDT) services eligibility "child" is defined as an individual under the age of 21.

I. Community supports coordinator (CSC): An agency or an individual that provides case management services to the eligible recipient that assist the eligible recipient in arranging for, directing and managing supports waiver program services and supports, as well as developing, implementing and monitoring the individual service plan (ISP) and AAB.

J. Electronic visit verification (EVV): A telephone and computer-based system that electronically verifies the occurrence of HSD selected service visits and documents the precise time the service begins and ends.

K. Eligible recipient:

An applicant meeting the financial and medical level of care (LOC) criteria who is approved to receive MAD services through the supports waiver.

L. Employer of record (EOR): The employer of record (EOR) is the individual responsible for directing the work of the support's waiver employees, including recruiting, hiring, managing and terminating employees. The EOR is responsible for directing the work of any vendors contracted to perform services. The EOR tracks expenditures for employee payroll, goods, and services. EORs authorize the payment of timesheets and vendor payment requests by the financial management agency (FMA). An eligible recipient may be their own EOR unless the eligible recipient is a minor or has a plenary or limited guardianship or conservatorship over financial matters in place. An EOR must be the waiver participant or an EOR must be a legal representative of the recipient.

M. Financial management agency (FMA): HSD contractor that helps implement the AAB by paying the eligible recipient's service providers and tracking expenses.

N. Individual budgetary allotment (IBA): The maximum budget allotment available to an eligible recipient. The maximum IBA under the supports waiver is \$10,000 dollars. Based on this maximum amount, the eligible recipient will develop a plan to meet his or her assessed functional, medical, and habilitative needs to enable the recipient to remain in the community.

O. Individual service plan (ISP): The ISP is the name of the person-centered plan for the supports waiver. The ISP includes waiver services that meet the eligible recipient's needs including: the projected amount, the frequency and the duration of the waiver services; the type of provider who will furnish each waiver service; other services the eligible recipient will access; and the

eligible recipient's available supports that will complement waiver services in meeting their needs.

P. Intermediate care facilities for individuals with intellectual disabilities (ICF/IID): Facilities that are licensed and certified by the New Mexico department of health to provide room and board, continuous active treatment and other services for eligible MAD recipients with a primary diagnosis of intellectually disabled.

Q. Legal representative: A person that is a legal guardian, conservator, power of attorney or otherwise has a court established legal relationship with the eligible recipient. The eligible recipient must provide certified documentation to the community support coordinator provider and FMA of the legal status of the representative and such documentation will become part of the eligible recipient's file.

R. Level of care (LOC): The level of care an eligible recipient must meet to be eligible for the supports waiver program.

S. Participant directed: Supports waiver service delivery model wherein the eligible recipient identifies, accesses and manages the employees and vendors of services (among the state-determined waiver services and goods) that meet their assessed therapeutic, rehabilitative, habilitative, health or safety needs to support the eligible recipient to remain in their community.

T. Person-centered planning (PCP): Person-centered planning is a process that places a person at the center of planning their life and supports. It is an ongoing process that is the foundation for all aspects of the supports waiver and provider's work with individuals with intellectual/developmental disabilities (I/DD). The process is designed to identify the strengths, capacities, preferences, needs, and desired outcomes of the eligible recipient. The process may include other persons, freely chosen by the eligible

recipient who are able to serve as important contributors to the process. It involves person-centered thinking, person-centered service planning and person-centered practice. The PCP enables and assists the recipients' strengths, capacities, preferences, needs, and desired outcomes of the eligible recipient.

U. Reconsideration: A written request by an eligible recipient who disagrees with a clinical/medical utilization review decision or action submitted to the third-party assessor for reconsideration of the decision. The eligible recipient or his or her authorized representative may submit the request for a reconsideration through the community support coordinator or the community support coordinator agency may submit the request directly to MAD.

V. Third-party assessor (TPA): The MAD contractor who determines and re-determines LOC and medical eligibility for the supports waiver program. The TPA also reviews the eligible recipient's ISP and approves the AAB for the eligible recipient. The TPA performs utilization management duties for all supports waiver services.

W. Waiver: A program in which the federal government has waived certain statutory requirements of the Social Security Act to allow states to provide an array of home and community-based service options through MAD as an alternative to providing long-term care services in an institutional setting. [8.314.7 NMAC - N, 4/1/2021]

8.314.7.8 MISSION STATEMENT: To transform lives. Working with our partners, we design and deliver innovative, high quality health and human services that improve the security and promote independence for New Mexicans in their communities. [8.314.7.8 NMAC - N, 4/1/2021]

8.314.7.9 SUPPORTS WAIVER HOME AND COMMUNITY-BASED SERVICES:

A. New Mexico's supports waiver is designed to provide temporary assistance to those on the developmental disabilities (DD) waiver wait list. It is intended to provide support services to eligible recipients to enable work toward self-determination, independence, productivity, integration, and inclusion in all facets of community life across the lifespan. The services provided are intended to build on each eligible recipient's current support structures through person-centered planning to work toward individually defined life outcomes, focusing on developing the eligible recipient's abilities for self-determination, community living and participation, and economic self-sufficiency. An eligible recipient has a choice of receiving services through the agency-based service delivery model or the participant directed service delivery model.

B. The program is operated by the New Mexico department of health developmental disabilities supports division (DOH/DDSD), at the direction of the New Mexico human services department medical assistance division (HSD/MAD). [8.314.7.9 NMAC - N, 4/1/2021]

8.314.7.10 ELIGIBILITY REQUIREMENTS FOR RECIPIENT ENROLLMENT:

Enrollment in the supports waiver is contingent upon the applicant meeting the eligibility requirements, the availability of funding as appropriated by the New Mexico legislature, and the number of federally authorized unduplicated eligible recipients. When sufficient funding is available, DOH will offer the supports waiver to eligible recipients on the DD wait list. Once an offer has been given to the applicant, they must meet certain medical and financial criteria in order to qualify for enrollment. Eligible recipients must meet the following eligibility criteria: financial eligibility criteria determined in accordance with 8.290.400 NMAC; the eligible recipient must meet the level of care (LOC) required for admittance

to an intermediate care facility for individuals with intellectual disabilities (ICF/IID); and additional specific criteria as specified in the categories below.
[8.314.7.10 NMAC - N, 4/1/2021]

8.314.7.11 ELIGIBLE RECIPIENT

RESPONSIBILITIES:

Supports waiver eligible recipients have responsibilities to participate in the program. Failure to comply with these responsibilities or other program rules and service standards can result in termination from the program. The eligible recipient has the following responsibilities:

A. To maintain eligibility the recipient must complete required documentation demonstrating medical and financial eligibility both upon application and annually at recertification, and seek assistance with the application and the recertification process as needed from a community supports coordinator (CSC).

B. To participate in the supports waiver program, the eligible recipient must:

(1) comply with applicable NMAC rules to include this rule and supports waiver service standards and requirements that govern the program;

(2) collaborate with the CSC to choose between the agency-based or participant directed service delivery models, and determine support needs related to planning and self direction as applicable;

(3) collaborate with the CSC to develop an ISP and budget using the IBA in accordance with applicable NMAC rules to include this rule and supports waiver service standards;

(4) use supports waiver program funds appropriately by only requesting and purchasing goods and services covered by the supports waiver program in accordance with program rules which are identified in the eligible recipient's approved ISP and budget;

(5) comply with the approved ISP and not exceed the AAB;

(a) if the eligible recipient, due to mismanagement or failure to properly track expenditures, prematurely depletes the AAB amount during an ISP year, the failure to properly manage the AAB does not substantiate a claim for a budget increase (e.g. if all of the AAB is expended within the first three months of the ISP year, it is not justification for an increase in the budget for the ISP year);

(b) revisions to the AAB may occur within the ISP year, and the eligible recipient is responsible for ensuring that all expenditures are in compliance with the most current AAB in effect;

(i) the ISP must be amended to reflect a change in the eligible recipient's needs or circumstances before any revisions to the AAB can be requested;

(ii) other than for critical health and safety reasons, budget revisions may not be submitted to the TPA for review within the last 60 calendar days of the budget year;

(c) no supports waiver program funds can be used to purchase goods or services prior to TPA approval of the ISP and annual budget request;

(d) any funds not utilized within the ISP and AAB year cannot be carried over into the following year;

(6) access CSC services based upon identified need(s) in order to carry out the approved ISP;

(7) collaborate with the CSC to appropriately document service delivery and maintain documents for evidence of services received;

(8) report concerns or problems with any part of the supports waiver program to the community supports coordinator or if the concern or problem is with the CSC, to DOH;

(9) work with the TPA by providing documentation and information as requested;

(10) respond to requests for additional documentation and information from the CSC provider, FMA, and the TPA within the required deadlines;

(11) report to the local HSD income support division (ISD) office within 10 calendar days any change in circumstances, including a change in address, which might affect eligibility for the program; changes in address or other contact information must also be reported to the CSC provider and the financial management agency (FMA) within 10 calendar days;

(12) report to the TPA and CSC provider if hospitalized for more than three consecutive nights so that an appropriate LOC can be obtained;

(13) have monthly contact and meet face-to-face quarterly with the CSC, as required by the DOH; and

(14) comply with all electronic visit verification (EVV) requirements.

C. Specific responsibilities for eligible recipient in participant directed service delivery model:

In addition to the requirements in Subsection A and B of 8.314.7.11 NMAC, the eligible recipient must have an employer of record (EOR) to participate in the participant directed service delivery model. The EOR may be the eligible recipient unless the eligible recipient is a minor or has a plenary or limited guardianship or conservatorship over financial matters in place. An EOR must be the waiver participant or an EOR must be a legal representative of the recipient. The eligible recipient as their own EOR or the designated EOR must:

(1) direct the work of supports waiver employees, including recruiting, hiring, managing and terminating all employees;

(2) direct the work of any vendors contracted to perform services;

- (3) track expenditures for employee payroll, goods, and services;
- (4) authorize the payment of timesheets and vendor payment requests by the FMA;
- (5) keep track of all budget expenditures and ensure that all expenditures are within the AAB;
- (6) submit all required documents to the FMA to meet employer-related responsibilities. This includes, but is not limited to, documents for payment to employees and vendors and payment of taxes and other financial obligations within required timelines;
- (7) complete all trainings within the required timeframes by the DOH or medical assistance division (MAD);
- (8) ensure that all employees have registered and completed required trainings within the timeframes required by the DOH or MAD, identified in the ISP or identified by the EOR;
- (9) report any incidents of abuse, neglect or exploitation to the appropriate state agency;
- (10) arrange for the delivery of services, supports and goods;
- (11) maintain records and documentation for at least six years from first date of service and ongoing; and
- (12) comply with all electronic visit verification (EVV) requirements.

D. Voluntary

termination: The supports waiver eligible recipient may voluntarily terminate services through the supports waiver and will not lose their place on DD waiver wait list.

E. Involuntary

termination: A supports waiver eligible recipient may be terminated involuntarily by MAD and DOH for the following:

- (1) the eligible recipient refuses to comply with 8.314.7 NMAC and the supports waiver service standards, after receiving focused technical assistance

from DOH and MAD program staff, CSC, or FMA, which is supported by documentation of the efforts to assist the eligible recipient;

(2) the eligible recipient is an immediate risk to their health or safety, imminent risk of death or serious bodily injury, by continued participant direction of services. Examples include but are not limited to the following:

(a) the eligible recipient refuses to include and maintain services in their ISP and AAB that would address health and safety issues identified in their ISP or challenges the ISP after repeated and focused technical assistance and support from program staff, CSC, or FMA;

(b) the eligible recipient is experiencing significant health or safety needs, and either refuses to incorporate a plan to address health and safety needs or document applicable choices in ISP;

(c) the eligible recipient exhibits behaviors which endanger themselves or others after repeated and focused technical assistance and support from program staff, CSC, or FMA.

(3) the eligible recipient misuses supports waiver funds following repeated and focused technical assistance and support from the CSC or FMA, which is supported by documentation;

(4) the eligible recipient commits medicaid fraud;

(5) when the DOH is notified that the eligible recipient continues to utilize either an employee or a vendor, or both, who have consistently been substantiated against for abuse, neglect or exploitation while providing supports waiver services after notification of this by DOH;

(6) the eligible recipient who is involuntarily terminated from the supports waiver will remain on the DD waiver wait list, and will continue to have access to other medicaid benefits based on eligibility.

[8.314.7.11 NMAC - N, 4/1/2021]

8.314.7.12 SUPPORTS

WAIVER CONTRACTED ENTITIES AND PROVIDERS:

Services are to be provided in the least restrictive manner. The HSD does not allow for the use of any restraints, restrictive interventions, or seclusions to an eligible supports waiver recipient. The following resources and services have been established to assist eligible recipients to access supports waiver services through the agency-based service delivery model or the participant directed service delivery model. These include the following:

A. Community

supports coordinator (CSC)

services: CSC services are direct services intended to assist the eligible recipient in attaining and maintaining medical and financial eligibility; educating, guiding and assisting the eligible recipient to make informed planning decisions about service and supports; developing an ISP through a person-centered planning process; implementing and monitoring the ISP and AAB; and under the agency-based service delivery model, arranging for, directing, and managing supports waiver services and supports.

B. Financial

management agency (FMA):

For eligible recipients selecting the participant directed service delivery model, the FMA acts as the intermediary between the eligible recipient and the MAD payment system and assists the eligible recipient or the EOR with employer-related responsibilities. The FMA pays employees and vendors based upon an approved AAB. The FMA assures there is eligible recipient and program compliance with state and federal employment requirements and monitors and makes available to the eligible recipient the reports related to utilization of services and budget expenditures. Based on the eligible recipient's approved ISP and AAB, the FMA must:

(1) verify that the recipient is eligible for MAD services prior to making payment;

(2) receive and verify all required employee and vendor documentation;

- (3) establish an accounting for each eligible recipient's AAB;
- (4) process and pay invoices for goods, services and supports approved in the ISP and the AAB and supported by required documentation;
- (5) process all payroll functions on behalf of the eligible recipient and EORs including:
 - (a) collect and process timesheets of employees;
 - (b) process payroll, withholding, filing, and payment of applicable federal, state and local employment-related taxes and insurance; and
 - (c) track and report disbursements and balances of the eligible recipient's AAB and provide a monthly report of expenditures and budget status to the eligible recipient and their CSC, and quarterly and annual documentation of expenditures to the MAD;
- (6) receive and verify employee and vendor agreements, including collecting required provider qualifications;
- (7) monitor hours, the total amounts billed for all goods and services during the month;
- (8) process and report on employee background checks;
- (9) answer inquiries from the eligible recipient and solve problems related to the FMA responsibilities; and
- (10) report to the CSC provider, MAD and DOH any concerns related to the health and safety of an eligible recipient, or if the eligible recipient is not following the approved ISP and AAB.

C. Third-party assessor (TPA): The TPA or MAD's designee is responsible for determining medical eligibility through a LOC assessment, approving the ISP, and authorizing an eligible recipient's annual budget in accordance with 8.314.7 NMAC and the supports waiver service standards. The TPA:

- (1) determines medical eligibility using the LOC criteria in 8.314.7.9 NMAC; determinations are completed initially for an eligible recipient who is newly enrolled in the supports waiver and thereafter at least annually for currently enrolled supports waiver eligible recipients. The TPA may re-evaluate LOC more often than annually if there is an indication that the eligible recipient's medical condition or LOC has changed; and
- (2) approves the ISP and the annual budget request resulting in an AAB, at least annually or more often if there is a change in the eligible recipient's circumstances, in accordance with this NMAC and supports waiver service standards.

D. Conflict of interest:

An eligible recipient's CSC may not serve as the eligible recipient's EOR, authorized representative or personal representative for whom they are the CSC. A CSC may not be paid for any other services utilized by the eligible recipient for whom they are the CSC, whether as an employee of the eligible recipient, a vendor, an employee or subcontractor of an agency. A CSC may not provide any other paid supports waiver services to an eligible recipient unless the recipient is receiving CSC services from another agency. The CSC agency may not provide any other direct services for an eligible recipient that has an approved ISP, an approved budget, and is actively receiving services in the supports waiver program. The CSC agency may not employ as a CSC any immediate family member or guardian for an eligible recipient of the supports waiver program that is served by the CSC agency. A CSC agency may not provide guardianship services to an eligible recipient receiving CSC services from that same agency. The CSC agency may not provide any direct support services through any other type of 1915 (c) developmental disabilities waiver program. A CSC agency shall not engage in any activities in their capacity as a provider of services to an eligible recipient that may be a conflict of

interest. As such a CSC agency shall not hold a business or financial interest in an affiliated agency that is paid to provide direct care for any eligible recipients receiving supports waiver services. An affiliated agency is defined as a direct service agency providing supports waiver services that has a marital, domestic partner, blood, business interest or holds financial interest in providing direct care for eligible recipients receiving supports waiver services. Affiliated agencies must not hold a business or financial interest in any entity that is paid to provide direct care for any eligible recipients receiving home and community-based services (HCBS). Any direct service agency or CSC agency that has been referred to the DOH internal review committee (IRC) or is on a moratorium will not be approved to provide supports waiver services.

[8.314.7.12 NMAC - N, 4/1/2021]

8.314.7.13 QUALIFICATIONS FOR ELIGIBLE INDIVIDUAL EMPLOYEES, INDEPENDENT PROVIDERS, PROVIDER AGENCIES, AND VENDORS:

A. Agency-based service delivery model requirements for individual employees, independent providers, provider agencies and vendors: All supports waiver eligible providers under the agency-based model of service delivery must be approved by the DOH or its designee and have an approved MAD and DOH provider agreement. MAD through its designee, DOH/DDSD, must ensure that its subcontractors or employees meet all required qualifications. The provider agency must provide oversight of subcontractors and supervision of employees to ensure that all required MAD and DOH/DDSD qualifications; compliance with EVV requirements; all requirements outlined in the supports waiver services standards, applicable New Mexico administrative code (NMAC) rules, MAD supplements, and as applicable, the provider's New Mexico licensing board's scope of practice and licensure are met.

B. Participant directed service delivery model requirements for individual employees, independent providers, and vendors: In order to be approved to provide services under the participant directed service delivery model, provider agency, employees, vendors, or an independent provider, including non-licensed personal care or direct support worker, must meet the general and service specific qualifications set forth in this rule initially and continually meet licensure requirements as applicable, and submit an employee or vendor enrollment packet, specific to the provider or vendor type, for approval to the FMA. In addition, to be an authorized provider for the supports waiver and receive payment for delivered services, the provider must complete a vendor or employee provider agreement and all required tax documents. The provider must have credentials verified by the eligible recipient or the employee of record (EOR) and the FMA. The provider agency is responsible to ensure that all agency employees meet the required qualifications. Individual employees may not provide more than 40 hours of services in a consecutive seven-day work week.

(1) prior to rendering services to an eligible supports waiver recipient as a personal care or direct support worker, respite worker, customized community supports worker, or employment worker, an individual seeking to provide these services must complete and submit a nature of services questionnaire to the FMA. The FMA will determine, based on the nature of services questionnaire if the relationship is that of an employee or an independent contractor;

(2) an authorized CSC provider must have a MAD approved provider participation agreement (PPA) and the appropriate approved DOH/DDSD agreement.

C. General Qualifications agency-based and participant directed service delivery model providers:

(1) individual employees, independent providers, provider agencies, excluding CSC provider agencies, who are employed by a community supports waiver recipient to provide direct services shall:

(a) be at least 18 years of age;

(b) be qualified to perform the service and demonstrate capacity to perform required tasks;

(c) be able to communicate successfully with the eligible recipient;

(d) pass a nationwide caregiver criminal history screening pursuant to NMSA 1978, Section 29-17-2 et seq. and 7.1.9 NMAC and an abuse registry screen pursuant to NMSA 1978, Section 27-7a-1 et seq. and 8.11.6 NMAC;

(e) complete all trainings as required by DOH/DDSD and complete training specific to the eligible recipient's needs as identified in the approved ISP;

(f) for participant directed, training needs on items identified in the individual service plan (ISP), and the training plan is determined by the eligible recipient or their legal representative for any training specific to the employee in addition to trainings required by DOH/DDSD; the eligible recipient is also responsible for providing and arranging for employee training and supervising employee performance; training expenses for paid employees cannot be paid for with the eligible recipient's AAB; and

(g) meet any other service specific qualifications, as specified in 8.314.7 NMAC and service standards.

(2) vendors, including those providing professional services:

(a) shall be qualified to provide the service;

(b) shall possess a valid business license, if applicable; and

(c) are required to follow the applicable licensing regulations set forth by the profession; refer to the appropriate New Mexico board of licensure for information regarding applicable licenses;

(3) qualified and approved relatives and legal guardians may be hired as employees and paid for the provision, of supports waiver services except for CSC services, customized community supports group services, non-medical transportation services for a minor, environmental modifications services, vehicle modifications services, behavior support consultation services, assistive technology and employment supports. A spouse may not provide transportation for adult participants. A relative or legal guardian may not provide services that the legal responsible individual would ordinarily perform in the household for individuals of the same age who did not have a disability or chronic illness. A relative or legal guardian may not provide services that the legally responsible individual would ordinarily perform in the household for individuals of the same age who did not have a disability or chronic illness;

(4) once enrolled, providers, vendors and contractors receive a packet of information from the eligible recipient or FMA including billing instructions, and other pertinent materials. MAD makes available on the HSD/MAD website, on other program-specific websites, or in hard copy format, information necessary to participate in health care programs administered by HSD or its authorized agents, including program rules, billing instructions, utilization review instructions, and other pertinent materials. When enrolled, an eligible recipient or legal representative, or provider, vendor or contractor receives instruction on how to access these documents. It is the responsibility of the eligible recipient or legal representative, or provider, vendor, or contractor to access these instructions or ask for paper copies

to be provided, to understand the information provided and to comply with the requirements. The eligible recipient or legal representative, or provider, vendor, or contractor must contact HSD or its authorized agents to request hard copies of any program rules manuals, billing and utilization review instructions, and other pertinent materials and to obtain answers to questions on or not covered by these materials;

(a) no provider of any type may be paid in excess of 40 hours within the established work week for any one eligible recipient or EOR when applicable;

(b) no provider agency is permitted to perform both LOC assessments and provide any services for the eligible recipients;

(c) providers may market their services but are prohibited from soliciting eligible recipients under any circumstances.

(5) **Employer of record:** The EOR is the individual responsible for directing the work of the eligible recipient's employees under the participant directed service delivery model. The EOR may be the eligible recipient or a legal representative of the recipient. A recipient through the use of the support's waiver EOR questionnaire will determine if an individual meets the requirements to serve as an EOR. The recipient's CSC will provide him or her with the questionnaire. The questionnaire shall be completed by the recipient with assistance from the CSC upon request. The CSC shall maintain a copy of the completed questionnaire in the recipient's file. The EOR does not have budget authority. When utilizing both vendors and employees, an EOR is required for oversight of employees and to sign payment request forms for vendors. The EOR must be documented with the FMA whether the EOR is the eligible recipient or a designated qualified individual.

(a) an eligible recipient that is the subject

of a plenary or limited guardianship or conservatorship may not be their own EOR;

(b) a power of attorney or other legal instrument may not be used to assign EOR responsibilities, in part or in full, to another individual and may not be used to circumvent the requirements of the EOR as designated in 8.316.7 NMAC;

(c) a person under the age of 18 years may not be an EOR;

(d) an EOR who lives outside New Mexico shall reside within 100 miles of the New Mexico state border. If the eligible recipient wants to have an EOR who resides beyond this radius, the eligible recipient must obtain written approval from the DOH prior to the EOR performing any duties. This written approval must be documented in the ISP;

(e) the eligible recipient's provider may not also be their EOR;

(f) an EOR whose performance compromises the health, safety or welfare of the eligible recipient, may have their status as an EOR terminated;

(g) an EOR must be a legal representative if not the recipient; and

(h) an EOR may not be paid for any other services utilized by the eligible recipient for whom they are EOR, whether as an employee of the eligible recipient, a vendor, or an employee or contractor of an agency. An EOR makes important determinations about what is in the best interest of the eligible recipient and should not have any conflict of interest. An EOR assists in the management of the eligible recipient's budget and should have no personal benefit connected to the services requested or approved in the budget.

D. Qualifications of assistive technology providers and vendors: Must hold a current business license issued by the state, county or city government.

E. Qualifications of behavior support consultation providers: Behavior supports consultation provider agencies shall have a current business license issued by the state, county or city government, if required. Behavior supports consultation provider agencies shall comply with all applicable federal, state, and waiver rules and procedures regarding behavior support consultation, and must ensure that provider training is in accordance with the DOH/DDSD training policy. Providers of behavior support consultation must maintain a current New Mexico license with the appropriate professional field licensing body and have a minimum of one year of experience working with individuals with intellectual or developmental disabilities. Providers of behavior support consultation services must possess qualifications in at least one of the following areas:

(1) licensed clinical psychologist, licensed psychologist associate, (masters or Ph.D. level);

(2) licensed independent social worker (LISW) or a licensed clinical social worker (LCSW);

(3) licensed master social worker (LMSW);

(4) licensed mental health counselor LMHC);

(5) licensed professional clinical counselor (LPCC);

(6) licensed marriage and family therapist (LMFT); or

(7) licensed practicing art therapist (LPAT).

F. Qualifications of the community support coordinator providers: In addition to general requirements, a CSC provider shall ensure that all individuals hired, or contracted for CSC services meet the criteria specified in this section in addition to all applicable rules and service standards. Community supports coordinators shall:

(1) be at least 21 years of age;

(2) possess a bachelor's degree in social work, psychology, human services, counseling, nursing, special education or related field; or have a minimum of six-years direct experience related to the delivery of social services to people with disabilities;

(3) have at least one year of experience working with people with disabilities or I/DD;

(4) complete all trainings as required by DOH/DDSD;

(5) verification of provider qualifications; and

(6) pass a national care giver criminal history screening pursuant to Section 29-17-2 et seq. NMSA 1978 and 7.1.9 NMAC and an abuse registry screen pursuant to Section 27a-4 et seq. NMSA 1978 and 8.11.6 NMAC.

G. Qualifications for customized community supports individual providers: For individual community supports providers the worker must meet the following requirements:

(1) be 18 years of age or older;

(2) demonstrate the capacity to perform required tasks;

(3) be able to communicate successfully with the eligible recipient;

(4) complete all training requirements as required by DOH/DDSD; and

(5) pass a national care giver criminal history screening pursuant to Section 29-17-2 et seq. NMSA 1978 and 7.1.9 NMAC and an abuse registry screen pursuant to Section 27a-4 et seq. NMSA 1978 and 8.11.6 NMAC; and

(6) meet any other service qualifications, as specified in the regulations.

H. Qualifications for customized community supports group providers: Provider agencies must meet requirements including a business license, accreditation with the commission on accreditation of rehabilitation facilities (CARF) international, employment and

community services or the council on quality and leadership, quality assurances, financial solvency, training requirements, records management, quality assurance policy and processes. The agency staff must meet the following requirements:

(1) be at least 18 years of age;

(2) have at least one year of experience working with people with disabilities;

(3) be qualified to perform the service and demonstrate capacity to perform required tasks;

(4) be able to communicate successfully with the eligible recipient;

(5) pass a national care giver criminal history screening pursuant to Section 29-17-2 et seq. NMSA 1978 and 7.1.9 NMAC and an abuse registry screen pursuant to Section 27a-4 et seq. NMSA 1978 and 8.11.6 NMAC.

(6) complete specific training based on needs identified in the ISP and by the recipient; and

(7) meet any other service qualifications, as specified in the regulations.

I. Qualifications of personal care service providers:

In addition to general MAD requirements, the direct support providers must meet additional qualifications specific to the type of services provided. Provider agencies must be homemaker/personal care agencies certified by the MAD or its designee or a homemaker/personal care agency holding a New Mexico homemaker/personal care agency license. A homemaker/personal care agency must hold a current business license when applicable, and meet financial solvency, training, records management, and quality assurance rules and requirements. Personal care direct support workers must:

(1) be at least 18 years of age;

(2) demonstrate capacity to perform required tasks;

(3) be able to communicate successfully with the eligible recipient;

(4) complete all trainings as required by DOH/DDSD; and

(5) pass a national care giver criminal history screening pursuant to Section 29-17-2 et seq. NMSA 1978 and 7.1.9 NMAC and an abuse registry screen pursuant to Section 27a-4 et seq. NMSA 1978 and 8.11.6 NMAC.

J. Qualifications of employment supports providers:

(1) A job developer, whether an agency or individual provider, must:

(a) be at least 21 years of age;

(b) complete all training requirements by DOH/DDSD;

(c) have a high school diploma or GED;

(d) pass a national care giver criminal history screening pursuant to Section 29-17-2 et seq. NMSA 1978 and 7.1.9 NMAC and an abuse registry screen pursuant to Section 27a-4 et seq. NMSA 1978 and 8.11.6 NMAC;

(e) have experience in developing and using job and task analysis;

(f) have knowledge of the Americans with Disabilities Act (ADA);

(g) have knowledge and experience working with the department of vocational rehabilitation (DVR) office; and

(h) have experience with or knowledge of the purposes, functions, and general practices of entities such as department of labor navigators one-stop career centers, business leadership network, chamber of commerce job accommodation network, small business development centers, retired executives, local business community agencies, and DDSD resources.

(2) Job coaches whether agency or individual provider, must:

(a) be at least 18 years of age;

(b) complete all training requirements by DOH/DDSD;

(c) have a high school diploma or GED; and

(d) pass a national care giver criminal history screening pursuant to Section 29-17-2 et seq. NMSA 1978 and 7.1.9 NMAC and an abuse registry screen pursuant to Section 27a-4 et seq. NMSA 1978 and 8.11.6 NMAC.

K. Qualifications of environmental modifications providers: Environmental modification providers must possess an appropriate plumbing, electrician, contractor license; appropriate technical certification to perform the modification; and, hold a current business license issued by the state, county or city government.

L. Qualifications of non-medical transportation providers: Individual transportation providers must possess a valid New Mexico driver’s license with the appropriate classification, be free of physical or mental impairment that would adversely affect driving performance, have no driving while intoxicated (DWI) convictions or chargeable (at fault) accidents within the previous two years, have a current insurance policy and vehicle registration. Transportation vendors must hold a current business license and tax identification number. Each agency will ensure drivers meet the following qualifications:

- (1) be at least 18 years old;
- (2) possess a valid, appropriate New Mexico driver’s license;
- (3) have a current insurance policy and vehicle registration; and
- (4) must complete all training requirements as required by DOH/DDSD.

M. Qualifications of respite providers: Respite services may be provided by eligible individual respite providers.

Respite provider agencies must hold a current business license, and meet financial solvency, training, records management and quality assurance rules and requirements. In addition, for participant-directed services, the eligible recipient or their representative evaluates training needs based on the needs identified in the ISP and by the recipient, provides or arranges for training, as needed, and supervises the worker. Respite worker must:

- (1) be 18 years of age or older;
- (2) demonstrate capacity to perform required tasks;
- (3) be able to communicate successfully with the eligible recipient;
- (4) pass a nationwide caregiver criminal history screening pursuant to Section 29-17-2 et seq. NMSA 1978 and 7.1.9 NMAC and an abuse registry screen pursuant to Section 27-7a-1 et seq. NMSA 1978 and 8.11.6 NMAC; and
- (5) complete all training requirements as required by DOH/DDSD.

N. Qualifications of vehicle modification providers: Vehicle modification providers must possess an appropriate mechanic or body work license; appropriate technical certification to perform the modification; and, hold a current business license issued by the state, county or city government. [8.314.7.13 NMAC - N, 4/1/2021]

8.314.7.14 SERVICE DESCRIPTIONS AND COVERAGE CRITERIA:

The services covered by the supports waiver are intended to provide a community-based alternative to institutional care for an eligible recipient that allow greater choice, direction and control over services and supports in an agency-based service delivery model or participant directed service delivery model. These services must specifically address a therapeutic, rehabilitative, habilitative, health or safety need that results from the eligible recipient’s

qualifying condition. The supports waiver is the payor of last resort. The coverage of the services must be in accordance with the supports waiver rules and service standards. Supports waiver services must be provided in an integrated setting and facilitate full access to the community; ensure the eligible recipient receives services in the community to the same degree of access as those individuals not receiving HCBS services; maximize independence in making life choices; be chosen by the eligible recipient in consultation with the guardian as applicable; ensure the right to privacy, dignity, respect, and freedom from coercion and restraint; optimize recipient employment; and facilitate choice of services and who provides them.

A. General requirements regarding supports waiver covered services: To be considered a covered service under the supports waiver, the following criteria must be met. Services, supports and goods must:

- (1) directly address the eligible recipient’s qualifying condition or disability;
- (2) meet the eligible recipient’s clinical, functional, medical or habilitative needs;
- (3) be designed and delivered to advance the desired outcomes in the eligible recipient’s service and support plan; and
- (4) support the eligible recipient to remain in the community and reduce the risk of institutionalization.

B. Assistive technology: Assistive technology (AT) is an item, piece of equipment, or product system used to increase, maintain, or improve functional capabilities. AT services allow for the evaluation and purchase of the AT based on the needs of the eligible recipient and, not covered through the eligible recipient’s state plan benefits. Evaluation of the assistive technology needs of the participant include a functional evaluation of the impact of the provision of the appropriate assistive technology to the participant.

Services consist of selecting, designing, fitting, customization, adapting, applying, maintaining, and repair or repairing assistive technology devices. AT services also include training or technical assistance for the participant, or where appropriate, the family members, guardians, advocates, or authorized representatives of the participant, or professionals or direct service providers involved in the major life functions of the participant. AT includes remote personal support technology. Remote personal support technology is an electronic device or monitoring system that supports eligible recipients to be independent in their home or community. This service may provide up to 24-hour alert, monitoring or personal emergency response capability, prompting or in-home reminders, or monitoring for environmental controls for independence through the use of technologies. Remote monitoring is prohibited in eligible recipient's bedrooms and bathrooms. This service is not intended to provide for paid, in-person on-site response. On-site response must be planned through back up plans that are developed using natural or other paid supports. Assistive technology services are limited to five thousand dollars (\$5,000) every five years.

C. Behavior support consultation: Behavior support consultation services consist of functional support assessments, treatment plan development, and training and support coordination for the eligible recipient related to behaviors that compromise the eligible recipient's quality of life.

D. Community supports coordinator: Community support coordination services are intended to educate, guide and assist the eligible recipient to make informed planning decisions about services and supports, and monitor those services and supports. Specific waiver function(s) that CSC providers have are:

(1) monitor service delivery and conduct face-to-face visits including home visits at least quarterly;

(2) complete process to evaluate/re-evaluate level of care (medical eligibility);

(3) educate, train and assist eligible recipient (and guardian, employer of record) about participant direction or agency-based service delivery models (includes adherence to standards, review of rights, recognizing and reporting critical incidents);

(4) provide support and assistance during the medical and financial eligibility process;

(5) develop the person-centered plan with the eligible recipient; to include revising the plan as needed;

(6) serve as an advocate for the eligible recipient to enhance their opportunity to be successful with participant-direction or agency-based program; and

(7) supports the recipient with identifying resources outside of the supports waiver that may assist with meeting the recipient's needs.

E. Customized community supports individual: Customized community supports consist of individualized services and support that enable an individual to acquire, maintain, and improve opportunities for independence, community membership, and inclusion. The provider may be a skilled independent contractor or a hired employee depending on the level of support needed by the eligible recipient to access the community. Customized community supports services are designed around the preferences and choices of each individual and offers skill training and supports to include: adaptive skill development, adult educational supports, citizenship skills, communication, social skills, socially appropriate behaviors, self-advocacy, informed choice, community inclusion, arrangement of transportation, and relationship building. Customized community support services provide help to the individual to schedule, organize and meet expectations related to chosen

community activities. All services are provided in a community setting with the focus on community exploration and true community inclusion.

F. Customized community supports group: Customized community supports can include participation in congregate community day programs and centers that offer functional meaningful activities that assist with acquisition, retention, or improvement in self-help, socialization and adaptive skills for an eligible recipient. Customized community supports may include adult day habilitation, adult day health and other day support models. Customized community supports are provided in community day program facilities and centers and can take place in non-institutional and non-residential settings.

G. Employment support: Individual community integrated employment offers one-to-one support to an eligible recipient placed in inclusive jobs or self-employment in the community and support is provided at the worksite as needed for the eligible recipient to learn and perform the tasks associated with the job in the workplace. The provider agency is encouraged to develop natural supports in the workplace to decrease the reliance of paid supports.

H. Environmental modifications: Services include the purchase and installation of equipment or making physical adaptations to an eligible recipient's residence that are necessary to ensure the health, welfare and safety of the eligible recipient or enhance the eligible recipient's level of independence.

(1) adaptations include: installation of ramps; widening of doorways and hallways; installation of specialized electric and plumbing systems to accommodate medical equipment and supplies; installation of lifts or elevators; modification of bathroom facilities such as roll-in showers, sink, bathtub, and toilet modifications, water faucet controls, floor urinals and bidet adaptations and plumbing; turnaround

space adaptations; specialized accessibility and safety adaptations or additions; trapeze and mobility tracks for home ceilings; automatic door openers or doorbells; voice-activated, light-activated, motion-activated and electronic devices; fire safety adaptations; air filtering devices; heating or cooling adaptations; glass substitute for windows and doors; modified switches, outlets or environmental controls for home devices; and alarm and alert systems or signaling devices;

(2)

environmental modifications are limited to five thousand dollars (\$5000) every five years;

(3) all services

shall be provided in accordance with federal, state, and local building codes;

(4)

excluded are those adaptations or improvements to the home that are of general utility and are not of direct medical or remedial benefit to the eligible recipient, such as fences, storage sheds, or other outbuildings. Adaptations that add to the square footage of the home are excluded for this benefit except when necessary to complete an adaptation.

I. Personal care

services: Personal care services are provided on an intermittent basis to assist an eligible recipient 21 years and older with a range of activities of daily living, performance of incidental homemaker and chore service tasks if they do not comprise of the entirety of the service, and enable the eligible recipient to accomplish tasks he or she would normally do for themselves if they did not have a disability. Personal care direct support services are provided in the eligible recipient's own home and in the community, depending on the eligible recipient's needs. The eligible recipient identifies the personal care direct support worker's training needs through the ISP in addition to required training, and, if the eligible recipient or EOR for the participant directed service delivery model or agency is unable to do the training for themselves, the eligible

recipient or EOR for the participant directed service delivery model or agency arranges for the needed training. Supports shall not replace natural supports available such as the eligible recipient's family, friends, and individuals in the community, clubs, and organizations that are able and consistently available to provide support and service to the eligible recipient. Personal care services are covered under the medicaid state plan as enhanced early and periodic screening, diagnostic and treatment (EPSDT) benefits for supports waiver eligible recipients under 21 years of age and are not to be included in an eligible recipient's AAB.

J. Non-medical

transportation: Transportation services are offered to enable eligible recipients to gain access to services, activities, and resources, as specified by the ISP. Transportation services under the waiver are offered in accordance with the eligible recipient's ISP. Transportation services provided under the waiver are non-medical in nature whereas transportation services provided under the medicaid state plan are to transport eligible recipients to medically necessary physical and behavioral health services. Payment for supports waiver transportation services is made to the eligible recipient's individual transportation provider or employee or to a public or private transportation service vendor. Payment cannot be made to the eligible recipient. Non-medical transportation services for minors is not a covered service as these are services that a legally responsible individual (LRI) would ordinarily provide for household members of the same age who do not have a disability or chronic illness. Payment cannot be made to the eligible recipient. Whenever possible, family, neighbors, friends, or community agencies that can provide this service without charge shall be identified in the ISP and utilized.

K. Vehicle

modifications: Vehicle adaptations or alterations to an automobile or van that is the eligible recipient's primary

means of transportation in order to accommodate the special needs of the eligible recipient. Vehicle adaptations are specified by the service plan as necessary to enable the eligible recipient to integrate more fully into the community and to ensure the health, welfare and safety of the eligible recipient. The vehicle that is adapted may be owned by the eligible recipient, a family member with whom the eligible recipient lives or has consistent and on-going contact, or a non-relative who provides primary long-term support to the eligible recipient and is not a paid provider of services. Vehicle modifications are limited to five thousand dollars (\$5000) every five years. Payment may not be made to adapt the vehicles that are owned or leased by paid providers of waiver services. Vehicle accessibility adaptations consist of installation, repair, maintenance, training on use of the modifications and extended warranties for the modifications. The following are specifically excluded:

(1) adaptations

or improvements to the vehicle that are of general utility, and are not of direct medical or remedial benefit to the eligible recipient;

(2) purchase

or lease of a vehicle; and

(3) regularly

scheduled upkeep and maintenance of a vehicle except upkeep and maintenance of the modifications.

L. Respite:

Respite is a family support service, the primary purpose of which is to give the primary, unpaid caregiver time away from their duties on a short-term basis. Respite services include assisting the eligible recipient with routine activities of daily living (e.g., bathing, toileting, preparing or assisting with meal preparation and eating), enhancing self-help skills, and providing opportunities for leisure, play and other recreational activities; assisting the eligible recipient to enhance self-help skills, leisure time skills and community and social awareness; providing opportunities for community and neighborhood integration and involvement; and

providing opportunities for the eligible recipient to make their own choices with regard to daily activities. Respite services are furnished on a short-term basis and can be provided in the eligible recipient's home, the provider's home, or in a community setting of the family's choice (e.g., community center, swimming pool and park).
[8.314.7.14 NMAC - N, 4/1/2021]

8.314.7.15 NON-COVERED SERVICES:

The waiver does not pay for the purchase of goods or services that a household without a person with a disability would be expected to pay for as a routine household or personal expense. If the eligible recipient requests a specific good or service, the CSC and the state can work with the eligible recipient to find other, including less costly, alternatives. Non-covered services include, but are not limited to the following:

A. Services covered by the medicaid state plan (including EPSDT), MAD school-based services, medicare and other third parties.

B. Any service or good, the provision of which would violate federal or state statutes, regulations or guidance.

C. Formal academic degrees or certification-seeking education, educational services covered by IDEA or vocational training provided by the public education department (PED), division of vocational rehabilitation (DVR).

D. Food and shelter expenses, including property-related costs, such as rental or purchase of real estate and furnishing, maintenance, utilities and utility deposits, and related administrative expenses; utilities include gas, electricity, propane, firewood, wood pellets, water, sewer, and waste management.

E. Experimental or investigational services, procedures or goods, as defined in 8.325.6 NMAC.

F. Any goods or services that are to be used for recreational or diversional purposes.

G. Personal goods or items not related to the disability.

H. Animals and costs of maintaining animals including the purchase of food, veterinary visits, grooming and boarding except for training and certification for service dogs.

I. Gas cards and gift cards.

J. Purchase of insurance, such as car, health, life, burial, renters, homeowners, service warranties or other such policies.

K. Purchase of a vehicle, and long-term lease or rental of a vehicle.

L. Purchase of recreational vehicles, such as motorcycles, campers, boats or other similar items.

M. Firearms, ammunition or other weapons.

N. Vacation expenses, including airline tickets, cruise ship or other means of transport, guided.

O. Meals, hotel, lodging or similar recreational expenses.

P. Purchase of usual and customary furniture and home furnishings, *unless* adapted to the eligible recipient's disability or use, or of specialized benefit to the eligible recipient's condition; requests for adapted or specialized furniture or furnishings must include a recommendation from the eligible recipient's health care provider and, when appropriate, a denial of payment from any other source.

Q. Regularly scheduled upkeep, maintenance and repairs of a home and addition of fences, storage sheds or other outbuildings, *except* upkeep and maintenance of modifications or alterations to a home which are an accommodation directly related to the eligible recipient's qualifying condition or disability.

R. Regularly scheduled upkeep, maintenance and repairs of a vehicle, or tire purchase or replacement, *except* upkeep and maintenance of modifications or alterations to a vehicle or van, which is an accommodation directly related to the eligible recipient's qualifying

condition or disability; requests must include documentation that the adapted vehicle is the eligible recipient's primary means of transportation.

S. Clothing and accessories, except specialized clothing based on the eligible recipient's disability or condition.

T. Training expenses for paid employees.

U. Costs associated with such conferences or class cannot be covered, including airfare, lodging or meals; consumer electronics such as computers, printers and fax machines, or other electronic equipment that does not meet the criteria specified in Subsection A of 8.314.6.14 NMAC; no more than one of each type of item may be purchased at one time; and consumer electronics may not be replaced more frequently than once every three years.

V. Cell phone services that include fees for data unless data is for an app specifically approved through supports waiver funds; or more than one cell phone line per eligible recipient.

[8.314.7.15 NMAC - N, 4/1/2021]

8.314.7.16 INDIVIDUAL SERVICE PLAN (ISP) AND AUTHORIZED ANNUAL BUDGET (AAB):

An ISP and an AAB request are developed at least annually by the eligible recipient in collaboration with the eligible recipient's CSC and others that the eligible recipient invites to be part of the process. The CSC serves in a supporting role to the eligible recipient, assisting the eligible recipient to understand the supports waiver program, and with developing and implementing the ISP and the AAB. The ISP and annual budget request are developed and implemented as specified in 8.314.7. NMAC and supports waiver service standards and submitted to the TPA or MAD's designee for final approval. Upon final approval the annual budget request becomes an AAB.

A. ISP development process: For development of the person-centered service plan, the

planning meetings are scheduled at times and locations convenient to the eligible recipient. This process obtains information about eligible recipient strengths, capacities, preferences, desired outcomes and risk factors through the LOC assessment process and the planning process that is undertaken between the CSC and eligible recipient to develop their ISP.

(1)

Assessments:

(a)

assessment activities that occur prior to the ISP meeting assist in the development of an accurate and functional plan. The functional assessments conducted during the LOC determination process address the following needs of a person: medical, behavioral health, adaptive behavior skills, nutritional, functional, community/social and employment;

(b)

assessments occur on an annual basis or during significant changes in circumstance or at the time of the LOC determination. After the assessments are completed, the results are made available to the eligible recipient and their CSC for use in planning;

(c)

the eligible recipient and the CSC will assure that the ISP addresses the information and concerns, if any, identified through the assessment process.

(2) Pre-

planning:

(a)

the CSC contacts the eligible recipient upon their choosing enrollment in the supports waiver program to provide information regarding this program, including the range and scope of choices and options, as well as the rights, risks, and responsibilities associated with participation in the supports waiver;

(b)

the CSC discusses areas of need to address on the eligible recipient's ISP. The CSC provides support during the annual re-determination process to assist with completing medical and financial eligibility in a timely manner;

(3) ISP

components: The ISP contains:

(a)

the supports waiver services that are furnished to the eligible recipient, the projected amount, frequency and duration, and the type of provider who furnishes each service;

(i)

the ISP must describe in detail how the services or goods relate to the eligible recipient's qualifying condition or disability;

(ii)

the ISP must describe how the services and goods support the eligible recipient to remain in the community and reduce their risk of institutionalization; and

(iii)

the ISP must specify the hours of services to be provided and payment arrangements.

(b)

other services needed by the supports waiver eligible recipient regardless of funding source, including state plan services;

(c)

informal supports that complement supports waiver services in meeting the needs of the eligible recipient;

(d)

methods for coordination with the medicaid state plan services and other public programs;

(e)

methods for addressing the eligible recipient's health care needs when relevant;

(f)

quality assurance criteria to be used to determine if the services and goods meet the eligible recipient's needs as related to their qualifying condition or disability;

(g)

information, resources or training needed by the eligible recipient and service providers;

(h)

methods to address the eligible recipient's health and safety, such as emergency and back-up services.

(4) Individual

service plan meeting:

(a)

the eligible recipient receives a

LOC assessment and local resource manual and person-centered planning documents prior to the ISP meeting;

(b)

the eligible recipient may begin planning and drafting the ISP utilizing those tools prior to the ISP meeting;

(c)

during the ISP meeting, CSC assists the eligible recipient to ensure that the ISP addresses the eligible recipient's goals, health, safety and risks. The eligible recipient and their CSC will assure that the ISP addresses the information, goals and concerns identified in the person-centered planning process. The ISP must address the eligible recipient's health and safety needs before addressing other issues. The CSC ensures that:

(i)

the planning process addresses the eligible recipient's needs and goals in the following areas: health and wellness and accommodations or supports needed at home and in the community;

(ii)

services selected address the eligible recipient's needs as identified during the assessment process; needs not addressed in the ISP will be addressed outside the supports waiver program;

(iii)

the outcome of the assessment process for assuring health and safety is considered in the plan;

(iv)

services do not duplicate or replace those available to the eligible recipient through the medicaid state plan or other programs;

(v)

services are not duplicated in more than one service code;

(vi)

job descriptions are complete for each provider and employee in the plan; a job description will include frequency, intensity and expected outcomes for the service;

(vii)

the quality assurance section of the ISP is complete and specifies the roles of the eligible recipient, community supports coordinator and any others listed in this section;

(viii) the responsibilities are assigned for implementing the plan;

(ix) the emergency and back-up plans are complete; and

(x) the ISP is submitted to the TPA after the ISP meeting, in compliance with supports waiver rules and service standards.

B. ISP review

criteria: Services and related goods identified in the eligible recipient’s requested ISP may be considered for approval if the following requirements are met:

- (1) the services or goods must be responsive to the eligible recipient’s qualifying condition or disability and must address the eligible recipient’s clinical, functional, medical or habilitative needs; and
- (2) the services or goods must accommodate the eligible recipient in managing their household; or
- (3) the services or goods must facilitate activities of daily living;
- (4) the services or goods must promote the eligible recipient’s personal health and safety; and
- (5) the services or goods must afford the eligible recipient an accommodation for greater independence; and
- (6) the services or goods must support the eligible recipient to remain in the community and reduce his/her risk for institutionalization; and
- (7) the services or goods must be documented in the ISP and advance the desired outcomes in the eligible recipient’s ISP; and
- (8) the ISP contains the quality assurance criteria to be used to determine if the service or goods meet the eligible recipient’s need as related to the qualifying condition or disability; and
- (9) the services or goods must decrease the need for other MAD services; and

(10) the eligible recipient receiving the services or goods does not have the funds to purchase the services or goods; or

(11) the services or goods are not available through another source; the eligible recipient must submit documentation that the services or goods are not available through another source, such as the medicaid state plan or medicare; and

(12) the service or good is not prohibited by federal regulations, NMAC rules, billing instructions, standards, and manuals; and

(13) each service or good must be listed as an individual line item whenever possible; however, when a service or a good are ‘bundled’ the ISP must document why bundling is necessary and appropriate.

C. Budget review

criteria: The eligible recipient’s proposed annual budget request may be considered for approval, if all the following requirements are met:

- (1) the proposed annual budget request is within the supports waiver IBA;
- (2) the rate for each service is included;
- (3) the proposed cost for each good is reasonable, appropriate and reflects the lowest available cost for that chosen good;
- (4) the estimated cost of the service or good is specifically documented in the eligible recipient’s budget worksheets; and
- (5) no employee exceeds 40 hours paid work in a consecutive seven-day work week.

D. Modification of the ISP:

(1) The ISP may be modified based upon a change in the eligible recipient’s needs or circumstances, such as a change in the eligible recipient’s health status or condition or a change in the eligible recipient’s support system, such as the death or disabling condition of a

family member or other individual who was providing services.

(2) If the modification is to provide new or additional services than originally included in the ISP, these services must not be able to be acquired through other programs or sources. The eligible recipient must document the fact that the services are not available through another source. The new or additional services are subject to utilization review for medical necessity and program requirements as per 8.314.7.17 NMAC.

(3) The CSC initiates the process to modify the ISP by forwarding the request for modification to the TPA for review.

(4) The ISP must be modified before there is any change in the AAB.

(5) The ISP may be modified once the original ISP has been submitted and approved. Only one ISP revision may be submitted at a time, e.g.; an ISP revision may not be submitted if an initial ISP request or prior ISP revision request is under initial review by the TPA. This requirement also applies to any re-consideration of the same revision request. Other than for critical health and safety reasons, neither the ISP nor the AAB may be modified within 60 calendar days of the expiration of the current ISP. [8.314.7.16 NMAC - N, 4/1/2021]

8.314.7.17 PRIOR AUTHORIZATION AND UTILIZATION REVIEW:

All MAD services, including services covered under the supports waiver program, are subject to utilization review for medical necessity and program requirements. Reviews by MAD or its designees may be performed before services are furnished, after services are furnished, before payment is made, or after payment is made in accordance with 8.310.2 NMAC.

A. Prior

authorization: Services, supports, and goods specified in the ISP and AAB require prior authorization from HSD/MAD or its designee. The

ISP must specify the type, amount and duration of services. Services for which prior authorization was obtained remain subject to utilization review at any point in the payment process.

B. Eligibility

determination: To be eligible for supports waiver program services, eligible recipients must require the LOC of services provided in an ICF-IID. Prior authorization of services does not guarantee that applicants or eligible recipients are eligible for medical assistance program (MAP) or supports waiver services.

C. Reconsideration:

If there is a disagreement with a prior authorization denial or other review decision, the community supports coordinator provider on behalf of the eligible recipient, can request reconsideration from the TPA that performed the initial review and issued the initial decision. Reconsideration must be requested within 30-calendar days of the date on the denial notice, must be in writing and provide additional documentation or clarifying information regarding the eligible recipient's request for the denied services or goods.

D. Denial of payment:

If a service, support, or good is not covered under the supports waiver program, the claim for payment may be denied by MAD or its designee. If it is determined that a service is not covered before the claim is paid, the claim is denied. If this determination is made after payment, the payment amount is subject to recoupment or repayment.

[8.314.7.17 NMAC - N, 4/1/2021]

8.314.7.18 RECORDKEEPING AND DOCUMENTATION

RESPONSIBILITIES: Service providers and vendors who furnish goods and services to supports waiver eligible recipients are reimbursed by the financial management agency (FMA) and must comply with all applicable New Mexico administrative code (NMAC), medical assistance division (MAD) rules and service standards.

The FMA, community supports coordinators (CSC) and service providers must maintain records, which are sufficient to fully disclose the extent and nature of the goods and services provided to the eligible recipients, as detailed in applicable NMAC, MAD provider rules and comply with random and targeted audits conducted by MAD and department of health (DOH) or their audit agents. MAD or its designee will seek recoupment of funds from service providers when audits show inappropriate billing for services. Supports waiver vendors who furnish goods and services to supports waiver eligible recipients and bill the FMA must comply with all MAD provider participation agreement (PPA) requirements and NMAC, MAD rules and requirements, including but not limited to 8.310.2 NMAC and 8.321.2 NMAC and 8.302.1 NMAC. [8.314.7.18 NMAC - N, 4/1/2021]

8.314.7.19

REIMBURSEMENT: Health care to MAP eligible recipients is furnished by a variety of providers and provider groups. The reimbursement and billing for these services is administered by MAD.

A. Agency-based

service delivery model provider

reimbursement: Upon approval of a New Mexico MAD provider participation agreement (PPA) by MAD or its designee, licensed practitioners, facilities, and other providers of services that meet applicable requirements are eligible to be reimbursed for furnishing covered services to MAP eligible recipients. A provider must be enrolled before submitting a claim for payment to the MAD claims processing contractors. MAD makes available on the human service department/medical assistance division (HSD/MAD) website, on other program-specific websites, or in hard copy format, information necessary to participate in health care programs administered by HSD or its authorized agents, including New Mexico administrative code (NMAC) rules, billing instructions, utilization review instructions, service definitions

and service standards and other pertinent materials. When enrolled, a provider receives instruction on how to access these documents. It is the provider's responsibility to access these instructions, to understand the information provided and to comply with the requirements. The provider must contact HSD or its authorized agents to obtain answers to questions related to the material or not covered by the material. To be eligible for reimbursement, a provider must adhere to the provisions of the MAD PPA and all applicable statutes, regulations, and executive orders. MAD or its selected claims processing contractor issues payments to a provider using electronic funds transfer (EFT) only.

B. Participant

directed service delivery

model provider and vendor

reimbursement: Supports waiver eligible recipients must follow all billing instructions provided by the FMA to ensure payment of service providers, employees, and vendors. Claims must be billed to the FMA per the billing instructions. Reimbursement to a service provider and a vendor in the supports waiver program is made, as follows:

- (1) supports waiver service provider and vendor must enroll with the FMA;
- (2) the eligible recipient receives instructions and documentation forms necessary for a service provider's and a vendor's claims processing;
- (3) an eligible recipient must submit claims for payment of their supports waiver service provider and vendor to the FMA for processing; claims must be filed per the billing instructions provided by the FMA;
- (4) the eligible recipient and their supports waiver service provider and vendor must follow all FMA billing instructions; and
- (5) reimbursement of a supports waiver service provider and vendor is made at a predetermined reimbursement rate by the eligible recipient with

the supports waiver service provider or vendor, approved by the TPA contractor, and documented in the ISP and in the supports waiver provider or vendor agreement; at no time can the total expenditure for services exceed the eligible recipient's AAB;

(6) the FMA must submit claims that have been paid by the FMA on behalf of the eligible recipient to the MAD fiscal contractor for processing; and

(7) reimbursement may not be made directly to the eligible recipient, either to reimburse them for expenses incurred or to enable the eligible recipient to pay a service provider directly.

[8.314.7.19 NMAC - N, 4/1/2021]

8.314.7.20 RIGHT TO AN HSD ADMINISTRATIVE HEARING:

A. The human services department/medical assistance division (HSD/MAD) must grant an opportunity for an administrative hearing as described in this section in the following circumstances and pursuant to 42 CFR Section 431.220(a)(1), Section 27-3-3 NMSA 1978 and 8.352.2 NMAC *Recipient Hearings*:

(1) when a supports waiver applicant has been determined not to meet the LOC requirement for waiver services;

(2) when a supports waiver applicant has not been given the choice of HCBS as alternative to institutional care;

(3) when a supports waiver applicant is denied the services of their choice or the provider of their choice;

(4) when a supports waiver recipient's services are denied, suspended, reduced or terminated;

(5) when a supports waiver recipient has been involuntarily terminated from the program; or

(6) when a supports waiver recipient's request for a budget adjustment has been denied.

B. DOH and its

counsel, if necessary, shall participate in any fair hearing involving an eligible recipient. HSD/MAD, and its counsel, if necessary, may participate in fair hearings.

[8.314.7.20 NMAC - N, 4/1/2021]

8.314.7.21 CONTINUATION OF BENEFITS PURSUANT TO TIMELY APPEAL:

A. Continuation of benefits may be provided to eligible recipients who request an HSD administrative hearing within the timeframe defined in 8.352.2 NMAC. The notice will include information on the right to continued benefits and on the eligible recipient's responsibility for repayment if the hearing decision is not in the eligible recipient's favor. See 8.352.2 New Mexico administrative code (NMAC) for a complete description of the continuation of benefits process of an HSD administrative hearing for an eligible recipient.

B. The continuation of benefit is only available to an eligible recipient that is currently receiving the appealed benefit. The eligible recipient's current AAB and ISP at the time of the request is termed a 'continuation' of benefits. The continuation budget may not be revised until the conclusion of the fair hearing process.

[8.314.7.21 NMAC - N, 4/1/2021]

8.314.7.22 GRIEVANCE/ COMPLAINT SYSTEM: An eligible recipient has the opportunity to register grievances or complaints concerning the provision of services under the supports waiver program.

Eligible recipients may register complaints with either HSD/MAD or DOH/DDSD via e-mail, mail or phone. Complaints will be referred to the appropriate department for resolution. The eligible recipient is informed that filing a grievance or complaint is not a prerequisite or substitute for a fair hearing.

[8.314.7.21 NMAC - N, 4/1/2021]

HISTORY OF 8.314.7 NMAC: [RESERVED]

STATE AUDITOR, OFFICE OF THE

The Office of the State Auditor reviewed at its 2/17/2020 hearing, to repeal its rule 2.2.2 NMAC, Audits of Governmental Entities - Requirements For Contracting Audits of Agencies (filed 2/27/2020) and replace it with 2.2.2 NMAC, Audits of Governmental Entities - Requirements For Contracting Audits of Agencies, adopted 2/27/2020 and effective 3/23/2021.

STATE AUDITOR, OFFICE OF THE

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

2.2.2.1 ISSUING AGENCY: Office of the State Auditor. [2.2.2.1 NMAC - Rp, 2.2.2.1 NMAC, 3/23/2021]

2.2.2.2 SCOPE: Agencies and local public bodies as defined by the Audit Act and independent public accountants interested in contracting to perform professional services related to the financial affairs and transactions of those agencies. [2.2.2.2 NMAC - Rp, 2.2.2.2 NMAC, 3/23/2021]

2.2.2.3 STATUTORY AUTHORITY: Audit Act, Sections 12-6-1 to 12-6-14 NMSA 1978. [2.2.2.3 NMAC - Rp, 2.2.2.3 NMAC, 3/23/2021]

2.2.2.4 DURATION: Permanent. [2.2.2.4 NMAC - Rp, 2.2.2.4 NMAC, 3/23/2021]

2.2.2.5 EFFECTIVE DATE: March 23, 2021, unless

a later date is cited at the end of a section.

[2.2.2.5 NMAC - Rp, 2.2.2.5 NMAC, 3/23/2021]

2.2.2.6 OBJECTIVE:

The objective is to establish policies, procedures, rules and requirements for contracting and conducting financial audits, special audits, attestation engagements, performance audits, and forensic accounting engagements of or for governmental agencies of the state of New Mexico.

[2.2.2.6 NMAC - Rp, 2.2.2.6 NMAC, 3/23/2021]

2.2.2.7 DEFINITIONS:

This section describes certain terms used in 2.2.2 NMAC. When terminology differs from that used at a particular organization or under particular standards, auditors should use professional judgment to determine if there is an equivalent term:

A. Definitions

beginning with the letter "A":

(1) "AAG"

"AAG" means AICPA Audit and Accounting Guide - Government auditing standards and Single Audits (latest edition).

(2) "AAG"

"AAG" means AICPA Audit and Accounting Guide - State and Local Governments (latest edition).

(3)

"Agency" means any department, institution, board, bureau, court, commission, district or committee of the government of the state, including district courts, magistrate or metropolitan courts, district attorneys and charitable institutions for which appropriations are made by the legislature; any political subdivision of the state, created under either general or special act, that receives or expends public money from whatever source derived, including counties, county institutions, boards, bureaus or commissions; municipalities; drainage, conservancy, irrigation, or other special districts; and school districts; any entity or instrumentality of the state specifically provided for by law, including the New Mexico

finance authority, the New Mexico mortgage finance authority, the New Mexico lottery authority and every office or officer of any entity listed in Paragraphs (1) through (3) of Subsection A of Section 12-6-2 NMSA 1978.

(4) "Attest engagement" means an engagement to issue, or where an IPA issues, an examination, a review, AUP report, or report on subject matter, or an assertion about subject matter that is the responsibility of an agency or local public body, including engagements performed pursuant to AICPA and GAGAS attestation standards and all engagements pursuant to Subsection A of Section 12-6-3 NMSA 1978.

(5) "Audit"

may refer to or include annual financial and compliance audit, or attestation engagement, unless otherwise specified.

(6) "Audit documentation"

means the record of procedures performed, relevant evidence obtained, and conclusions reached (terms such as working papers or workpapers are also sometimes used).

(7) "Auditor"

means independent public accountant performing audit or attest work as defined in the Public Accountancy Act.

(8) "AICPA"

means American institute of certified public accountants.

(9) "AU-C"

means U.S. auditing standards-AICPA (Clarified).

(10) "AUP"

means agreed upon procedures.

B. Definitions

beginning with the letter "B":
[RESERVED]

C. Definitions

beginning with the letter "C":

(1) "CPA"

means certified public accountant.

(2) "CPE"

means continuing professional education.

(3) "CUSIP"

means committee for uniform securities identification procedures,

the unique identification number assigned to all stocks and registered bonds in the United States and Canada by the committee on uniform securities identification procedures.

(4) "CYFD"

means the New Mexico children youth and families department.

D. Definitions

beginning with the letter "D":

(1) "DFA"

means the New Mexico department of finance and administration.

(2) "DOH"

means the New Mexico department of health.

(3) "DOT"

means the New Mexico department of transportation.

E. Definitions

beginning with the letter "E":

(1)

"ECECD" means the New Mexico early childhood education and care department.

(2) "ERB"

means the New Mexico education retirement board.

F. Definitions

beginning with the letter "F":

(1) "FCD"

means financial control division of the department of finance and administration.

(2) "FDIC"

means federal deposit insurance corporation.

(3) "FDS"

means financial data schedule.

G. Definitions

beginning with the letter "G":

(1) "GAAP"

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

(2) "GAGAS"

means the most recent revision of government auditing standards issued by the comptroller general of the United States (yellow book).

(3) "GAO"

means the government accountability office, a division of the OSA.

(4) "GASB"

means governmental accounting standards board.

(5) "GAAS"

means auditing standards generally

accepted in the United States of America.

(6) “GSD” means the New Mexico general services department.

(7) “GRT” means gross receipts tax.

H. Definitions beginning with the letter “H”:

(1) “HED” means the New Mexico higher education department.

(2) “HSD” means the New Mexico human services department.

(3) “HUD” means United States (US) department of housing and urban development.

I. Definitions beginning with the letter “I”:

(1) “IPA” means independent public accountant performing professional services for agencies and local public bodies.

(2) “IRC” means internal revenue code.

J. Definitions beginning with the letter “J”:

[RESERVED]

K. Definitions beginning with the letter “K”:

[RESERVED]

L. Definitions beginning with the letter “L”:

(1) “LGD” means the local government division of department of finance and administration (DFA).

(2) “Local public body” means a mutual domestic water consumers association, a land grant, an incorporated municipality or a special district.

M. Definitions beginning with the letter “M”:

[RESERVED]

N. Definitions beginning with the letter “N”:

(1) “NCUSIF” means national credit union shares insurance fund.

(2) “NMAC” means New Mexico administrative code.

(3) “NMSA” means New Mexico statutes annotated.

(4) “Non-attest engagement” means any engagement that is not an attest engagement, including, but not limited to, audits, services performed in accordance with the statement on standards for consulting services or the statement on standards for forensic services, or any other engagement that is not under Section 12-6-3 NMSA 1978, including certain agency- initiated or other engagements in which the IPA’s role is perform an engagement, assist the client or testify as an expert witness in accounting, auditing, taxation, or other matters, given certain stipulated facts.

O. Definitions beginning with the letter “O”:

(1) “Office” or “OSA” means the New Mexico office of the state auditor.

(2) “OMB” means the United States office of management and budget.

P. Definitions beginning with the letter “P”:

(1) “PED” means the New Mexico public education department.

(2) “PERA” means the New Mexico public employee retirement association.

(3) “PHA” means public housing authority.

Q. Definitions beginning with the letter “Q”:

[RESERVED]

R. Definitions beginning with the letter “R”:

(1) “REAC” means real estate assessment center.

(2) “REC” means regional education cooperative.

(3) “Report” means a document issued as a result of an annual financial and compliance audit, special audit, attestation engagement, performance audit, forensic accounting engagement, or AUP engagement regardless of whether the document is on the contractor’s letterhead or signed by the contractor.

(4) “RSI” means required supplementary information.

S. Definitions beginning with the letter “S”:

(1) “SAS” means the AICPA’s statement on auditing standards.

(2) “SHARE” means statewide human resources accounting and management reporting system.

(3) “SI” means supplementary information.

(4) “Special audit” means a limited-scope examination of financial records and other information designed to investigate allegations of waste, fraud, abuse, theft, non-compliance, or misappropriation of funds, or to quantify the extent of such losses, including both attest engagements and non-attest engagements, performance audits, forensic accounting engagements, and any other engagement that is not part of the annual financial statement and compliance audit, depending on designation or scope.

(5) “State auditor” may refer to either the elected state auditor of the state of New Mexico, or personnel of his office designated by him.

(6) “STO” means state treasurer’s office.

T. Definitions beginning with the letter “T”:

(1) “Tier” is established based on the amount of each local public body’s annual revenue, pursuant to Section 12-6-3 NMSA 1978 and 2.2.2.16 NMAC.

(2) “TRD” means the New Mexico taxation and revenue department.

U. Definitions beginning with the letter “U”:

(1) “UFRS” means uniform financial reporting standards.

(2) “Uniform guidance” Title 2 U.S. Code of Federal Regulations Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

(3) “U.S. GAO” means the United States

government accountability office.

V. Definitions beginning with the letter “V”:
[RESERVED]

W. Definitions beginning with the letter “W”:
[RESERVED]

X. Definitions beginning with the letter “X”:
[RESERVED]

Y. Definitions beginning with the letter “Y”:
[RESERVED]

Z. Definitions beginning with the letter “Z”:
[RESERVED]
[2.2.2.7 NMAC - Rp, 2.2.2.7 NMAC, 3/23/2021]

2.2.2.8 THE PROCUREMENT AND AUDIT PROCESS:

A. Firm profiles: For an IPA to be included on the state auditor’s list of approved firms to perform audits, AUPs, and other attest engagements, an IPA shall submit a firm profile online annually on the fifth business day in January, in accordance with the guidelines set forth herein. The OSA shall review each firm profile for compliance with the requirements set forth in this rule. IPAs shall notify the state auditor of changes to the firm profile as information becomes available. The state auditor shall approve contracts for audit, AUPs, and other attest engagements only with IPAs who have *submitted a complete and correct* firm profile that has been approved by the OSA, and who have complied with all the requirements of this rule, including but not limited to:

(1) Subsection A of 2.2.2.14 NMAC, continuing professional education requirements for all staff that the firm will use on any New Mexico governmental engagements;

(2) for IPAs who have audited agencies under this rule in the past, they shall have previously complied with: 2.2.2.9 NMAC, *report due dates*, including notifying the state auditor regarding late audit reports and 2.2.2.13 NMAC, review of audit reports and audit documentation.

B. List of approved firms: The state auditor shall maintain a list of independent public accounting (IPA) firms that are approved and eligible to compete for audit contracts, AUPs, and other attest engagements with agencies. The state auditor’s list of approved firms shall be reviewed and updated on an annual basis. An IPA on the list of approved firms is approved to perform government audits, AUPs, and other attest engagements for agencies and local public bodies until the list of approved firms is published for the following year; provided that the OSA may restrict firms at any time for failure to submit firm profile updates timely. An IPA that is included on the state auditor’s list of approved firms for the first time may be subject to an OSA quality control review of the IPA’s working papers for audits, AUPs and other attest engagements.

This review shall be conducted as soon as the documentation completion date, as defined by AU-C Section 230, has passed (60 days after the report release date, as posted on the OSA’s audit reports website). The state auditor shall approve contracts for audits, AUPs and other attest engagements only with IPA firms that have submitted a complete and correct firm profile complying with all the requirements set forth in this rule and that has been approved by the OSA. The OSA shall inform all IPAs whose firm profiles were submitted by the due date whether they are on the list of approved firms for audits, AUPs and other attest engagements and shall publish the list of approved firms concurrent with notification to government agencies to begin the procurement process to obtain an IPA to conduct the agency’s annual financial audit. Firms that only perform non-attest engagements, or otherwise do not meet applicable requirements, shall not be included on the list of approved firms.

C. Disqualified firms: An IPA firm shall not be included on the list of approved firms for audits, AUPs, and other attest engagements if any of the following applies to that IPA:

(1) the firm received a peer review rating of “failed”;

(2) the firm does not have a current New Mexico firm permit to practice;

(3) the firm profile does not include at least one certified public accountant with a current CPA certificate who has met the GAGAS CPE requirements described at Subsection A of 2.2.2.14 NMAC, to perform GAGAS audits;

(4) the IPA has been restricted in the past and has not demonstrated improvement (this includes submitting excessively deficient audit reports or having excessively deficient workpapers);

(5) the IPA made false statements in their firm profile or any other official communication with the OSA that were misleading enough to merit disqualification; or

(6) any other reason determined by the state auditor to serve the interest of the state of New Mexico.

D. Restriction:

(1) IPAs may be placed on restriction based on the OSA’s review of the firm profile and deficiency considerations as described below. Restriction may take the form of limiting either the type of engagements or the number of audit contracts, or both, that the IPA may hold. The OSA may impose a corrective action plan associated with the restriction. The restriction remains in place until the OSA notifies the IPA that the restriction has been modified or removed. The deficiency considerations include, but are not necessarily limited to:

(a) failure to submit reports in accordance with report due dates provided in Subsection A of 2.2.2.9 NMAC, or the terms of their individual agency contract(s);

(b) failure to submit late report notification letters in accordance with Subsection A of 2.2.2.9 NMAC;

(c) failure to comply with this rule;

(d) poor quality reports as determined by the OSA;

(e) poor quality working papers as determined by the OSA;

(f) a peer review rating of “pass with deficiencies” with the deficiencies being related to governmental audits;

(g) failure to contract through the OSA for New Mexico governmental audits or AUP engagements;

(h) failure to inform agency in prior years that the IPA is restricted;

(i) failure to comply with the confidentiality requirements of this rule;

(j) failure to invite the state auditor or his designee to engagement entrance conferences, progress meetings or exit conferences after receipt of related notification from the OSA;

(k) failure to comply with OSA referrals or requests in a timely manner;

(l) suspension or debarment by the U.S. general services administration;

(m) false statements in the IPA’s firm profile or any other official communication with the OSA;

(n) failure to cooperate timely with requests from successor IPAs, such as reviewing workpapers;

(o) failure to have required contracts approved by the OSA; or

(p) any other reason determined by the state auditor to serve the interest of the state of New Mexico.

(2) The OSA shall notify any IPA that it proposes to place under restriction. If the proposed restriction includes a limitation on the number of engagements that an IPA is eligible to hold, the IPA shall not submit proposals or bids to new agencies if the number of multi-year proposals the IPA possesses at the time of

restriction is equal to or exceeds the limitation on the number of engagements for which the IPA is restricted.

(3) An IPA under restriction is responsible for informing the agency whether the restricted IPA is eligible to engage in a proposed contract.

(4) If an agency or local public body submits an unsigned contract to the OSA for an IPA that was ineligible to perform that contract due to its restriction, the OSA shall reject the unsigned contract.

E. Procedures for imposition of restrictions:

(1) The state auditor may place an IPA under restriction in accordance with Subsection D of 2.2.2.8 NMAC.

(a) The state auditor or his designee shall cause written notice of the restriction to be sent by email and certified mail, return receipt requested, to the IPA, which shall take effect as of the date of the letter of restriction. The letter shall contain the following information:

- (i) the nature of the restriction;
- (ii) the conditions of the restriction;
- (iii) the reasons for the restriction;
- (iv) the action to place the IPA on restriction is brought pursuant to Subsection A of Section 12-6-3 NMSA 1978 and these regulations;
- (v) the IPA may request, in writing, reconsideration of the proposed contract restriction which shall be received by the OSA within 15 calendar days from the date of the letter of restriction; and
- (vi) the e-mail or street address where the IPA’s written request for reconsideration shall be delivered, and the name of the person to whom the request shall be sent.

(b) The IPA’s written request for reconsideration shall include

sufficient facts to rebut on a point for point basis each deficiency noted in the OSA’s letter of restriction. The IPA may request an opportunity to present in person its written request for reconsideration and provide supplemental argument as to why the OSA’s determination should be modified or withdrawn. The IPA may be represented by an attorney licensed to practice law in the state of New Mexico.

(c) The IPA shall have forfeited its opportunity to request reconsideration of the restriction(s) if the OSA does not receive a written request for reconsideration within 15 calendar days of the date of the letter of restriction. The state auditor may grant, for good cause shown, an extension of the time an IPA has to submit a request for reconsideration.

(2) The OSA shall review an IPA’s request for reconsideration and shall make a determination on reconsideration within 15 calendar days of the IPA response letter unless the IPA has asked to present its request for reconsideration in person, in which case the OSA shall make a determination within 15 calendar days from the date of the personal meeting. The OSA may uphold, modify or withdraw its restriction pursuant to its review of the IPA’s request for reconsideration, and shall notify the IPA of its final decision in writing which shall be sent to the IPA via email and certified mail, return receipt requested.

F. Procedures to obtain professional services from an IPA: Concurrent with publication of the list of approved firms, the OSA shall authorize agencies to select an IPA to perform their annual audit or AUP engagement. Agencies are prohibited from beginning the process of procuring IPA services for annual audits or AUPs pursuant to Section 12-6-3 NMSA 1978 until they receive the OSA authorization. Agencies that wish to begin the IPA procurement process for their annual audit or AUP pursuant to Section 12-6-3 NMSA 1978 prior

to receiving OSA authorization may request an exception, however any such exceptions granted by OSA are subject to changes in the final audit rule applicable to the annual audit or AUP pursuant to Section 12-6-3 NMSA 1978 and changes in restrictions to, or disqualifications of, IPAs. The notification shall inform the agency that it shall consult its prospective IPA to determine whether the prospective IPA has been restricted by the OSA as to the type of engagement or number of contracts it is eligible to perform. Agencies that may be eligible for the tiered system shall complete the evaluation described in Subsection B of 2.2.2.16 NMAC. Agencies that receive and expend federal awards shall follow the uniform guidance procurement requirements from 2 CFR 200.317 to 200.326 and 200.509, and shall also incorporate applicable guidance from the following requirements. Agencies shall comply with the following procedures to obtain professional services from an IPA for an audit or AUP engagement.

(1) Upon receipt of written authorization from the OSA to proceed, and at no time before then unless OSA has granted an exception, the agency shall identify all elements or services to be solicited pursuant to this rule and conduct a procurement that includes each applicable element of the annual financial and compliance audit, special audit, attestation engagement, performance audit, forensic audit or AUP engagement.

(2) Quotations or proposals for annual financial audits shall contain each of the following elements:

- (a) financial statement audit;
- (b) federal single audit (if applicable);
- (c) financial statement preparation so long as the IPA has considered any threat to independence and mitigated it;
- (d) other non-audit services (if applicable and allowed by current government auditing standards); and

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

(3) The agency is encouraged to request multiple year proposals for audit and AUP services, however the term of the contract shall be for one year only. The parties shall enter a new audit contract each year. The agency is responsible for procuring IPA services in accordance with all applicable laws and regulations which may include, but are not limited to, the State Procurement Code (Chapter 13, Article 1 NMSA 1978) or equivalent home rule procurement provisions; GSD Rule, Section 1.4.1 NMAC, Procurement Code Regulations, if applicable; DFA Rule, Section 2.40.2 NMAC, Governing the Approval of Contracts for the Purchase of Professional Services; Uniform Guidance; and Section 13-1-191.1 NMSA 1978 relating to campaign contribution disclosure forms. In the event that either of the parties to the contract elects not to contract for all of the years contemplated by a multiple year proposal, or the state auditor disapproves the contract, the agency shall use the procedures described above to procure services from a different IPA.

(4) If the agency is a component of a primary government, the agency's procurement for audit services shall include the AU-C 600 (group audits) requirements for the IPA to communicate and cooperate with the group engagement partner and team, and the primary government. This requirement applies to agencies and universities that are part of the statewide comprehensive annual financial report, other component units of the statewide comprehensive annual financial report and other component units of any primary government that use a different audit firm from the primary government's audit firm. Costs for the IPA to cooperate with the group engagement partner and team, and the primary government, caused by

the requirements of AU-C 600 (group audit) may not be charged in addition to the cost of the engagement, as the OSA views this in the same manner as compliance with any other applicable standard.

(5) Agencies are encouraged to include representatives of the offices of separately elected officials such as county treasurers, and component units such as charter schools and housing authorities, in the IPA selection process. As part of their evaluation process, the OSA recommends that agencies consider the following when selecting an IPA for their annual audit or AUP pursuant to Section 12-6-3 NMSA 1978:

- (a) responsiveness to the request for proposal (the firm's integrity, record of past performance, financial and technical resources);
- (b) relevant experience, availability of staff with professional qualifications and technical abilities;
- (c) results of the firm's peer and external quality control reviews; and
- (d) weighting the price criteria less than fifteen percent of the total criteria taken into consideration by the evaluation process or selection committee.

Upon the OSA's request, the agency shall make accessible to the OSA all of the IPA procurement and selection documentation.

(6) After selecting an IPA for their annual audit or AUP pursuant to Section 12-6-3 NMSA 1978, each agency shall enter the appropriate requested information online on the OSA-connect website (www.osa-app.org). In order to do this, the agency shall register on OSA-Connect and obtain a user-specified password. The agency's user shall then use OSA-Connect to enter information necessary for the contract and for the OSA's evaluation of the IPA selection. After the agency enters the information, the OSA-Connect system generates a draft contract containing the information

entered. The agency shall submit to the OSA for approval a copy of the unsigned draft contract by following the instructions on OSA-Connect.

(7) The OSA shall notify the agency as to the OSA's approval or rejection of the selected IPA and contract. The OSA's review of audit contracts does not include evaluation of compliance with any state or local procurement laws or regulations; each agency is responsible for its own compliance with applicable procurement laws, regulations or policies. After the agency receives notification of approval of the selected IPA and contract from the OSA, the agency is responsible for getting the contract signed and sent to any oversight agencies, including DFA, for approval (if applicable). The OSA shall not physically sign the contract. After the agency obtains all the required signature and approvals of the contract, the agency shall submit an electronic portable document format (PDF) copy of the final signed contract to the OSA by electronic mail to: *reports@osa.state.nm.us*.

(8) The agency shall deliver the unsigned contract generated by OSA-Connect to the OSA by the due date shown below. In the event that the due date falls on a weekend or holiday, the due date shall be the next business day. If the unsigned contract is not submitted to the state auditor by these due dates, the IPA may, according to professional judgment, include a finding of non-compliance with Subsection F of 2.2.2.8 NMAC in the audit report or AUP report.

(a) Regional education cooperatives, cooperative educational services, independent housing authorities, hospitals and special hospital districts: April 15;

(b) school districts, counties, and higher education: May 1;

(c) incorporated counties (of which Los Alamos is the only one), local workforce investment boards and local public bodies that do not qualify for the tiered system: May 15;

(d) councils of governments, district courts, district attorneys, state agencies: July 1 and the state of New Mexico comprehensive annual financial report: July 31;

(e) local public bodies that qualify for the tiered system pursuant to Subsections A and B of 2.2.2.16 NMAC with a June 30 fiscal year end: July 30;

(f) local public bodies that qualify for the tiered system pursuant to Subsections A and B of 2.2.2.16 NMAC with a fiscal year end other than June 30 shall use a due date 30 days after the end of the fiscal year;

(g) agencies with a fiscal year end other than June 30 shall use a due date 30 days before the end of the fiscal year;

(h) component units that are being separately audited: on the primary government's due date;

(i) Charter schools that are chartered by the PED and agencies that are subject to oversight by the HED have the additional requirement of submitting their audit contract to PED or HED for approval (Section 12-6-14 NMSA 1978); and

(j) In the event the agency's unsigned contract is submitted to the OSA, but is not approved by the state auditor, the state auditor shall promptly communicate the decision, including the reason(s) for disapproval, to the agency, at which time the agency shall promptly submit a contract with a different IPA using OSA-Connect. This process shall continue until the state auditor approves an unsigned contract. During this process, whenever an unsigned contract is not approved by the state auditor, the agency may submit a written request to the state auditor for reconsideration of the disapproval. The agency shall submit its request no later than 15 calendar days after the date of the disapproval and shall include documentation in support of its IPA selection. If warranted, after review of the request, the state auditor may

hold an informal meeting to discuss the request. The state auditor shall set the meeting in a timely manner with consideration given to the agency's circumstances.

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

(10) If the agency fails to submit an unsigned contract by the due date set forth in this rule, or, if no due date is applicable, within 60 days of notification from the state auditor to engage an IPA, the state auditor may conduct the audit or select the IPA for that agency. The reasonable costs of such an audit shall be borne by the agency audited unless otherwise exempted pursuant to Section 12-6-4 NMSA 1978.

(11) In selecting an IPA for an agency pursuant to Subsection F of 2.2.2.8 NMAC the state auditor shall at a minimum consider the following factors, but may consider other factors in the state auditor's discretion that serve the best interest of the state of New Mexico and the agency:

(a) the IPA shall be drawn from the list of approved IPAs maintained by the state auditor;

(b) an IPA subject to restriction pursuant to Subsection D of 2.2.2.8 NMAC, is ineligible to be selected under this paragraph;

(c) whether the IPA has conducted one or more audits of similar government agencies;

(d) the physical proximity of the IPA to the government agency to be audited;

(e) whether the resources and expertise of the IPA are consistent with the audit requirements of the government agency to be audited;

(f) the IPA's cost profile, including examination of the IPA's fee schedule and blended rates;

(g) the state auditor shall not select an IPA in which a conflict of interest exists with the agency or that may be otherwise impaired, or that is not in the best interest of the state of New Mexico.

(12) The state auditor shall consider, at a minimum, the following factors when considering which agencies shall be subject to the state auditor’s selection of an IPA:

(a) whether agency is demonstrating progress in its own efforts to select an IPA;

(b) whether the agency has funds to pay for the audit;

(c) whether the agency is on the state auditor’s “at risk” list;

(d) whether the agency is complying with the requirements imposed on it by virtue of being on the state auditor’s “at risk” list;

(e) whether the agency has failed to timely submit its e-mailed draft unsigned contract copy in accordance with the audit rule on one or more occasions;

(f) whether the agency has failed to timely submit its annual financial audit report in accordance with the audit rule due dates on one or more occasions.

(13) The state auditor may appoint a committee of the state auditor’s staff to make recommendations for the state auditor’s final determination as to which IPAs shall be selected for each government agency subject to the discretion of the state auditor.

(14) Upon selection of an IPA to audit a government agency subject to the discretion of the state auditor, the state auditor shall notify the agency in writing regarding the selection of an IPA to conduct its audit. The notification letter shall include, at a minimum, the following statements:

(a) the agency was notified by the state auditor to select an IPA to perform its audit or AUP engagement;

(b) 60 days or more have passed since such notification, or the applicable due date in this rule has passed, and the agency failed to deliver its draft contract in accordance with this subsection;

(c) pursuant to Subsection A of Section 12-6-14 NMSA 1978, the state auditor is selecting the IPA for the agency;

(d) delay in completion of the agency’s audit is contrary to the best interest of the state and the agency, and threatens the functioning of government and the preservation or protection of property;

(e) in accordance with Section 12-6-4 NMSA 1978, the reasonable costs of such an audit shall be borne by the agency unless otherwise exempted; and

(f) selection of the IPA is final, and the agency shall immediately take appropriate measures to procure the services of the selected IPA.

G. State auditor approval/rejection of unsigned contract: The state auditor shall use discretion and may reject unsigned contracts as follows:

(1) An unsigned audit contract, special audit contract, attestation engagement contract, performance audit contract, forensic accounting engagement contract or AUP professional services contract under 2.2.2.16 NMAC that does not serve the best interests of the public or the agency or local public body because of one or more of the following reasons:

(a) lack of experience of the IPA;

(b) failure to meet the auditor rotation requirements as follows:

(i) the IPA is prohibited from conducting the agency audit for a period of two years because the IPA already conducted those services for

that agency for a period of eight consecutive years;

(c) lack of competence or staff availability;

(d) circumstances that may cause untimely delivery of the audit report or AUP report;

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

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

(g) lack of compliance with the procurement code, the audit act, or this rule;

(h) the agency giving too much consideration to the price of the IPA’s response to the request for bids or request for proposals in relation to other evaluation criteria;

(i) newness of the IPA to the state auditor’s list of approved firm;

(j) noncompliance with the requirements of Section 12-6-3 NMSA 1978 the audit act by the agency for previous fiscal years; or

(k) any other reason determined by the state auditor to be in the best interest of the state of New Mexico.

(2) An audit contract, special audit contract, attestation engagement contract, performance audit contract, or forensic accounting engagement contract or AUP contract of an IPA that has:

(a) breached a prior-year contract;

(b) failed to deliver an audit or AUP report on time;

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

(d) performed non-audit services (including services related to fraud) for an agency or local public body it

is performing an audit, special audit, attestation engagement, performance audit, forensic accounting engagement or an AUP for, without prior approval of the state auditor;

(e) performed non-audit services under a separate contract for services that may be disallowed by GAGAS independence standards;

(f) failed to respond, in a timely and acceptable manner, to an OSA audit, special audit contract, attestation engagement contract, performance audit contract, forensic accounting engagement contract, AUP report review or working paper review;

(g) impaired independence during an engagement;

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

(i) not adhered to external quality control review standards as defined by GAGAS and 2.2.2.14 NMAC;

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

(k) released the audit report or AUP report to the agency, local public body or the public before the audit release letter or the OSA letter releasing the AUP report was received from the OSA;

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

(m) failed to submit a completed firm profile as required by Subsection A of 2.2.2.8 NMAC or failed to include all staff in the firm profile who would be working on the firm's engagements;

(n) reached the limit of contracts to which the state auditor restricted the IPA;

(o) failed to respond to communications from the OSA or engagement clients within a reasonable amount of time; or

(p) otherwise, in the opinion of the state auditor, the IPA was unfit to be awarded a contract.

(3) An audit contract, special audit contract, attestation engagement contract, performance audit contract, forensic accounting engagement contract or AUP contract for an IPA received by the OSA, which the state auditor decides to perform himself with or without the assistance of an IPA, and pursuant to Section 12-6-3 NMSA 1978, even if the agency or local public body was previously designated for audit or AUP to be performed by an IPA.

H. Audit contract requirements: The agency shall use the appropriate audit or AUP engagement contract form provided by the OSA through the OSA-connect website at www.osa-app.org. The OSA may provide audit or AUP engagement contract forms to the agency via facsimile, e-mail, or U.S. mail if specifically requested by the agency. Only contract forms provided by the state auditor shall be accepted and shall:

(1) be completed and submitted in its unsigned form by the due date indicated at Subsection F of 2.2.2.8 NMAC;

(2) for all agencies whose contracts are approved through the DFA's contracts review bureau, have the IPA's combined reporting system (CRS) number verified by the taxation and revenue department (TRD) after approval by the state auditor; and

(3) in the compensation section of the contract, include the dollar amount that applies to each element of the contracted procedures that shall be performed;

(4) if the agency requires the IPA to provide additional services outside the scope of work described in the audit or AUP contract form provided through the OSA-connect website, the additional services shall be described in detail in the "other provisions section" of the contract; if the additional services

required by the "other provisions" section of the contract cause a significant change in the scope of the audit, then the contract amendment provisions of Subsection N of 2.2.2.8 NMAC shall apply.

I. Professional liability insurance: The IPA shall maintain professional liability insurance covering any error or omission committed during the term of the contract. The IPA shall provide proof of such insurance to the state auditor with the firm profile. The amount maintained should be commensurate with the risk assumed. The IPA shall provide to the state auditor, prior to expiration, updated insurance information.

J. Breach of contract: A breach of any terms of the contract shall be grounds for immediate termination of the contract. The injured party may seek damages for such breach from the offending party. Any IPA who knowingly makes false statements, assurances, or disclosures may be disqualified from conducting audits or AUP engagements of New Mexico governmental agencies.

K. Subcontractor requirements:

(1) Audit firms that have only one individual qualified to supervise a GAGAS audit and issue the related audit report pursuant to Section 61-28B-17 NMSA 1978, and GAGAS Paragraph 4.16 shall submit with the firm profile, a completed contingency subcontractor form that is dated to be effective until the date the next firm profile shall be submitted. The form shall indicate which IPA on the state auditor's current list of approved IPAs shall complete the IPA's audits in the event the one individual with the qualifications described above becomes incapacitated and unable to complete the audit. See the related contingency subcontractor form available at www.osanm.org. The OSA shall not approve audit contracts for such a firm without the required contingency subcontractor form.

(2) In the event an IPA chooses to use a subcontractor to assist the IPA in

working on a specific audit, then the IPA shall obtain the prior written approval of the state auditor to subcontract a portion of the audit work. The IPA may subcontract only with IPAs who have submitted a completed and approved firm profile to the state auditor as required in Subsection A of 2.2.2.8 NMAC. Subcontractors are subject to an independence analysis, which may include the IPA rotation requirements of Subsection G of 2.2.2.8 NMAC. "Technical review contracts" are considered subcontracting and are subject to the requirements of this Section. The audit contract shall specify subcontractor responsibility, who shall sign the report(s), and how the subcontractor shall be paid. For additional information see the subcontract work section of the OSA website.

L. IPA independence:

IPAs shall maintain independence with respect to their client agencies in accordance with the requirements of the current *government auditing standards*.

M. Progress

Payments: The state auditor shall approve progress and final payments for the annual audit contract as follows:

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

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

(3) Progress payments up to seventy percent do not require state auditor approval provided that the agency certifies the receipt of services before any payments are made to the IPA. If the report has been submitted, progress payments up to eighty-five percent do not require state auditor approval.

The agency shall monitor audit progress and make progress payments only up to the percentage that the audit is completed. If requested by the state auditor, the agency or the IPA shall provide a copy of the approved invoices and progress billing(s). Progress payments between seventy percent and ninety-five percent if no report has been submitted, or eighty-five and ninety-five percent if a report has been submitted, require state auditor approval after being approved by the agency. When component unit audits are part of a primary government's audit contract, requests for progress payments on the component unit audit(s) shall be included within the primary government's request for progress payment approval. In this situation, the OSA shall not process separate progress payment approvals submitted by the component unit.

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

(5) Section 12-6-14 NMSA 1978 (contract audits) provides that final payment under an audit contract may be made by the agency to the IPA only after the state auditor has determined, in writing, that the audit has been made in a competent manner in accordance with contract provisions and this rule. The state auditor's determination with respect to final payment shall be communicated as follows:

(a) stated in the letter accompanying the release of the report to the agency; or
(b) in the case of ongoing law enforcement investigations, stated in a letter prior to the release of the report to the agency.

In no circumstance may the total billed by the IPA under the audit contract exceed the total contract amount, as amended if applicable. Further, as the compensation section of the contract shall include the dollar

amount that applies to each element of the contracted procedures that shall be performed, if certain procedures, such as a single audit, are determined to be unnecessary and are not performed, the IPA may not bill the agency for these services. Final payment to the IPA by the agency prior to review and release of the audit report by the state auditor is considered a violation of Section 12-6-14 NMSA 1978 and this rule and shall be reported as an audit finding in the audit report of the agency. If this statute is violated, the IPA may be removed from the state auditor's list of approved auditors.

N. Contract amendment requirements:

(1) Contract amendments to contracts for audit services, AUP services, or non-attest services shall be submitted to the OSA regarding executed contracts. Contracts may not be amended after they expire. The contract should be amended prior to the additional work being performed or as soon as practicable thereafter. Any amendments to contracts for audits, AUPs, or other attest or non-attest engagements shall be made on the contract amendment form available at www.saonm.org. The OSA's review of audit contracts and amendments does not include evaluation of compliance with the state procurement code or other applicable requirements. Although the parties may amend the delivery dates in a contract, audit report regulatory due dates cannot be modified by amendment. The OSA's review of audit contract amendments does not include evaluation of compliance with any state or local procurement laws or regulations; each agency is responsible for its own compliance with applicable procurement laws, regulations or policies.

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

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

(b) how the work to be performed relates to the scope of work outlined in the original contract.

(3) Since annual financial audit contracts are fixed-price contracts, contract amendments for fee increases shall only be approved for extraordinary circumstances, reasons determined by the state auditor to be in the best interest of the state of New Mexico, or a significant change in the scope of an audit. For example, if an audit contract did not include a federal single audit, a contract amendment shall be approved if a single audit is required. Other examples of significant changes in the scope of an audit include: the addition of a new program, function or individual fund that is material to the government-wide financial statements; the addition of a component unit; and the addition of special procedures required by this rule, a regulatory body or a local, state or federal grantor. Contract amendments shall not be approved to perform additional procedures to achieve an unmodified opinion. The state auditor shall also consider the auditor independence requirements of Subsection L of 2.2.2.8 NMAC when reviewing contract amendments for approval. Requests for contract amendments shall be submitted to the OSA with the signed contract amendment. The OSA shall review the requests and respond to the agency and the IPA within 30 calendar days of receipt.

(4) If a proposed contract amendment is rejected for lack of adequate information, the IPA and agency may submit a corrected version for reconsideration.

O. Termination of audit contract requirements:

(1) The state auditor may terminate an audit contract to be performed by an IPA after determining that the audit has been unduly delayed, or for any other reason, and perform the audit entirely or partially with IPAs contracted by the OSA (consistent with the October 6, 1993, stipulated order, *Vigil v. King*,

No. SF 92-1487(C). The notice of termination of the contract shall be in writing.

(2) If the agency or IPA terminate the audit or AUP engagement contract pursuant to the termination paragraph of the contract, the OSA shall be notified of the termination immediately. The party sending out the termination notification letter shall simultaneously send a copy of the termination notification letter to the OSA with an appropriate cover letter, addressed to the state auditor.

(a) The agency is responsible for procuring the services of a new IPA in accordance with all applicable laws and regulations, and this rule.

(b) The unsigned contract for the newly procured IPA shall be submitted to the OSA within 30 calendar days of the date of the termination notification letter.

(c) As indicated in Subsection A of 2.2.2.9 NMAC, the state auditor shall not grant extensions of time to the established regulatory due dates.

(d) If the IPA does not expect to deliver the engagement report by the regulatory due date, the IPA shall submit a written notification letter to the state auditor and oversight agency as required by Subsection A of 2.2.2.9 NMAC or Subsection G of 2.2.2.16 NMAC.

[2.2.2.8 NMAC - Rp, 2.2.2.8 NMAC, 3/23/2021]

2.2.2.9 REPORT DUE DATES:

A. Report due dates:
The IPA shall deliver the electronic draft annual financial audit report to the state auditor by 5:00 p.m. on the date specified in the audit contract and send it electronically by the due date. IPAs and agencies are encouraged to perform interim work as necessary and appropriate to meet the following due dates.

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

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

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

(c) higher education, state agencies not specifically named elsewhere in this Subsection, district courts, district attorneys, the New Mexico finance authority, the New Mexico lottery authority, and other agencies with June 30 fiscal year-ends that are reported as component units in the state of New Mexico comprehensive annual financial report: November 1;

(d) school districts, TRD, CYFD, DOH, DOT, HSD, GSD, ECECD, and the state of New Mexico component appropriation funds (state general fund): November 15;

(e) the PED, the state investment council, and the three post-employment benefit agencies (PERA, ERB and the retiree health care authority): the Wednesday before Thanksgiving day;

(f) counties, incorporated counties (of which Los Alamos is the only one), workforce investment boards, councils of governments, and the New Mexico mortgage finance authority: December 1;

(g) local public bodies including municipalities: December 15;

(h) the state of New Mexico comprehensive annual financial report: December 31;

(i) the ERB, PERA and retiree health care authority schedules of employer allocations reports and related employer guides required by Subsections Z of 2.2.2.10 NMAC: June 15;

(j) agencies with a fiscal year-end other than June 30 shall submit the audit report no later than *five months after the fiscal year-end*;

(k) regarding component unit reports (e.g., housing authorities, charter schools, hospitals, foundations, etc.), all separate audit reports prepared by an auditor that is different from the primary government's auditor, are *due fifteen days before the primary government's audit report is due*, unless some other applicable due date requires the report to be submitted earlier;

(l) any agency that requires its report to be released by December 31st for any reason (bonding, GFOA, etc.): the earlier of its agency due date or December 1; and

(m) late audit or AUP reports of any agency (not performed in the current reporting period): not more than six months after the date the contract was executed.

(2) If an audit report is not delivered on time to the state auditor, the auditor shall include this instance of non-compliance with Subsection A of 2.2.2.9 NMAC as an audit finding in the audit report. This requirement is not negotiable. If appropriate, the finding may also be reported as a significant deficiency or material weakness in the operation the agency's internal controls over financial reporting pursuant to AU-C 265.

(3) An electronic copy of the report shall be submitted for review by the OSA with the following: copy of the signed management representation letter and a copy of the completed state auditor report review guide (available at www.saonm.org). A report shall not be considered submitted to the OSA for the purpose of meeting the due date until a copy of the signed management representation letter and the completed report review guide are also submitted to the OSA. All separate reports prepared for component units shall also be submitted to the OSA for review, along with a copy of the management representation letter, and a completed report review guide for each separate audit report. A separate component

unit report shall not be considered submitted to the OSA for the purpose of meeting the due date until a copy of the signed management representation letter and the completed report review guide are also submitted to the OSA. If a due date falls on a weekend or holiday, or if the OSA is closed due to inclement weather, the audit report is due the following business day by 5:00 p.m.

(4) AU-C 700.41 requires the auditor's report to be dated after audit evidence supporting the opinion has been obtained and reviewed, the financial statements have been prepared and the management representation letter has been signed. AU-C 580.20 requires the management representation letter to be dated the same date as the independent auditor's report.

(5) As soon as the auditor becomes aware that circumstances exist that will make an agency's audit report be submitted after the applicable due date provided in Subsection A of 2.2.2.9 NMAC, the auditor shall notify the state auditor in writing. This notification shall consist of a letter, not an email. However, a scanned version of the official letter sent via email is acceptable. The late audit notification letter is subject to the confidentiality requirements detailed at Subsection M of 2.2.2.10 NMAC. This does not prevent the state auditor from notifying the legislative finance committee or applicable oversight agency pursuant to Subsections F and G of Section 12-6-3 NMSA 1978. There shall be a separate notification for each late audit report. The notification shall include a specific explanation regarding why the report will be late, when the IPA expects to submit the report and a concurring signature by a duly authorized representative of the agency. If the IPA is going to miss the expected report submission date, then the IPA shall send a revised notification letter. In the event the contract was signed after the report due date, the notification letter shall still be submitted to the OSA explaining the reason the audit report will be submitted after the report

due date. The late report notification letter is not required if the report was submitted to the OSA for review by the due date, and then rejected by the OSA, making the report late when resubmitted. Reports resubmitted to the OSA with changes of the IPA's opinion after the report due date shall be considered late and a late audit finding shall be included in the audit report.

(6) The due date of any report not listed in Subsection A of 2.2.2.9 NMAC shall be the date specified in the contract.

B. Delivery and release of the audit report:

(1) The IPA shall deliver to the state auditor an electronic copy of the audit report for review by 5:00 p.m. on the day the report is due. Unfinished or excessively deficient reports shall not satisfy this requirement; such reports shall be rejected and returned to the IPA and the OSA may take action in accordance with Subsection C of 2.2.2.13 NMAC. When the OSA rejects and returns a substandard audit report to the IPA, the OSA shall consider the audit report late if the corrected report is not resubmitted by the due date. The IPA shall also report a finding for the late audit report in the audit report. The firm shall submit an electronic version of the corrected rejected report for OSA review. The name of the electronic file shall be "corrected rejected report" followed by the agency name and fiscal year.

(2) Before initial submission, the IPA shall review the report using the appropriate report review guide available on the OSA's website. The report review guide shall reference applicable page numbers in the audit report. The audit manager or person responsible for the IPA's quality control system shall either complete the report review guide or sign off as having reviewed it. All questions in the guide shall be answered, and the reviewer shall sign and date the last page of the guide. If the review guide is not accurately completed or incomplete, the report shall not be accepted.

(3) IPAs are encouraged to deliver completed audit reports before the due date. All reports, except for reports prepared by the OSA, shall be addressed to the state auditor, the agency executive and governing body (if applicable). Reports prepared by the OSA shall be addressed to the agency executive and governing body (if applicable). The OSA shall review all audit reports submitted by the report due date before reviewing reports that are submitted after the report due date. Once the review of the report is completed pursuant to Subsection A of 2.2.2.13 NMAC, and any OSA comments have been addressed by the IPA, the OSA shall indicate to the IPA that the report is ready to print. After the OSA issues the “*ok to print*” communication for the audit report, the OSA shall authorize the IPA to submit the corrected report with the following items to the OSA within five business days; an electronic searchable version of the audit report labeled “final”, in PDF format, and an electronic Excel version of the summary of findings report and any other required electronic schedule (electronic schedules may not apply to engagements pursuant to 2.2.2.15 or 2.2.2.16 NMAC) if applicable, and an electronic excel version of the schedule of asset management costs for investing agencies, if applicable (all available at www.saonm.org). The OSA shall not release the report until the searchable electronic PDF version of the report and all required electronic Excel schedules are received by the OSA. The electronic file containing the final audit report shall:

- (a) be created and saved as a PDF document in a single PDF file format (simply naming the file using a PDF extension .pdf does not by itself create a PDF file);
- (b) be version 5.0 or newer;
- (c) not exceed 10 megabytes (MB) per file submitted (contact the OSA to request an exception if necessary);

(d) have all security settings like self-sign security, user passwords, or permissions removed or deactivated so the OSA is not prevented from opening, viewing, or printing the file;

(e) not contain any embedded scripts or executables, including sound or movie (multimedia) objects;

(f) have a file name that ends with .pdf;

(g) be free of worms, viruses or other malicious content (a file with such content shall be deleted by the OSA);

(h) be “flattened” into a single layer file prior to submission;

(i) not contain any active hypertext links, or any internal/external links (although it is permissible for the file to textually reference a URL as a disabled link);

(j) be saved at 300 dots per inch (DPI) (lower DPI makes the file hard to read and higher DPI makes the file too large);

(k) have a name that starts with the OSA agency number, followed by the agency name, the fiscal year and “final”; and

(l) be searchable.

(4) The IPA shall deliver to the agency the number of copies of the audit report indicated in the audit contract only after the state auditor has officially released the audit report with a “release letter”.

(a) The audited agency may waive the 5-day waiting period required by Section 12-6-5 NMSA 1978. To do so, the agency’s governing authority or the governing authority’s designee must provide written notification to the OSA of the waiver. The notification must be signed by the agency’s governing authority or the governing authority’s designee and be sent via letter, e-mail or fax to the attention of the state auditor. The OSA encourages agencies wishing to waive the five-day waiting period to

provide the written notification *prior* to the submission of the final report to the OSA.

(b) The IPA shall deliver to the agency the number of copies of the audit report indicated in the audit contract only after the state auditor has officially released the audit report with a “release letter”. Release of the audit report to the agency or the public prior to it being officially released by the state auditor shall result in an audit finding.

(5) After the release of a report, the OSA shall provide DFA and the legislative finance committee with notification that the report is available on the OSA website.

(6) If an audit report is reissued pursuant to AU-C 560, subsequent events and subsequently discovered facts, or AAG GAS 13.29-30 for uniform guidance compliance reports, the reissued audit report shall be submitted to the OSA with a cover letter addressed to the state auditor. The cover letter shall explain that:

(a) the attached report is a “reissued” report;

(b) the circumstances that caused the reissuance; and

(c) a summary of the changes that appear in the reissued report. The OSA shall subject the reissued report to the report review process and upon completion of that report review process, shall issue a “release letter.” The contents of the reissued audit report are subject to the confidentiality requirements described in Subsection M of 2.2.2.10 NMAC. Agency management and the IPA are responsible for ensuring that the latest version of the report is provided to each recipient of the prior version of the report. The OSA shall notify the appropriate oversight agencies regarding the updated report on the OSA website.

(7) If changes to a released audit report are submitted to the OSA, and the

changes do not rise to the level of requiring a reissued report, the IPA shall submit a cover letter addressed to the agency, with a copy to the state auditor, which includes the following minimum elements:

(a) a statement that the changes did not rise to the level of requiring a reissued report;

(b) a description of the circumstances that caused the resubmitted updated report; and

(c) a summary of the changes that appear in the resubmitted updated report compared to the prior released report. Agency management and the IPA are responsible for ensuring that the latest version of the resubmitted report is provided to each recipient of the prior version of the report. The OSA shall notify the appropriate oversight agencies regarding the updated report on the OSA website.

C. Required status reports: For an agency that has failed to submit audit or agreed-upon procedures reports as required by this rule, and has therefore been designated as “at risk” due to late reports, the state auditor requires the agency to submit written status reports to the OSA on each March 15, June 15, September 15, and December 15 that the agency is not in compliance with this rule. Status reports are not required for agencies that are included on the “at risk” list solely due to an adverse or disclaimed independent auditor’s opinion. The status report shall be signed by a member of the agency’s governing authority, a designee of the governing authority or a member of the agency’s top management. If the agency has a contract with an IPA to conduct the audit or perform the AUP engagement, the agency must send the IPA a copy of the quarterly status report. IPAs engaged to audit or perform AUP engagements for agencies with late reports are responsible for assisting these agencies in complying with the reporting requirements of this section. Failure to do so shall be noted by the

OSA and taken into account during the IPA Firm Profile evaluation process. At a minimum, the quarterly written status report shall include:

(1) a detailed explanation of the agency’s efforts to complete and submit its audit or agreed-upon procedures;

(2) the current status of any ongoing audit or agreed-upon procedures work;

(3) any obstacles encountered by the agency in completing its audit or agreed-upon procedures; and

(4) a projected completion date for the financial audit or agreed-upon procedures report. [2.2.2.9 NMAC - Rp, 2 2.2.9 NMAC, 3/23/2021]

2.2.2.10 GENERAL CRITERIA:

A. Annual financial and compliance audits:

(1) The financial audit shall cover the entire financial reporting entity including the primary government and the component units of the primary government, if any. For any financial and compliance audit the agency should produce all documents necessary to conduct the engagement.

(a) The primary government shall determine whether an agency that is a separate legal entity from the primary government is a component unit of the primary government as defined by GASBS 14, 39, 61, and 80 (as amended). The flowchart at GASBS 61.68 may be useful in making this determination. The primary government shall notify all other agencies determined to be component units by September 15 of the subsequent fiscal year. Failure to meet this due date results in a compliance finding. IPAs shall use GASB guidelines as found in relevant GASBS to determine the correct presentation of the component unit. All agencies that meet the criteria to be a component unit of the primary government shall be included with the audited financial statements of the primary government

by discrete presentation or blended, as appropriate. Component units are reported using the government financial reporting format if they have one or more of the characteristics described at AAG SLV 1.01. If a component unit does not qualify to be reported using the governmental format and is not statutorily required to be reported using the governmental format, that fact shall be explained in the notes to the financial statements (summary of significant accounting policies: financial reporting entity). If there was a change from the prior year’s method of presenting a component unit or change in component units reported, the notes to the financial statements shall disclose the reason(s) for the change.

(b) If a primary government has no component units, that fact shall be disclosed in the notes to the financial statements (summary of significant accounting policies: financial reporting entity). If the primary government has component units that are not included in the financial statements due to materiality, that fact shall also be disclosed in the notes.

(c) The state auditor requires component unit(s) to be audited by the same audit firm that audits the primary government (except for public housing authority component units that are statutorily exempt from this requirement, and the statewide comprehensive annual financial report). Requests for exemption from this requirement shall be submitted in writing by the primary government to the state auditor. If the request to use a different auditor for the component unit is approved in writing by the state auditor, the following requirements shall be met:

(i) the IPAs of the primary government and all component units shall consider and comply with the requirements of AU-C 600;

(ii) the group engagement partner shall agree that the group engagement team will be able to obtain sufficient appropriate audit evidence through

the use of the group engagement team's work or use of the work of the component auditors (AU-C 600.15); **(iii)**

the component unit auditor selected shall appear on the OSA list of approved IPAs; **(iv)**

all bid and auditor selection processes shall comply with the requirements of this rule; **(v)**

the OSA standard contract form shall be used by both the primary government and the component unit; **(vi)**

the primary government, the primary engagement partner, management of the component unit, and the component unit auditor shall all coordinate their efforts to ensure that the audit reports of the component unit and the primary government are submitted by the applicable due dates; **(vii)**

all component unit findings shall be disclosed in the primary government's audit report (except the statewide comprehensive annual financial report, which shall include only component unit findings that are significant to the state as a whole); and **(viii)**

any separately issued component unit financial statements and associated auditors' reports shall be submitted to the state auditor by the due date in Subsection A of 2.2.2.9 NMAC for the review process described in Subsection A of 2.2.2.13 NMAC. **(d)**

With the exception of the statewide comprehensive annual financial report, the following SI pertaining to component units for which separately issued financial statements are not available shall be audited and opined on as illustrated in AAG SLV 16.103 example A-15: financial statements for each of the component unit's major funds, combining and individual fund financial statements for all of the component unit's non-major funds, and budgetary comparison statements for the component unit's general fund and major special revenue funds that have

legally adopted annual budgets (AAG SLV 3.22). **(2)** Audits of agencies shall be comprised of a financial and compliance audit of the financial statements and schedules as follows: **(a)**

The level of planning materiality described at AAG SLV 4.72-4.73 and exhibit 4-1 shall be used. Planning materiality for component units is at the individual component unit level. **(b)**

The scope of the audit includes the following statements and disclosures which the auditor shall audit and give an opinion on. The basic financial statements (as defined by GASB and displayed in AAG SLV exhibit 4-1) consisting of: **(i)**

the governmental activities, the business-type activities, and the aggregate discretely presented component units; **(ii)**

each major fund and the aggregate remaining fund information; **(iii)**

budgetary comparison statements for the general fund and major special revenue funds that have legally adopted annual budgets (when budget information is available on the same fund structure basis as the GAAP fund structure, the state auditor requires that the budgetary comparison statements be included as part of the basic financial statements consistent with GASBS 34 fn. 53, as amended, and AAG SLV 11.12 and 11.13); and **(iv)**

the related notes to the financial statements. **(c)**

Budgetary comparison statements for the general fund and major special revenue funds presented on a fund, organization, or program structure basis because the budgetary information is not available on the GAAP fund structure basis for those funds shall be presented as RSI pursuant to GASBS 41. **(d)**

The auditor shall apply procedures and report in the auditor's report on

the following RSI (if applicable) pursuant to AU-C 730: **(i)**

management's discussion and analysis (GASBS 34.8-.11); **(ii)**

RSI data required by GASBS 67 and 68 for defined benefit pension plans; **(iii)**

RSI schedules required by GASBS 43 and 74 for postemployment benefit plans other than pension plans; **(iv)**

RSI schedules required by GASBS 45 and 75 regarding employer accounting and financial reporting for postemployment benefits other than pensions; and **(v)**

infrastructure modified approach schedules derived from asset management systems (GASBS 34.132-133). **(e)**

The audit engagement and audit contract compensation include an AU-C 725 opinion on the SI schedules presented in the audit report. The auditor shall subject the information on the SI schedules to the procedures required by AU-C 725. The auditor shall report on the remaining SI in an other-matter paragraph following the opinion paragraph in the auditor's report on the financial statements pursuant to AU-C 725. With the exception of the statewide comprehensive annual financial report, the following SI schedules are required to be included in the AU-C 725 opinion if the schedules are applicable to the agency: **(i)**

primary government combining and individual fund financial statements for all non-major funds (GASBS 34.383); **(ii)**

the schedule of expenditures of federal awards required by uniform guidance; **(iii)**

the schedule of pledged collateral required by Subsection P of 2.2.2.10 NMAC; **(iv)**

the financial data schedule (FDS)

of housing authorities pursuant to Subsection B of 2.2.2.12 NMAC;

(v) the school district schedule of cash reconciliation required by Subsection C of 2.2.2.12 NMAC. In addition, the school district schedule of cash reconciliation SI shall be subjected to audit procedures that ensure the cash per the schedule reconciles to the PED reports as required by Subsection C of 2.2.2.12 NMAC;

(vi) any other SI schedule required by this rule.

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

- (1) the most recent revision of GAGAS issued by the United States government accountability office;
- (2) U.S. auditing standards-AICPA (clarified);
- (3) uniform administrative requirements, cost principles, and audit requirements for federal awards (uniform guidance);
- (4) AICPA audit and accounting guide, government auditing standards and single audits, (AAG GAS) latest edition;
- (5) AICPA audit and accounting guide, state and local governments (AAG SLV) latest edition; and
- (6) 2.2.2 NMAC, requirements for contracting and conducting audits of agencies, latest edition.

C. Financial statements and notes to the financial statements: The financial statements and notes to the financial statements shall be prepared in accordance with accounting principles generally accepted in the United States of America. Governmental accounting principles are identified in the government accounting standards board (GASB) codification, latest edition. IPAs shall follow interpretations, technical bulletins, and concept statements issued by GASB, other

applicable pronouncements, and GASB illustrations and trends for financial statements. In addition to the revenue classifications required by NCGAS 1.110, the OSA requires that the statement of revenues, expenditures, and changes in fund balance - governmental funds include classifications for intergovernmental revenue from federal sources and intergovernmental revenue from state sources, as applicable.

D. Requirements for preparation of financial statements:

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

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

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

(4) If the IPA prepared the financial statements in their entirety from the client-provided trial balance or underlying accounting records the IPA should conclude significant threats to independence exist and shall document the threats and safeguards applied to mitigate the threats to an acceptable level. If the threats cannot be documented as mitigated the IPA may appropriately decide to decline to provide the service. IPAs should refer to the GAGAS conceptual framework to evaluate independence. The fact that the auditor prepared the financial statements from the client-provided trial balance or underlying

records shall be disclosed on the exit conference page of the audit report.

E. Audit documentation requirements:

(1) The IPA's audit documentation shall be retained for a minimum of five-years from the date shown on the opinion letter of the audit report or longer if requested by the federal oversight agency, cognizant agency, or the state auditor. Audit documentation, including working papers, are the property of the IPA or responsible certificate holder per Subsection A of Section 61-28B-25 NMSA 1978. Audit documentation includes all documents used to support any opinions or findings included in the report. The state auditor shall have access to the audit documentation at the discretion of the state auditor.

(2) When requested by the state auditor, all of the audit documentation shall be delivered to the state auditor by the due date indicated in the request. State auditor review of audit documentation does not transfer the ownership of the documents. Ownership of the audit documentation is maintained by the IPA or responsible certificate holder.

(3) The audit documentation of a predecessor IPA shall be made available to a successor IPA in accordance with AU-C 510.07 and 510.A3 to 510.A11, and the predecessor auditor's contract. Any photocopy costs incurred shall be borne by the requestor. If the successor IPA finds that the predecessor IPA's audit documentation does not comply with applicable auditing standards and this rule, or does not support the financial data presented in the audit report, the successor IPA shall notify the state auditor in writing specifying all deficiencies. If the state auditor determines that the nature of deficiencies indicate that the audit was not performed in accordance with auditing or accounting standards generally accepted in the United States of America and related laws, rules and regulations and this rule, any or all of the following actions may be taken:

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

(b) the state auditor may deny or limit the issuance of future audit contracts; or

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

F. Auditor communication requirements:

(1) The IPA shall comply with the requirements for auditor communication with those charged with governance as set forth in AU-C 260 and GAGAS 6.06 and 6.07.

(2) After the agency and IPA have an approved audit contract in place, the IPA shall prepare a written and dated engagement letter during the planning stage of a financial audit, addressed to the appropriate officials of the agency, keeping a copy of the signed letter as part of the audit documentation. In addition to meeting the requirements of the AICPA professional standards and the GAGAS requirements, the engagement letter shall state that the engagement shall be performed in accordance with 2.2.2 NMAC.

(3) The audit engagement letter shall not include any fee contingencies. The engagement letter shall not be interpreted as amending the contract. Nothing in the engagement letter can impact or change the amount of compensation for the audit services. Only a contract amendment submitted pursuant to Subsection N of 2.2.2.8 NMAC may amend the amount of compensation for the audit services set forth in the contract.

(4) A separate engagement letter and list of client prepared documents is required for each fiscal year audited. The IPA shall provide a copy of the engagement letter and list of client prepared documents immediately

upon request from the state auditor.

(5) The IPA shall conduct an audit entrance conference with the agency with representatives of the agency's governing authority and top management, which may include representatives of any component units (housing authorities, charter schools, hospitals, foundations, etc.), if applicable. The OSA has the authority to notify the agency or IPA that the state auditor shall be informed of the date of the entrance conference and any progress meetings. If such notification is received, the IPA and agency shall invite the state auditor or his designee to attend all such conferences no later than 72 hours before the proposed conference or meeting.

(6) All communications with management and the agency's oversight officials during the audit, regarding any instances of non-compliance or internal control weaknesses, shall be made in writing. The auditor shall obtain and report the views of responsible officials of the audited agency concerning the audit findings, pursuant to GAGAS 6.57-6.60. Any violation of law or good accounting practice, including instances of non-compliance or internal control weaknesses, shall be reported as audit findings per Section 12-6-5 NMSA 1978. Separate management letter comments shall not be issued as a substitute for such findings.

G. Reverting or non-reverting funds: Legislation can designate a fund as reverting or non-reverting. The IPA shall review the state law that appropriated funds to the agency to confirm whether any unexpended, unencumbered balance of a specific appropriation shall be reverted and to whom. The law may also indicate the due date for the required reversion. Appropriate audit procedures shall be performed to evaluate compliance with the law and accuracy of the related liability account balances due to other funds, governmental agencies, or both. The financial statements and the accompanying notes shall fully

disclose the reverting or non-reverting status of a fund or appropriation. The financial statements shall disclose the specific legislation that makes a fund or appropriation non-reverting and any minimum balance required. If non-reverting funds are commingled with reverting appropriations, the notes to the financial statements shall disclose the methods and amounts used to calculate reversions. For more information regarding state agency reversions, see Subsection A of 2.2.2.12 NMAC and the department of finance and administration (DFA) white papers "calculating reversions to the state general fund," and "basis of accounting-modified accrual and the budgetary basis." The statewide comprehensive annual financial report is exempt from this requirement.

H. Referrals and Risk Advisories: The Audit Act (Section 12-6-1 *et seq.* NMSA 1978) states that "the financial affairs of every agency shall be thoroughly examined and audited each year by the state auditor, personnel of the state auditor's office designated by the state auditor or independent auditors approved by the state auditor." (Section 12-6-3 NMSA 1978). Further, audits of New Mexico governmental agencies "shall be conducted in accordance with generally accepted auditing standards and rules issued by the state auditor." (Section 12-6-3 NMSA 1978).

(1) In an effort to ensure that the finances of state and local governments are thoroughly examined, OSA may provide IPAs with written communications to inform the IPA that OSA received information that may suggest elevated risk in specific areas relevant to a particular agency's annual financial and compliance audit. These communications shall be referred to as "referrals." Referrals are considered confidential audit documentation. Referrals may relate to any topic, including the scope of the annual financial and compliance audit. IPAs shall take the circumstances described in OSA referral communications into account in their risk assessment and perform such procedures as, in the IPA's professional judgment,

are necessary to determine what further actions, if any, in the form of additional disclosures, findings, and recommendations are appropriate in connection with the annual audit of the agency. After the conclusion of fieldwork but at least 14 days prior to submitting the draft annual audit report to the OSA for review, IPAs shall provide written confirmation to the OSA that the IPA took appropriate action in response to the referral. This written confirmation shall respond to all aspects of the referral and list any findings associated with the subject matter of the referral. IPAs shall retain adequate documentation in the audit workpapers to support the written confirmation to OSA that the IPA took appropriate action in response to the referral. As outlined in 2.2.2.13 NMAC the OSA may review IPA workpapers associated with the annual audit of any agency. OSA workpaper review procedures shall include examining the IPA documentation associated with referrals. Insufficient or inadequate documentation may result in deficiencies noted in the workpaper review letter and may negatively impact the IPA during the subsequent firm profile review process. In accordance with Subsection D of 2.2.2.8 NMAC, an IPA may be placed on restriction if an IPA refuses to comply with OSA referrals in a timely manner.

(2) OSA may issue written communications to inform agencies and IPAs that OSA received information that suggests elevated risk in specific areas relevant to the annual financial and compliance audits of some agencies. These communications shall be referred to as “risk advisories.” Risk advisories shall be posted on the OSA website in the following location: https://www.saonm.org/risk_advisories. Risk advisories may relate to any topic relevant to annual financial and compliance audits of New Mexico agencies. IPAs shall take the circumstances described in OSA risk advisories into account in their risk assessment and perform such procedures and

testwork as, in the IPA’s professional judgment, are necessary to determine what further action, if any, in the form of disclosure, findings and recommendations are appropriate in connection with the annual audit of the agency.

I. State auditor

workpaper requirement: The state auditor requires that audit workpapers include a written audit program for fund balance and net position that includes tests for proper classification of fund balance pursuant to GASBS 54 and proper classification of net position pursuant to GASBS 34.34-.37 (as amended) and GASBS 46.4-.5 (as amended).

J. State compliance

audit requirements: An IPA shall identify significant state statutes, rules and regulations applicable to the agency under audit and perform tests of compliance. In designing tests of compliance, IPAs may reference AU-C 250 relating to consideration of laws and regulations in an audit of financial statements and AU-C 620 relating to using the work of an auditor’s specialist. As discussed in AU-C 250.A23, in situations where management or those charged with governance of the agency, or the agency’s in-house or external legal counsel, do not provide sufficient information to satisfy the IPA that the agency is in compliance with an applicable requirement, the IPA may consider it appropriate to consult the IPA’s own legal counsel. AU-C 620.06 and 620.A1 discuss the use of an auditor’s specialist in situations where expertise in a field other than accounting or auditing is necessary to obtain sufficient, appropriate audit evidence, such as the interpretation of contracts, laws and regulations. In addition to the significant state statutes, rules and regulations identified by the IPA, compliance with the following shall be tested if applicable (with the exception of the statewide comprehensive annual financial report):

(1)

Procurement Code, Sections 13-1-1 to 13-1-199 NMSA 1978 including providing the state purchasing agent

with the name of the agency’s chief procurement officer, pursuant to Section 13-1-95.2 NMSA 1978, and Procurement Code Regulations, Section 1.4.1 NMAC, or home rule equivalent. All agencies must retain support for procurement until the contract expires or the minimum time required for record retention is met, whichever is longer.

(2) Per Diem

and Mileage Act, Sections 10-8-1 to 10-8-8 NMSA 1978, and Regulations Governing the Per Diem and Mileage Act, Section 2.42.2 NMAC.

(3) Public

Money Act, Sections 6-10-1 to 6-10-63 NMSA 1978, including the requirements that county and municipal treasurers deposit money in their respective counties, and that the agency receive a joint safe keeping receipt for pledged collateral.

(4) Public

School Finance Act, Sections 22-8-1 to 22-8-48 NMSA 1978.

(5) Investment

of Public Money Act, Sections 6-8-1 to 6-8-25 NMSA 1978.

(6) Public

Employees Retirement Act, Sections 10-11-1 to 10-11-142 NMSA 1978. IPAs shall test to ensure eligible contributions are remitted to PERA. The IPA shall evaluate and test internal controls regarding employee eligibility for PERA and other benefits. IPAs shall evaluate risk associated with employees excluded from PERA and test that employees are properly excluded.

(7)

Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978. IPAs shall test to ensure eligible contributions are remitted to ERA. The IPA shall evaluate and test internal controls regarding employee eligibility for ERA and other benefits. IPAs shall evaluate risk associated with employees excluded from ERA and test that employees are properly excluded.

(8) Sale of

Public Property Act, Sections 13-6-1 to 13-6-8 NMSA 1978.

(9) Anti-

Donation Clause, Article IX, Section

14, New Mexico Constitution.

(10) Special, deficiency, and supplemental appropriations (appropriation laws applicable for the year under audit).

(11) State agency budget compliance with Sections 6-3-1 to 6-3-25 NMSA 1978, and local government compliance with Sections 6-6-1 to 6-6-19 NMSA 1978.

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

(13) Accounting and control of fixed assets of state government, Sections 2.20.1.1 to 2.20.1.18 NMAC, (updated for GASBS 34 as applicable).

(14) Requirements for contracting and conducting audits of agencies, 2.2.2 NMAC.

(15) Article IX of the state constitution limits on indebtedness.

(16) Any law, regulation, directive or policy relating to an agency's use of gasoline credit cards, telephone credit cards, procurement cards, and other agency-issued credit cards.

(17) Retiree Health Care Act, Sections 10-7C-1 to 10-7C-19 NMSA 1978. IPAs shall test to ensure eligible contributions are reported to NMRHCA. NMRHCA employer and employee contributions are set forth in Section 10-7C-15 NMSA 1978. The IPA shall evaluate and test internal controls regarding employee eligibility for NMRHCA and other benefits. IPAs shall evaluate risk associated with employees excluded from NMRHCA and test that employees are properly excluded.

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

(19) School Personnel Act, Sections 22-10A-1 to 22-10A-39 NMSA 1978.

(20) School

Athletics Equity Act, Sections 22-31-1 to 22-31-6 NMSA 1978. IPAs shall test whether the district has submitted the required school-district-level reports, but no auditing of the reports or the data therein is required.

K. Federal

requirements: IPAs shall conduct their audits in accordance with the requirements of the following government pronouncements and shall test federal compliance audit requirements as applicable:

(1) government auditing standards (GAGAS) issued by the United States government accountability office, most recent revision;

(2) uniform administrative requirements, cost principles, and audit requirements for federal awards;

(3) compliance supplement, latest edition;

(4) catalog of federal domestic assistance (CFDA), latest edition; and

(5) internal revenue service (IRS) employee income tax requirements. IRS Publication 15-B, employer's tax guide to fringe benefits, available online, provides detailed information regarding the taxability of fringe benefits.

L. Audit finding

requirements:

(1) Communicating findings: IPAs shall communicate findings in accordance with generally accepted auditing standards and the requirements of GAGAS 6.17-6.30. All finding reference numbers shall follow a standard format with the four-digit audit year, a hyphen and a three-digit sequence number (e.g. 20XX-001, 20XX-002 ... 20XX-999). All prior year findings shall include the finding numbers used when the finding was first reported under historical numbering systems in brackets, following the current year finding reference number (e.g., 2021-001 (2020-003)) to enable the report user to see what year the finding originated and how it was identified in previous years. Finding reference numbers

for single audit findings reported on the data collection form shall match those reported in the schedule of findings and questioned costs and the applicable auditor's report. Depending on the IPA's classification of the finding, the finding reference number shall be followed by one of the following descriptions: "material weakness"; "significant deficiency"; "material non-compliance"; "other non-compliance"; or "other matters."

(a)

IPAs shall evaluate deficiencies to determine whether individually or in combination they are significant deficiencies or material weaknesses in accordance with AU-C 260.

(b)

Findings that meet the requirements described in AAG GAS 4.12 shall be included in the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards. AAG GAS 13.35 table 13-2 provides guidance on whether a finding shall be included in the schedule of findings and questioned costs.

(c)

Section 12-6-5 NMSA 1978 requires that "each report set out in detail, in a separate section, any violation of law or good accounting practices found by the audit or examination."

(i)

When auditors detect violations of law or good accounting practices that shall be reported per Section 12-6-5 NMSA 1978, but that do not rise to the level of significant deficiencies or material weaknesses, such findings are considered to warrant the attention of those charged with governance due to the statutory reporting requirement. The auditor shall communicate such violations in the "compliance and other matters" paragraph in the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards.

(ii)

Findings required by Section 12-6-

5 NMSA 1978 shall be presented in a separate schedule of findings labeled "Section 12-6-5 NMSA 1978 findings". This schedule shall be placed in the back of the audit report following the financial statement audit and federal award findings. Per AAG GAS 13.49 there is no requirement for such findings to be included or referenced in the uniform guidance compliance report.

(d)

Each audit finding (including current year and unresolved prior-year findings) shall specifically state and describe the following:

(i)

condition (provides a description of a situation that exists and includes the extent of the condition and an accurate perspective, the number of instances found, the dollar amounts involved, if specific amounts were identified, and *for repeat findings, management's progress or lack of progress towards implementing the prior year planned corrective actions*);

(ii)

criteria (identifies the required or desired state or what is expected from the program or operation; cites the specific section of law, regulation, ordinance, contract, or grant agreement if applicable);

(iii)

effect (the logical link to establish the impact or potential impact of the difference between the situation that exists (condition) and the required or desired state (criteria); demonstrates the need for corrective action in response to identified problems or relevant risks);

(iv)

cause (identifies the reason or explanation for the condition or the factors responsible for the difference between what the auditors found and what is required or expected; the cause serves as a basis for the recommendation);

(v)

recommendation addressing each condition and cause; and

(vi)

agency response (the agency's comments about the finding, *including*

specific planned corrective actions with a timeline and designation of what employee position(s) are responsible for meeting the deadlines in the timeline).

(e)

Uniform guidance regarding single audit findings (uniform guidance 200.511): The auditee is responsible for follow-up and corrective action on all audit findings. As a part of this responsibility, the auditee shall prepare a summary schedule of prior audit findings and a corrective action plan for current year audit findings in accordance with the requirements of uniform guidance 200.511. The corrective action plan and summary schedule of prior audit findings shall include findings relating to the financial statements which shall be reported in accordance with GAGAS. The summary schedule of prior year findings and the corrective action plan shall be included in the reporting package submitted to the federal audit clearinghouse (AAG GAS 13.49 fn 38). In addition to being included in the agency response to each audit finding, the corrective action plan shall be provided on the audited agency's letterhead in a document separate from the auditor's findings. (COFAR frequently asked questions on the office of management and budget's uniform administrative requirements, cost principles, and audit requirements for federal awards at 2 CFR 200, Section 511-1).

(f)

All audit reports shall include a summary of audit results preceding the presentation of audit findings (if any). The summary of audit results shall include the type of auditor report issued and whether the following categories of findings for internal control over financial reporting were identified: material weakness, significant deficiency, and material noncompliance. AUP reports completed pursuant to 2.2.2.16 NMAC are not required to include a summary of audit results.

(2)

Prior year

findings:

(a)

IPAs shall comply with the

requirements of GAGAS Section 6.11 relating to findings and recommendations from previous audits and attestation engagements. In addition, IPAs shall report the status of *all* prior-year findings and *all* findings from special audits performed under the oversight of the state auditor in the current year audit report in a summary schedule of prior year audit findings. The summary schedule of prior year audit findings shall include the prior year finding number, the title, and whether the finding was resolved, repeated, or repeated and modified in the current year. No other information shall be included in the summary schedule of prior year audit findings. All findings from special audits performed under the oversight of the state auditor shall be included in the findings of the annual financial and compliance audits of the related fiscal year.

(b)

Uniform guidance regarding single audit prior year findings (uniform guidance 200.511): The auditor shall follow up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with the uniform guidance, and report, as a current-year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding (AAG GAS 13.53).

(3) Current-

year audit findings: Written audit findings shall be prepared and submitted to management of the agency as soon as the IPA becomes aware of the findings so the agency has time to respond to the findings prior to the exit conference. The agency shall prepare "planned corrective actions" as required by GAGAS 6.57 and 6.58. The agency shall respond, in writing, to the IPA's audit findings within 10 business days. Lack of agency responses within the 10 business days does not warrant a delay of the audit report. The agency's responses to the audit findings and the "planned corrective

actions” shall be included in the finding after the recommendation. If the IPA disagrees with the management’s comments in response to a finding, they may explain in the report their reasons for disagreement, after the agency’s response (GAGAS 6.59). Pursuant to GAGAS 6.60, “if the audited agency refuses to provide comments or is unable to provide comments within a reasonable period of time, the auditors may issue the report without receiving comments from the audited agency. In such cases, the auditors should indicate in the report that the audited agency did not provide comments.”

(4)

If appropriate in the auditor’s professional judgment, failure to submit the completed audit contract to the OSA by the due date at Subsection F of 2.2.2.8 NMAC may be reported as a current year compliance finding.

(5) If

an agency has entered into any professional services contract with the IPA who performs the agency’s annual financial audit, or the scope of work on any professional services contract relates to fraud, waste, or abuse, and the contract was not approved by the state auditor, the IPA shall report a finding of non-compliance with Subsection L of 2.2.2.8 NMAC.

(6) If an

agency subject to the procurement code failed to meet the requirement to have a certified chief procurement officer during the fiscal year, the IPA shall report a finding of non-compliance with Section 1.4.1.94 NMAC.

(7)

Component unit audit findings shall be reported in the primary government’s financial audit report. This is not required for the statewide comprehensive annual financial report unless a finding of a legally separate component unit is significant to the state as a whole.

(8) Except

as discussed in Subsections A and E of 2.2.2.12 NMAC, release of any portion of the audit report by the IPA or agency prior to being officially released by the state auditor is a

violation of Section 12-6-5 NMSA 1978 and requires a compliance finding in the audit report.

(9) In the

event that an agency response to a finding indicates in any way that the OSA is the cause of the finding, the OSA may require that a written response from the OSA be included in the report, below the other responses to that finding.

M. Exit conference and related confidentiality issues:

(1) The IPA

shall hold an exit conference with representatives of the agency’s governing authority and top management, which may include representatives of any component units (housing authorities, charter schools, hospitals, foundations, etc.), if applicable. The OSA has the authority to notify the agency or IPA that the state auditor shall be informed of the date of any progress meetings and the exit conference.

If such notification is received, the IPA and agency shall invite the state auditor or his designee to attend all such conferences. If component unit representatives cannot attend the combined exit conference, a separate exit conference shall be held with the component unit’s governing authority and top management. The exit conference and presentation to governance shall occur in the forum agreed to by the agency and the IPA, to include virtual or telephonic options. The OSA reserves the right to require an in-person exit conference and presentation to the board. The date of the exit conference(s) and the names and titles of personnel attending shall be stated in the last page of the audit report.

(2) The IPA,

with the agency’s cooperation, shall provide to the agency for review a draft of the audit report (stamped “draft”), a list of the “passed audit adjustments,” and a copy of all the adjusting journal entries at or before the exit conference. The draft audit report shall include, at minimum, the following elements: independent auditor’s report, basic financial statements, audit findings, summary

schedule of prior year audit findings, and the reports on internal control and compliance required by government auditing standards and uniform guidance.

(3) Agency

personnel and the agency’s IPA shall not release information to the public relating to the audit until the audit report is released by the OSA, and has become a public record. This does not preclude an agency from submitting financial statements and notes to the financial statements, clearly marked as “draft” or “unaudited” to federal or state oversight agencies or bond rating agencies. Any draft financial statements provided to federal or state oversight agencies or to bond rating agencies shall exclude draft auditor opinions and findings, and any pages including references to auditor opinions or findings.

(4) Once the

audit report is officially released to the agency by the state auditor (by a release letter) and the required waiting period of five calendar days has passed, unless waived by the agency in writing as described in Subparagraph (a) of Paragraph (4) of Subsection B of 2.2.2.9 NMAC, the audit report shall be presented by the IPA, to a quorum of the governing authority of the agency at a meeting held in accordance with the Open Meetings Act, if applicable. This requirement only applies to agencies with a governing authority, such as a board of directors, board of county commissioners, or city council, which is subject to the Open Meetings Act. The IPA shall ensure that the required communications to those charged with governance are made in accordance with AU-C 260.12 to 260.14.

(5) At all

times during the audit and after the audit report becomes a public record, the IPA shall follow applicable standards and 2.2.2 NMAC regarding the release of any information relating to the audit. Applicable standards include but are not limited to the AICPA Code of Conduct ET Section 1.700.001 and related interpretations and guidance, and GAGAS 6.53-6.55

and GAGAS 6.63-6.65. The OSA and the IPA shall not disclose audit documentation if such disclosure would undermine the effectiveness or integrity of the audit process. AU-C 230.A29.

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

(1) IPAs shall comply with the requirements of GAGAS 6.19-6.24 relating to fraud, noncompliance with provisions of laws, regulations, contracts and grant agreements, waste and abuse. Relating to contracts and grant agreements, IPAs shall extend the AICPA requirements pertaining to the auditors' responsibilities for laws and regulations to also apply to consideration of compliance with provisions of contracts or grant agreements. Concerning abuse, if an IPA becomes aware of abuse that could be quantitatively, or qualitatively material to the financial statements or other financial data significant to the audit objectives, the IPA shall apply audit procedures specifically directed to ascertain the potential effect on the financial statements or other financial data significant to the audit objectives.

(2) Pursuant to Section 12-6-6 NMSA 1978 (criminal violations), an agency or IPA shall notify the state auditor immediately, in writing, upon discovery of any alleged violation of a criminal statute in connection with financial affairs. If an agency or IPA has already made a report to law enforcement that fact shall be included in the notification. The notification shall be sent by e-mail to reports@osa.state.nm.us, by facsimile, or by US mail. Notifications shall not be made through the fraud hotline. The notification shall include an estimate of the dollar amount involved, if known or estimable, and a description of the alleged violation, including names of persons involved and any action taken or planned. The state auditor may cause the financial affairs and transactions of the agency to be audited in whole or in part pursuant to Section 12-6-3 NMSA

1978 and 2.2.2.15 NMAC. If the state auditor does not designate an agency for audit, an agency shall follow the provisions of 2.2.2.15 NMAC when entering into a professional services contract for a special audit, performance audit, non-attest engagement, or attestation engagement regarding the financial affairs and transactions of the agency relating to financial fraud, waste and abuse.

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

O. Special revenue funds authority: The authority for creation of special revenue funds and any minimum balance required shall be shown in the audit report (i.e., cite the statute number, code of federal regulation, executive order, resolution number, or other specific authority) on the divider page before the combining financial statements or in the notes to the financial statements. This requirement does not apply to the statewide comprehensive annual financial report.

P. Public monies:
(1) All monies coming into all agencies (i.e., vending machines, fees for photocopies, telephone charges, etc.) shall be considered public monies and be accounted for as such. For state agencies, all revenues generated shall be authorized by legislation (MAPS FIN 11.4).

(2) If the agency has investments in securities and derivative instruments, the IPA shall comply with the requirements of AU-C 501.04-.10. If the IPA elects to use the work of an auditor's specialist to meet the requirements of AU-C 501, the requirements of AU-C 620 shall also be met.

(3) Pursuant to Section 12-6-5 NMSA 1978, each

audit report shall include a list of individual deposit and investment accounts held by the agency. The information presented in the audit report shall include at a minimum:

- (a) name of depository (i.e., bank, credit union, state treasurer, state investment council, etc.);
- (b) account name;
- (c) type of deposit or investment account (also required in separate component unit audit reports):
 - (i) types of deposit accounts include non-interest bearing checking, interest bearing checking, savings, money market accounts, certificates of deposit, etc.; and
 - (ii) types of investment accounts include state treasurer general fund investment pool (SGFIP), state treasurer local government investment pool (LGIP), U.S. treasury bills, securities of U.S. agencies such as Fannie Mae (FNMA), Freddie Mac (FHLMC), government national mortgage association (GNMA), Sallie Mae, small business administration (SBA), federal housing administration (FHA), etc.
- (d) account balance of deposits and investments as of the balance sheet date;
- (e) reconciled balance of deposits and investments as of the balance sheet date as reported in the financial statements; and
- (f) for state agencies only, statewide human resources accounting and management reporting system (SHARE) fund number. In auditing the balance of a state agency's investment in the SGFIP, the IPA shall review the individual state agency's cash reconciliation procedures and determine whether those procedures would reduce the agency's risk of misstatement in the investment in SGFIP, and whether the agency is actually performing those procedures. The IPA shall also take

into consideration the complexity of the types of cash transactions that the state agency enters into and whether the agency processes its deposits and payments through SHARE. The IPA shall use professional judgment to determine each state agency's risk of misstatement in the investment in the SGFIP and write findings and modify opinions as deemed appropriate by the IPA.

(4) Pledged collateral:

(a) All audit reports shall disclose applicable collateral requirements in the notes to the financial statements. In addition, there shall be a SI schedule or note to the financial statements that discloses the collateral pledged by each depository for public funds. The SI schedule or note shall disclose the type of security (i.e., bond, note, treasury, bill, etc.), security number, committee on uniform security identification procedures (CUSIP) number, fair market value and maturity date.

(b) Pursuant to Section 6-10-17 NMSA 1978, the pledged collateral for deposits in banks and savings and loan associations shall have an aggregate value equal to one-half of the amount of public money held by the depository. If this requirement is not met the audit report shall include a finding. No security is required for the deposit of public money that is insured by the federal deposit insurance corporation (FDIC) or the national credit union administration (NCUA) in accordance with Section 6-10-16 NMSA 1978. Collateral requirements shall be calculated separately for each bank and disclosed in the notes.

(c) All applicable GASB 40 disclosure requirements relating to deposit and investment risk shall be met. In accordance with GASBS 40.8, relating to custodial credit risk, the notes to the financial statements shall disclose the dollar amount of deposits subject to custodial credit risk, and the type of risk the deposits are exposed to. To determine compliance with

the fifty percent pledged collateral requirement of Section 6-10-17 NMSA 1978, the disclosure shall include the dollar amount of each of the following for each financial institution: fifty percent pledged collateral requirement per statute, total pledged collateral, uninsured and uncollateralized.

(d) Repurchase agreements shall be secured by pledged collateral having a market value of at least one hundred two percent of the contract per Subsection H of Section 6-10-10 NMSA 1978. To determine compliance with the one hundred two percent pledged collateral requirement of Section 6-10-10 NMSA 1978, the disclosure shall include the dollar amount of the following for each repurchase agreement: one hundred-two percent pledged collateral requirement per statute, and total pledged collateral.

(e) Per Subsection A of Section 6-10-16 NMSA 1978, "deposits of public money shall be secured by: securities of the United States, its agencies or instrumentalities; securities of the state of New Mexico, its agencies, instrumentalities, counties, municipalities or other subdivisions; securities, including student loans, that are guaranteed by the United States or the state of New Mexico; revenue bonds that are underwritten by a member of the financial industry regulatory authority (known as FINRA), and are rated "BAA" or above by a nationally recognized bond rating service; or letters of credit issued by a federal home loan bank."

(f) Securities shall be accepted as security at market value pursuant to Subsection C of Section 6-10-16 NMSA 1978.

(g) State agency investments in the state treasurer's general fund investment pool do not require disclosure of specific pledged collateral for amounts held by the state treasurer. However, the notes to the financial statements shall refer the reader to the state treasurer's separately issued

financial statements which disclose the collateral pledged to secure state treasurer cash and investments.

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

(5) Agencies that have investments in the state treasurer's local government investment pool shall disclose the information required by GASBS 79 in the notes to their financial statements. Agencies with questions about the content of these required note disclosures may contact STO (<http://www.nmsto.gov>) for assistance.

Q. Budgetary presentation:

(1) Prior year balance included in budget:

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

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

(2) The differences between the budgetary basis and GAAP basis revenues and expenditures shall be reconciled. If the required budgetary comparison information is included in the basic financial statements, the reconciliation shall be included on the statement itself or in the notes to the financial statements. If the required budgetary comparison is presented as RSI, the reconciliation to GAAP basis shall appear in either a separate schedule or in the notes to the RSI (AAG SLV 11.14). The notes to the financial statements shall disclose the legal level of budgetary control for the entity and any excess of expenditures over appropriations at the legal level of budgetary control. The legal level of budgetary control for local governments is at the fund level. The legal level of budgetary control for school districts is at the function level. The legal level of budgetary control for state agencies is explained at Subsection A of 2.2.2.12 NMAC. For additional information regarding the legal level of budgetary control the IPA may contact the applicable oversight agency (DFA, HED, or PED).

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

(a) If the budget structure for the general fund and major special revenue funds is similar enough to the GAAP fund structure to provide the necessary information, the basic financial statements shall include budgetary comparison statements those funds.

(b) Budgetary comparisons for the general fund and major special revenue funds shall be presented as RSI if the agency budget structure differs from the GAAP fund structure enough that the budget information is unavailable for the general fund and major special revenue funds. An example of this “perspective

difference” would occur if an agency budgets by program with portions of the general fund and major special revenue funds appearing across various program budgets. In a case like that the budgetary comparison would be presented for program budgets and include information in addition to the general fund and major special revenue funds budgetary comparison data (GASBS 41.03 and .10).

R. Appropriations:
(1) Budget related findings:

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

(b) If budgeted expenditures exceed budgeted revenues (after prior-year cash balance and any applicable federal receivables used to balance the budget), that fact shall be reported in a finding. This type of finding shall be confirmed with the agency’s budget oversight entity (if applicable).

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

(a) Special, deficiency, specific, and capital outlay appropriations shall be disclosed in the notes to the financial statements. The original appropriation, the appropriation period, expenditures to date, outstanding encumbrances and unencumbered balances shall be shown in a SI schedule or in a note to the financial statements. The accounting treatment of any unexpended balances shall be fully explained in the SI schedule or in a note to the financial statements. This is a special requirement of the state auditor and it does not apply to the statewide comprehensive annual financial report audit.

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

S. Consideration of internal control and risk assessment in a financial statement audit:

Audits performed under this rule shall include tests of internal controls (manual or automated) over assertions about the financial statements and about compliance related to laws, regulations, and contract and grant provisions. IPAs and agencies are encouraged to reference the U.S. GAOs’ *standards for internal control in the federal government*, known as the “green book”, which may be adopted by state, local, and quasi-governmental Agencies as a framework for an internal control system.

T. Required auditor’s reports:

(1) The AICPA provides examples of independent auditor’s reports in the appendix to chapter 4 of AAG GAS and appendix A to chapter 16 of AAG SLV. Guidance is provided in footnote 4 to appendix A to chapter 16 of AAG SLV regarding wording used when opining on budgetary statements on the GAAP basis. IPAs conducting audits under this rule shall follow the AICPA report examples. All independent auditor’s reports shall include a statement that the audit was performed in accordance with auditing standards generally accepted in the United States of America *and with applicable government auditing standards* per GAGAS 6.37. This statement shall be modified in accordance with GAGAS 2.17b if some GAGAS requirements were not followed. Reports for single audits of fiscal years beginning on or after December 26, 2014 shall have references to OMB Circular A-133 replaced with references to Title 2 U.S. Code of Federal Regulations (CFR) Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance 200.110(b), AAG GAS 4.89, Example 4-1).

(2) The AICPA provides examples of the report on internal control over financial reporting and on compliance and

other matters based on an audit of financial statements performed in accordance with government auditing standards in the appendix to chapter 4 of AAG GAS. IPAs conducting audits under this rule shall follow the AICPA report examples.

(a)

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

(b)

No separate management letters shall be issued to the agency by the auditor. Issuance of a separate management letter to an agency shall be considered a violation of the terms of the audit contract and may result in further action by the state auditor. See also Subsection F of 2.2.2.10 NMAC regarding this issue.

(3) The AICPA

provides examples of the report on compliance for each major federal program and on internal control over compliance required by the uniform guidance in the appendix to chapter 13 of AAG GAS. IPAs conducting audits under this rule shall follow the AICPA report examples.

(4) The

state auditor requires the financial statements, RSI, SI, and other information required by this rule, and the following reports to be *included under one report cover*: the independent auditor's report; the report on internal control over financial reporting and on compliance and other matters based on an audit of financial statements performed in accordance with government auditing standards; and the report on compliance for each major federal program and on internal control over compliance required by the uniform guidance. If applicable, the independent auditor's report shall include the AU-C 725 opinion on SI, the schedule of expenditures of federal awards and the HUD financial data schedule (required by HUD guidelines on reporting and attestation

requirements of uniform financial reporting standards). The report shall also contain a table of contents and an official roster. The IPA may submit a written request for an *exemption* from the "one report cover" requirement, but shall receive prior written approval from the state auditor in order to present any of the above information under a separate cover.

U. Disposition of

property: Sections 13-6-1 and 13-6-2 NMSA 1978 govern the disposition of tangible personal property owned by state agencies, local public bodies, school districts, and state educational institutions. At least 30 days prior to any disposition of property included on the agency inventory list described at Subsection W of 2.2.2.10 NMAC, written notification of the official finding and proposed disposition duly sworn and subscribed under oath by each member of the authority approving the action shall be sent to the state auditor.

V. Joint powers

agreements:

(1) Any joint

powers agreement (JPA) shall be listed in a SI schedule in the audit report. The statewide comprehensive annual financial report schedule shall include JPAs that are significant to the state as a whole. The schedule shall include the following information for each JPA: participants; party responsible for operations; description; beginning and ending dates of the JPA; total estimated amount of project and portion applicable to the agency; amount the agency contributed in the current fiscal year; audit responsibility; fiscal agent if applicable; and name of government agency where revenues and expenditures are reported.

(2) For self-

insurance obtained under a JPA, see the GASB Codification Section J50.113.

W. Capital asset

inventory:

(1) The Audit

Act (at Section 12-6-10 NMSA 1978) requires agencies to capitalize only chattels and equipment that cost over five thousand dollars

(\$5,000). All agencies shall maintain a capitalization policy that complies with the law. All agencies shall maintain an inventory listing of capitalized chattels and equipment that cost over five thousand dollars (\$5,000).

(2) Agencies

shall conduct an annual physical inventory of chattels and equipment on the inventory list at the end of each fiscal year in accordance with the requirements of Section 12-6-10 NMSA 1978. The agency shall certify the correctness of the inventory after the physical inventory. This certification shall be provided to the agency's auditors. The IPA shall audit the inventory listing for correctness and compliance with the requirements of the Audit Act.

X. Tax increment

development districts: Pursuant to Subsection C of Section 5-15-9 NMSA 1978, tax increment development districts (TIDDs) are political subdivisions of the state, and they are separate and apart from the municipality or county in which they are located. Section 5-15-10 NMSA 1978 states that the district shall be governed by the governing body that adopted a resolution to form the district or by a five-member board composed of four members appointed by that governing body; provided, however, that the fifth member of the five-member board is the secretary of finance and administration or the secretary's designee with full voting privileges. However, in the case of an appointed board of directors that is not the governing body, at the end of the appointed directors' initial terms, the board shall hold an election of new directors by majority vote of owners and qualified resident electors. Therefore, a TIDD and its audit firm shall apply the criteria of GASBS 14, 39, 61, and 80 to determine whether the TIDD is a component unit of the municipality or county that approved it, or whether the TIDD is a related organization of the municipality or county that approved it. If the TIDD is determined to be a related organization per the GAAP requirements, then the TIDD

shall contract separately for an audit separate from the audit of the municipality or county that approved it.

Y. GASBS 68, accounting and financial reporting for pensions:

(1) PERA and ERB shall each prepare schedules of employer allocations as of June 30 of each fiscal year. The state auditor requires the following:

(a) Prior to distribution of the schedule of employer allocations, PERA and ERB shall obtain audits of their respective schedules. These audits shall be conducted in accordance with government auditing standards and AU-C 805, special considerations - audits of single financial statements and specific elements, accounts, or items of a financial statement.

(b) Pursuant to AU-C 805.16, the PERA and ERB auditors shall each issue a separate auditor’s report and express a separate opinion on the AU-C 805 audit performed (distinct from the agency’s regular financial statement and compliance audit). Additionally, the auditor shall apply the procedures required by AU-C 725 to all supplementary information schedules included in the schedule of employer allocations report in order to determine whether the supplementary information is fairly stated, in all material respects, in relation to the financial statements as a whole. The IPA shall include the supplementary information schedules in the related reporting in the other-matter paragraph pursuant to AU-C 725.09, regarding whether such information is fairly stated in all material respects in relation to the schedule of employer allocations as a whole.

(c) PERA and ERB shall include note disclosures in their respective schedule of employer allocations reports that detail each component of allocable pension expense at the fund level, excluding employer-specific pension expense for changes in proportion. Each plan shall also include note disclosures by fund

detailing collective fund-level deferred outflows of resources and deferred inflows of resources. The disclosures shall include a summary of changes in the collective deferred and inflows outflows of resources (excluding employer specific amounts), by year of deferral.

(d) The AU-C 805 audits and resulting separate reports on the PERA and ERB schedules of employer allocations shall be submitted to the OSA for review and release pursuant to Subsection A of 2.2.2.13 NMAC, prior to distribution to the participant employers.

(e) As soon as the AU-C 805 reports become public record, PERA and ERB shall make the information available to their participant employers.

(f) PERA and ERB shall each prepare an employer guide that illustrates the correct use of their respective schedule of employer allocations report by their participant employers. The guides shall explicitly distinguish between the plan-level reporting and any employer-specific items. The calculations and record-keeping necessary at the employer level (for adjusting journal entries, amortization of deferred amounts, etc.) shall be described and illustrated. The employer guides shall be made available to the participant employers by June 30 of the subsequent fiscal. Stand-alone state agency financial statements that exclude the proportionate share of the collective net pension liability of the state of New Mexico shall include note disclosure referring the reader to the statewide comprehensive annual financial report for the state’s net pension liability and other pension-related information.

(2) Stand-alone state agency financial statements that exclude the proportionate share of the collective net pension liability of the state of New Mexico shall include note disclosure referring the reader to the statewide comprehensive annual

financial report for the state’s net pension liability and other pension-related information.

Z. GASBS 77, tax abatement agreements: Unaudited, but final, GASBS 77 disclosure information shall be provided to any agency whose tax revenues are affected by the reporting agency’s tax abatement agreements no later than September 15 of the subsequent fiscal year. This due date does not apply if the reporting agency does not have any tax abatement agreements that reduce the tax revenues of another agency. All tax abatement agreements entered into by an agency’s component unit(s) shall be disclosed in the same manner as the tax abatement agreements of the primary government. If an agency determines that any required disclosure is confidential, the agency shall cite the legal authority for the determination.

AA. GASBS 75, accounting and financial reporting for postemployment benefits other than pensions: The retiree health care authority (RHCA) shall prepare a schedule of employer allocations as of June 30 of each fiscal year. The state auditor requires the following:

(1) Prior to distribution of the schedule of employer allocations, RHCA shall obtain an audit of the schedule. This audit shall be conducted in accordance with government auditing standards and AU-C 805, special considerations - audits of single financial statements and specific elements, accounts, or items of a financial statement.

(2) Pursuant to AU-C 805.16, the RHCA auditors shall issue a separate auditor’s report and express a separate opinion on the AU-C 805 audit performed (distinct from the agency’s regular financial statement and compliance audit). Additionally, the auditor shall apply the procedures required by AU-C 725 to all supplementary information schedules included in the schedule of employer allocations report in order to determine whether the supplementary information is fairly stated, in all material respects, in relation to the

financial statements as a whole. The IPA shall include the supplementary information schedules in the related reporting in the other-matter paragraph pursuant to AU-C 725.09, regarding whether such information is fairly stated in all material respects in relation to the schedule of employer allocations as a whole.

(3) RHCA shall include note disclosures in the schedule of employer allocations report that detail each component of allocable OPEB expense at the fund level, excluding employer-specific OPEB expense for changes in proportion. RHCA shall also include note disclosures by fund detailing collective fund-level deferred outflows of resources and deferred inflows of resources. The disclosures shall include a summary of changes in the collective deferred outflows and inflows of resources (excluding employer specific amounts), by year of deferral.

(4) The AU-C 805 audit and resulting separate report on the RHCA schedule of employer allocations shall be submitted to the OSA for review and release pursuant to Subsection A of 2.2.2.13 NMAC, prior to distribution to the participant employers.

(5) As soon as the AU-C 805 reports become public record, RHCA shall make the information available to its participant employers.

(6) RHCA shall prepare an employer guide that illustrates the correct use of the schedule of employer allocations report by its participant employers. The guide shall explicitly distinguish between the plan-level reporting and any employer-specific items. The calculations and record-keeping necessary at the employer level (for adjusting journal entries, amortization of deferred amounts, etc.) shall be described and illustrated. The employer guide shall be made available to the participant employers by June 30 of the subsequent fiscal year.

(7) Stand-alone state agency financial

statements that exclude the proportionate share of the collective OPEB liability of the state of New Mexico, shall include note disclosure referring the reader to the statewide comprehensive annual financial report for the state's net OPEB liability and other OPEB-related information. [2.2.2.10 NMAC - Rp, 2.2.2.10 NMAC, 3/23/2021]

2.2.2.11 [RESERVED]
[2.2.2.11 NMAC - Repealed 3/10/2020]

2.2.2.12 SPECIFIC CRITERIA: The specific criteria described in this section shall be considered in planning and conducting governmental audits. These requirements are not intended to be all-inclusive; therefore, OSA recommends that IPAs review the NMSA and NMAC while planning governmental audits.

A. Pertaining to audits of state agencies:

(1) Due dates for agency audits: audit reports of agencies under the oversight of DFA FCD are due to OSA in accordance with the requirements of Subsection D of Section 12-6-3 NMSA 1978 and Subsection A of 2.2.2.9 NMAC.

(2) All the individual SHARE funds shall be reported in the financial statements, either within the basic financial statements or as SI.

(3) Accounts payable at year-end and reversion calculation: If goods and services were received (as defined by generally accepted accounting principles) by the end of the fiscal year but not paid for by the end of the fiscal year, an accounts payable shall be reported for the respective amount due in both the government-wide financial statements and the fund financial statements. The "actual" expenditures in the budgetary comparison exclude any accounts payable that were not paid timely and therefore require a request to the financial control division to pay prior year bills out of current year budget. They are paid out of the budget of the following fiscal

year. An agency's reversions are calculated using the *budgetary basis expenditures* because the agency does not have the legal authority to obligate the state for liabilities once the appropriation period has lapsed. Thus, the agency cannot keep the cash related to accounts payable that were not paid timely. This results in a negative fund balance in the modified accrual basis financial statements of a reverting fund.

(4) Net position/fund balance:

(a) Pursuant to GASBS 63.8 the government-wide statement of net position and the proprietary fund statement of net position show net position as:

(i) net investment in capital assets as defined by GASBS 63.9;

(ii) restricted (distinguishing between major categories of restrictions) as defined by GASBS 63.10; and

(iii) unrestricted as defined by GASBS 63.11.

(b) Governmental fund financial statement fund balances shall be reported in accordance with GASBS 54.

(5) Book of record:

(a) The state maintains the centralized accounting system SHARE. The SHARE data and reports are the original book of record that the auditor is auditing. Each fiscal year, the agency shall record all audit adjusting journal entries in SHARE. The financial information in SHARE shall agree to the agency's audited financial statements, with the exception of accounts payable as explained in Subsection A of 2.2.2.12 NMAC. If the agency maintains a separate accounting system, it shall be reconciled with the SHARE system and all applicable adjustments shall be recorded in SHARE in the month in which the transactions occurred. DFA FCD provides guidance to agencies, which IPAs shall review, regarding

policy and procedure requirements. These documents are available on the DFA FCD website and include:

- (i) the manual of model accounting practices (MAPs);
- (ii) various white papers, yearly closing instructions; and
- (iii) various accounting guideline memos.

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

Appropriation unit code/ appropriation unit description	
200	personal services & employee benefits
300	contractual services
400	other
500	other financing uses
600	non-budgeted

(c) Revenue categories of appropriations to state agencies are listed below. The budgetary comparison statements for state agencies shall be presented in the audit report by the revenue categories shown below and by the expenditure categories that appear in the agency’s final approved budget.

- (i) state general fund;
- (ii) other state funds;
- (iii) internal service funds/inter-agency transfers; or
- (iv) federal funds.

(d) For more detail about the SHARE chart of accounts see the DFA website.

(6) Reversions to state general fund:

(a) All reversions to the state general fund shall be identified in the financial statements by the fiscal year of appropriation (i.e., reversion to state general fund - FY 16). The gross amount of the appropriation and the gross amount of the reversion shall be shown separately.

(b) Subsection A of Section 6-5-10 NMSA 1978 states “all unreserved undesignated fund balances in reverting funds and accounts as reflected in the central accounting system as of June 30 shall revert by September 30 to the general fund. The division may adjust the reversion within 45 days of release of the audit report for that fiscal year.” Failure to transfer reverting funds timely in compliance with the statute requires an audit finding.

(7) Non-reciprocal (not payments for materials or services rendered) interfund (internal) activity includes: (a) transfers; and (b) reimbursements (GASBS 34.410):

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

in the government-wide financial statements;

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

(c) Regarding inter-agency transfers between legally separate component units and the primary government (the state of New Mexico):

(i) if the inter-agency transfer is between a blended component unit of the state and other funds of the state, then the component unit’s separately issued financial statements report such activity between itself and the primary government as revenues and expenses. When the blended component unit is included in the primary government’s financial statements, such inter-agency transfers are reclassified as transfers (GASBS 34.318);

(ii) all resource flows between a discretely presented component unit of the state and other funds of the state shall be reported as external transactions - revenues and expenses - in the primary government’s financial statements and the component unit’s separately issued financial statements (GASBS 34.318);

(d) All transfers to and from SHARE fund 853, the state general fund

appropriation account, shall be clearly identifiable in the audit report as state general fund appropriations, reversions, or collections;

(e)

Reimbursements are transfers between funds that are used to reallocate the revenues and expenditures/expenses to the appropriate fund. Reimbursements are not reported as inter-fund activity in the financial statements.

(8)

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

(9)

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

(10)

Independent auditor's report: The independent auditor's report for state agencies, district attorneys, district courts, and the educational institutions created by New Mexico Constitution Article XII, Sec. 11 shall include an emphasis of matter paragraph referencing the summary of significant accounting principles disclosure regarding the reporting agency. The emphasis of matter paragraph shall indicate that the financial statements are not intended to present the financial position and

changes in financial position of the primary government, the state of New Mexico, but just the financial position and the changes in financial position of the department. The emphasis of matter paragraph shall follow the example provided in AAG SLV 16.103 ex. A-17.

(11) Budgetary

basis for state agencies: the state budget is adopted on the modified accrual basis of accounting except for accounts payable accrued at the end of the fiscal year that do not get accrued by the statutory deadline per Section 6-10-4 NMSA 1978. Those accounts payable that do not get paid timely or accrued by the statutory deadline shall be paid out of the next year's budget. If an agency needs to recognize additional accounts payable amounts that were not accrued by the statutory deadline, then the budgetary statements and the fund financial statements require a reconciliation of expenditures, as discussed at Subsection Q of 2.2.2.10 NMAC. All transactions are recorded in the state's book of record, SHARE, under the modified accrual basis of accounting except for accounts payable not meeting the statutory deadline; therefore, the "actual" expenditures in the budgetary comparison schedules equal the expenditures as recorded in SHARE for the fund. Encumbrances related to single year appropriations lapse at year end. Appropriation periods are sometimes for periods in excess of 12 months (multiple-year appropriations). When multiple-year appropriation periods lapse, the authority for the related budgets also lapse and encumbrances can no longer be charged to those budgets. The legal level of budgetary control shall be disclosed in the notes to the financial statements. Per Subsection C of Section 9 of the General Appropriation Act of 2017, all agencies, including legislative agencies, may request category transfers among personal services and employee benefits, contractual services and other. Therefore, the legal level of budgetary control is the appropriation program level (A-Code, P-Code, and Z-Code).

A-Codes pertain to capital outlay appropriations (general obligation/severance tax or state general fund). P-Codes pertain to program/operating funds. Z-Codes pertain to special appropriations. The IPA shall compare total expenditures for each program to the program's approved final budget to evaluate compliance.

(12) Budgetary

comparisons of state agencies shall show the original and final appropriated budget (same as final budget approved by DFA), the actual amounts on the budgetary basis, and a column with the variance between the final budget and actual amounts. If a state agency presents budgetary comparisons by fund, the appropriation program code(s) (A-Code, P-Code, and Z-Code) shall be reported on the budgetary comparison schedule.

(13)

Accounting for special capital outlay appropriations financed by bond proceeds:

(a)

STO administers the debt service funds for various bond issues that are obligations of the state of New Mexico. STO does not report in its departmental financial statements bonds payable that are obligations of the state of New Mexico. These payables and the related bond face amounts (proceeds) are reported in the state's comprehensive annual financial report. The note disclosures associated with STO's departmental financial statements shall explain that, by statute, STO is responsible for making the state's bond payments and keeping the related records; however, it is not responsible for the related debt, the state is. Additionally, the note disclosures associated with STO's departmental financial statements shall refer the reader to detailed SI in the STO audit report and the statewide comprehensive annual financial report. The STO departmental financial statements shall include SI regarding the state of New Mexico bond obligations. The SI schedules shall show;

(i)

the beginning and end-of-year bond

payable balances, increases and decreases (separately presented), and the portions of each bond issuance that are due within one year, as required by GASBS 34.119;

(ii)

the details of debt service requirements to maturity, as required by GASBS 38.10; and

(iii)

any violations of bond covenants and related actions taken to address violations of bond covenants, as required by GASBS 38.9 and Section 12-6-5 NMSA 1978.

(b)

DFA has provided accounting and reporting guidance for state agencies that receive or administer special capital outlay appropriations from the state legislature that are financed by bond proceeds. DFA's guidance is available in the "FYI 2008 Audit Forum 9/30/08" section of DFA's website at <http://www.nmdfa.state.nm.us/Forums.aspx>. In the notes to the financial statements, agencies disclose that the bond proceeds were allocated by the legislature to the agency to administer disbursements to the project recipients, and the agency is not obligated in any manner for the related indebtedness. Agencies also disclose the specific revenue recognition policy for these appropriations. Each agency's IPA shall audit the agency's financial statement presentation of this capital outlay project information to ensure that they are presented in accordance with accounting principles that are generally accepted in the United States.

(14) Amounts

"due from other state agencies" and "due to other state agencies": if a state agency reports amounts "due from" or "due to" other state agencies the notes shall disclose the amount "due to" or "due from" each agency, the name of each agency, the SHARE fund account numbers, and the purpose of the account balance.

(15)

Investments in the state general fund investment pool (SGFIP): these balances are presented as cash and cash equivalents in the statements of

net position and the balance sheets of the participant agencies, with the exception of the component appropriation funds (state general fund). The notes to the financial statements of the component appropriation funds shall contain GASBS 40 disclosures for the SGFIP. This disclosure may refer the reader to the separate audit report for STO for additional information regarding the SGFIP.

(16) Format

for the statement of activities: state agencies that have more than one program or function shall use the financial statement format presented in GASBS 34, Illustrations B-1 through B-4. The simplified statement of activities (GASBS 34, Illustration B-5) may not be used for agencies that have multiple programs or functions. GASBS 34.41 requires governments to report direct expenses for each function.

B. Pertaining to audits of housing authorities:

(1) Housing

authorities within the state of New Mexico consist of regional housing authorities, component units or departments of local governments, component units of housing authorities, and housing authorities created by intergovernmental agreements between cities and counties that are authorized to exercise all powers under the Municipal Housing Law, Section 3-45-1 *et seq.*, NMSA 1978.

(2) The

financial statements of a housing authority that is a department, program or component unit of a primary government shall be included in the financial audit report of the primary government by discrete presentation unless an exemption from this requirement has been obtained from the state auditor. In the event that a primary government determines that a housing authority is a department or program of, rather than a component unit of, the primary government, a request for exemption from the discrete presentation requirement shall be submitted to the state auditor, by the

primary government. The request for exemption shall include evidence that the housing authority is not a separate legal entity from the primary government and that the corporate powers of the housing authority are held by the primary government. Evidence included in the request shall address these issues:

(a)

the housing authority is not a corporation registered with the secretary of state;

(b)

there was never a resolution or ordinance making the housing authority a public body corporate; and

(c)

the housing authority was authorized under Section 3-45-1 *et seq.*, NMSA 1978.

(d)

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

(3) Audits of

public housing authorities that are departments of a local government shall be conducted by the same IPA that performs the audit of the local government. Separate audit contracts shall not be approved.

(a)

Local governments are encouraged to include representatives from public housing authorities that are departments of the local government in the IPA selection process.

(b)

The IPA shall include the housing authority's governing board and management representatives in the entrance and exit conferences with the primary government. If it is not possible to hold such combined conferences, the IPA shall hold separate entrance and exit conferences with housing authority's management and a member of the governing board. The OSA has the authority to notify the agency or IPA that the state auditor shall be informed of

the date of the entrance conference, any progress meetings and the exit conference. If such notification is received, the IPA and agency shall invite the state auditor or his designee to attend all such conferences no later than 72 hours before the proposed conference.

(4) The following information relates to housing authorities that are component units of a local government.

(a) The housing authority shall account for financial activity in proprietary funds.

(b) At the public housing authority's discretion, the agency may "be audited separately from the audit of its local primary government entity. If a separate audit is made, the public housing authority audit shall be included in the local primary government entity audit and need not be conducted by the same auditor who audits the financial affairs of the local primary government entity" (Subsection E of Section 12-6-3 NMSA 1978). Statute further stipulates in Subsection A of Section 12-6-4 NMSA 1978 that "a public housing authority other than a regional housing authority shall not bear the cost of an audit conducted solely at the request of its local primary government entity."

(c) Audit reports of separate audits of component unit housing authorities shall be released by the state auditor separately from the primary government's report under a separate release letter to the housing authority.

(5) Public housing authorities and their IPAs shall follow the requirements of *guidelines on reporting and attestation requirements of uniform financial reporting standards* (UFRS), which is available on the U.S. department of housing and urban development's website under a search for UFRS. Additional administrative issues related to audits of public housing authorities follow.

(a) Housing authority audit contracts include the cost of the audit firm's AU-C 725 opinion on the financial data schedule (FDS). The preparation and submission cost for this HUD requirement shall be included in the audit contract. The public housing authority shall electronically submit a final approved FDS based on the audited financial statements no later than nine months after the public housing authority's fiscal year end. The IPA shall:

- (i) electronically report on the comparison of the electronic FDS submission in the REAC staging database through the use of an identification (ID) and password;
- (ii) include a hard copy of the FDS in the audit report;
- (iii) render an AU-C 725 opinion on the FDS; and
- (iv) explain in the notes any material differences between the FDS and the financial statements.

(b) The IPA shall consider whether any fee accountant used by the housing authority is a service organization and, if applicable, follow the requirements of AU-C 402 regarding service organizations.

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

(6) Single audit reporting issue: If a single audit is performed on the separate audit report for the public housing authority, including the housing authority's schedule of expenditures of federal awards, the housing authority federal funds do not need to be subjected a second time to a single audit during the single audit of the primary government. In this situation, the housing authority's federal expenditures do not need to be included in the primary government's schedule of expenditures of federal

awards. See AAG GAS 6.15 for more information.

C. Pertaining to audits of school districts:

(1) In the event that a state-chartered charter school subject to oversight by PED is not subject to the requirement to use the same auditor as PED, that charter school is reminded that their audit contract shall be submitted to PED for approval. Charter schools shall ensure that sufficient time is allowed for PED review refer to Subsection F of 2.2.2.8 NMAC for the due date for submission of the audit contract to the OSA.

(2) Regional education cooperative (REC) audits:

(a) A separate financial and compliance audit is required on activities of RECs. The IPA shall provide copies of the REC report to the participating school districts and PED once the report has been released by the state auditor.

(b) Audits of RECs shall include tests for compliance with Section 6.23.3 NMAC.

(c) Any 'on-behalf' payments for fringe benefits and salaries made by RECs for employees of school districts shall be accounted for in accordance with GASB Cod. Sec. N50.135 and communicated to the employer in accordance with GASB Cod. Sec. N50.131.

(d) The audit report of each REC shall include a cash reconciliation schedule which reconciles the cash balance as of the end of the previous fiscal year to the cash balance as of the end of the current fiscal year. This schedule shall account for cash in the same categories used by the REC in its monthly cash reports to the PED. If there are differences in cash per the REC financial statements and cash per the REC accounting records, the IPA shall provide the adjusting entries to the REC to reconcile cash per the financial statements to cash per the REC accounting records. If cash per the REC accounting records differs

from the cash amount the REC reports to PED in the monthly cash report, the IPA shall issue a finding which explains that the PED reports do not reconcile to the REC accounting records.

(3) School district audits shall address the following issues:

(a) Audits of school districts shall include tests for compliance with Section 6.20.2 NMAC and PED’s manual of procedures for public schools accounting and budgeting (PSAB), with specific emphasis on supplement 7, cash controls.

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

(c) Any joint ventures or other Agencies created by a school district are agencies subject to the Audit Act.

(d) Student activity funds: Risk should

be assessed and an appropriate sample tested regarding controls over student activity funds.

(e) Relating to capital expenditures by the New Mexico public school facilities authority (PSFA), school districts shall review capital expenditures made by PSFA for repairs and building construction projects of the school district. School districts shall also determine the amount of capital expenditures that shall be added to the capital assets of the school district and account for those additions properly. The IPA shall test the school district capital asset additions for proper inclusion of these expenditures.

(f) Sub-funds of the general fund: school district audit reports shall include individual fund financial statements for the following sub-funds of the general fund: operational, transportation, instructional materials and teacherage (if applicable).

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

(b) Certain GASBS 14 criteria (as amended by GASBS 39, 61, and 80) shall be applied to determine whether a charter school is a component unit of the chartering entity (the district or PED). The chartering agency (primary government) shall make the determination whether the charter school is a component unit of the primary government.

(c) No charter school that has been determined to be a component unit may be omitted from the financial

statements of the primary government based on materiality. All charter schools that are component units shall be included in the basic financial statements using one of the presentation methods described in GASBS 34.126, as amended.

D. Pertaining to audits of counties: Tax roll reconciliation county governments: Audit reports for counties shall include two SI schedules.

(1) The first one is a “tax roll reconciliation of changes in the county treasurer’s property taxes receivable” showing the June 30 receivable balance and a breakout of the receivable for the most recent fiscal year ended, and a total for the previous nine fiscal years. Per Subsection C of Section 7-38-81 NMSA 1978, property taxes that have been delinquent for more than 10 years, together with any penalties and interest, are presumed to have been paid.

(2) The second schedule titled “county treasurer’s property tax schedule” shall show by property tax type and agency, the amount of taxes: levied; collected in the current year; collected to-date; distributed in the current year; distributed to-date; the amount determined to be uncollectible in the current year; the uncollectible amount to-date; and the outstanding receivable balance at the end of the fiscal year. This information is necessary for proper revenue recognition on the part of the county as well as on the part of the recipient agencies, under GASBS 33. If the county does not have a system set up to gather and report the necessary information for the property tax schedule, the IPA shall issue a finding.

E. Pertaining to audits of educational institutions:

(1) Educational institutions are reminded that audit contracts shall be submitted to HED for approval. Refer to Subsection F of 2.2.2.8 NMAC for the due date for submission of the audit contract to the OSA.

(2) Budgetary comparisons: the legal level of

budgetary control per 5.3.4.10 NMAC shall be disclosed in the notes to the financial statements. The state auditor requires that every educational institution's audit report include budgetary comparisons as SI. The budgetary comparisons shall be audited and an auditor's opinion shall be rendered. An AU-C 725 opinion does not meet this requirement. The budgetary comparisons shall show columns for: the original budget; the revised budget; actual amounts on the budgetary basis; and a variance column. The IPA shall confirm the final adjusted and approved budget with HED. The IPA shall compare the financial statement budget comparison to the related September 15 budget submission to HED. The only differences that should exist between the HED budget submission and the financial statement budgetary comparisons are adjustments made by the institution after September 15 and audit adjustments. If the HED budget submission does not tie to the financial statement budgetary comparison, taking into account only those differences, then the IPA shall write a related finding. A reconciliation of actual revenue and expense amounts on the budgetary basis to the GAAP basis financial statements shall be disclosed at the bottom of the budgetary comparisons or in the notes to the financial statements. The reconciliation is required only at the "rolled up" level of "unrestricted and restricted - all operations" and shall include revenues and expenses. HED approved the following categories which shall be used for the budgetary comparisons.

(a)

Unrestricted and restricted - All operations (schedule 1): beginning fund balance/net position; unrestricted and restricted revenues; state general fund appropriations; federal revenue sources; tuition and fees; land and permanent fund; endowments and private gifts; other; total unrestricted & restricted revenues; unrestricted and restricted expenditures; instruction; academic support; student services; institutional support; operation and maintenance

of plant; student social & cultural activities; research; public service; internal services; student aid, grants & stipends; auxiliary services; intercollegiate athletics; independent operations; capital outlay; renewal & replacement; retirement of indebtedness; total unrestricted & restricted expenditures; net transfers; change in fund balance/net position (budgetary basis); ending fund balance/net position.

(b)

Unrestricted instruction & general (schedule 2): beginning fund balance/net position; unrestricted revenues; tuition; miscellaneous fees; federal government appropriations; state government appropriations; local government appropriations; federal government contracts/grants; state government contracts/grants; local government contracts/grants; private contracts/grants; endowments; land & permanent fund; private gifts; sales and services; other; total unrestricted revenues; unrestricted expenditures; instruction; academic support; student services; institutional support; operation & maintenance of plant; total unrestricted expenditures; net transfers; change in fund balance/net position (budgetary basis); ending fund balance/net position.

(c)

Restricted instruction & general (schedule 3): beginning fund balance/net position; restricted revenues; tuition; miscellaneous fees; federal government appropriations; state government appropriations; local government appropriations; federal government contracts/grants; state government contracts/grants; local government contracts/grants; private contracts/grants; endowments; land & permanent fund; private gifts; sales and services; other; total restricted revenues; restricted expenditures; instruction; academic support; student services; institutional support; operation & maintenance of plant; total restricted expenditures; net transfers; change in fund balance/net position (budgetary basis); ending fund balance/net position.

(3)

Educational institutions shall present

their financial statements using the business type activities model.

(4)

Compensated absence liability is reported as follows: the statement of net position reflects the current portion of compensated absences under current liabilities and the long-term portion of compensated absences under noncurrent liabilities.

(5)

Component unit issues: educational institutions shall comply with the requirements of Subsection A of 2.2.2.10 NMAC. Additionally:

(a)

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

(b)

there is no level of materiality for reporting findings of component units that do not receive public funds. All component unit findings shall be disclosed in the primary government's audit report.

(6)

Management discussion and analysis (MD&A): The MD&A of educational institutions shall include analysis of significant variations between original and final budget amounts and between final budget amount and actual budget results. The analysis shall include any currently known reasons for those variations that are expected to have a significant effect on future services or liquidity.

(7)

Educational institutions established by Section 11 of Article XII of the New Mexico state constitution shall provide the department of finance and administration's financial control division with a draft copy of their financial statements excluding opinions and findings, pursuant to Subsection A of 2.2.2.12 NMAC.

F. Pertaining to audits of investing agencies:

Investing agencies, which are defined

as STO, PERA, ERB, and the state investment council, shall prepare *schedules of asset management costs* which include management fee information by investment class.

(1) For all asset classes except private asset classes and alternative investment classes, the schedules shall, at minimum, include the following information:

(a) relating to consultants: the name of the firm or individual, the location of the consultant (in-state or out-of-state), a brief description of investments subject to the agreement, and fees;

(b) relating to third-party marketers (as defined in Section 6-8-22 NMSA 1978): the name of the firm or individual, the location of the marketer (in-state or out-of-state), a brief description of investments subject to the agreement, and any fees, commissions or retainers;

(c) relating to traditional asset classes: name of the investment, asset class, value of the investment, and fees (including both “direct” and “embedded” costs).

(2) For private asset classes and alternative investment classes, the schedules shall, at minimum, include the following information:

(a) relating to consultants: the aggregate fees by asset class and consultant location (in-state or out-of-state), and a brief description of investments included in each asset class;

(b) relating to third-party marketers (as defined in Section 6-8-22 NMSA 1978): aggregate fees, commissions and retainers by asset class and third-party marketer location (in-state or out-of-state), and a brief description of investments included in each asset class;

(c) relating to alternative asset classes: the total fees by asset class (including both “direct” and “embedded” costs), and a brief description of the

investments included in each asset class.

(3) These schedules shall be included as unaudited other information in the audit report.

G. Pertaining to audits of local public bodies; budgetary comparisons: Auditors shall test local public body budgets for compliance with required reserves and disclose those reserves on the face of the financial statements and in notes financial statements (if applicable).

[2.2.2.12 NMAC, Rp, 2.2.2.12 NMAC, 3/23/2021]

2.2.2.13 REVIEW OF AUDIT REPORTS AND AUDIT DOCUMENTATION:

A. Statutory requirement to review audit reports: Subsection B of Section 12-6-14 NMSA 1978 requires the state auditor or personnel of his office designated by him examine all reports of audits of agencies made pursuant to contract. All audits performed under contracts approved by the state auditor are subject to review. The OSA shall review all reports submitted by the IPA to determine if the reports are presented in accordance with the requirements of this rule and applicable auditing, accounting and financial reporting standards. The OSA shall review all audit reports submitted by the report due date before reviewing reports that are submitted after the report due date. As discussed in Subsection B of 2.2.2.9 NMAC, audit reports reissued by the agency and IPA, pursuant to AU-C 560, are also subject to OSA review procedures.

B. Comprehensive reviews: Released audit reports are subject to a comprehensive report and audit documentation review by the state auditor. The IPA’s audit documentation shall be assembled in one complete file or one complete set of files in one location, whether the documentation is hardcopy or electronic. The documentation shall be either all hardcopy or all electronic. OSA reviews of audit

and AUP working papers include inspection of firm documentation related to compliance with governmental auditing, accounting and financial reporting standards, rules and other requirements issued by GASB, AICPA, GAO, and the OSA.

C. Consequences of deficiencies: If during the course of its review of an audit report or the related audit documentation, the OSA finds significant deficiencies that warrant a determination that the audit was not made in accordance with the provisions of the contract or applicable standards and requirements, any or all of the following action(s) may be taken;

(1) the IPA may be required by OSA to correct the deficiencies in the report or audit documentation, and reissue the audit report to the agency and any others receiving copies;

(2) the IPA’s eligibility to perform future engagements may be limited in number or type of engagement pursuant to Subsection D of 2.2.2.8 NMAC;

(3) for future audit reports, for some or all audit contracts, the IPA may be required to submit working papers with the audit reports for review by the OSA prior to the release of the report; or

(4) the IPA may be referred to the New Mexico public accountancy board for possible licensure action.

D. Results of work paper reviews: After the review is completed, the OSA shall issue a letter to advise the IPA about the results of the review. The IPA shall respond in writing to all review comments when directed. If the firm disagrees with any comments, the firm shall provide references to professional standards supporting the firm’s disagreement. Failure to respond shall be noted during the firm profile review process. Results of work paper reviews are confidential audit documentation.

[2.2.2.13 NMAC - Rp, 2.2.2.13 NMAC, 3/23/2021]

2.2.2.14 CONTINUING PROFESSIONAL EDUCATION AND PEER REVIEW REQUIREMENTS:

A. Continuing professional education: IPAs performing annual financial and compliance audits, or other attest engagements under GAGAS shall ensure that all members of their staff comply with the CPE requirements of the most recent revision of GAGAS.

B. Peer review requirements: IPAs performing annual financial and compliance audits, or other attest engagements under GAGAS shall comply with the requirements of the most recent revision of GAGAS relating to quality control and assurance and external peer review.

(1) Per AICPA PRP Section 1000 standards for performing and reporting on peer reviews, a firm's due date for its initial peer review is 18 months from the date the firm enrolled in the peer review program or should have enrolled, whichever is earlier. A firm's subsequent peer review is due three years and six months from the previous peer review year end.

(2) The IPA firm profile submission to the state auditor shall include copies of the following peer review documentation:

- (a) the peer review report for the auditor's firm;
- (b) if applicable, detailed descriptions of the findings, conclusions and recommendations related to deficiencies or significant deficiencies required by GAGAS 5.91;
- (c) if applicable, the auditor's response to deficiencies or significant deficiencies;
- (d) the letter of acceptance from the peer review program in which the firm is enrolled; and
- (e) a list of the governmental audits reviewed during the peer review.

(3) A peer review rating of "failed" on the

auditor's peer review shall disqualify the IPA from performing New Mexico governmental audits.

(4) During the procurement process IPAs shall provide a copy of their most recent external peer review report to the agency with their bid proposal or offer. Any subsequent peer review reports received during the period of the contract shall also be provided to the agency.

(5) The peer review shall meet the requirements of GAGAS 5.60 to 5.95.

(6) The New Mexico public accountancy board's substantial equivalency provision has been replaced with mobility pursuant to the 1999 Public Accountancy Act (61-28B NMSA 1978). If a CPA is performing any type of attest work subject to this rule, the firm shall maintain a New Mexico firm permit.

(7) The peer reviewer shall be familiar with this rule. This is a requirement of the state auditor that can be achieved by attendance at audit rule training provided by the OSA.

C. State auditor quality control reviews: The state auditor performs its own quality control review of IPA audit reports and working papers. An IPA that is included on the state auditor's list of approved firms for the first time may be subject to an OSA quality control review of the IPA's working papers. This review shall be conducted as soon as the documentation completion date, as defined by AU-C Section 230, has passed (60 days after the report release date). When the result of the state auditor's quality control review differs significantly from the external quality control report and corresponding peer review rating, the state auditor may no longer accept external peer review reports performed by that reviewer. In making this determination, the state auditor shall take into consideration the fact that AICPA peer reviews are performed on a risk-based or key-element approach looking for systemic problems, while the state auditor reviews are engagement-

specific reviews.

[2.2.2.14 NMAC - Rp, 2.2.2.14 NMAC, 3/23/2021]

2.2.2.15 SPECIAL AUDITS AND EXAMINATIONS:

A. Fraud, waste or abuse in government reported by agencies, IPAs or members of the public:

(1) Definition of fraud: Fraud includes, but is not limited to, fraudulent financial reporting, misappropriation of assets, corruption, and use of public funds for activities prohibited by the constitution or laws of the state of New Mexico. Fraudulent financial reporting means intentional misstatements or omissions of amounts or disclosures in the financial statements to deceive financial statement users, which may include intentional alteration of accounting records, misrepresentation of transactions, or intentional misapplication of accounting principles. Misappropriation of assets means theft of an agency's assets, including theft of property, embezzlement of receipts, or fraudulent payments. Corruption means bribery and other illegal acts. (GAO-14-704G federal internal control standards paragraph 8.02).

(2) Definitions of waste and abuse: Waste is the act of using or expending resources carelessly, extravagantly, or to no purpose. Abuse involves behavior that is deficient or improper when compared with behavior that a prudent person would consider reasonable and necessary operational practice given the facts and circumstances. This includes the misuse of authority or position for personal gain or for the benefit of another. Waste and abuse do not necessarily involve fraud or illegal acts. However, they may be an indication of potential fraud or illegal acts and may still impact the achievement of defined objectives. (GAO-14-704G federal internal control standards paragraph 8.03).

(3) Reports of fraud, waste & abuse: Pursuant to the authority set forth Section 12-

6-3 NMSA 1978, the state auditor may conduct initial fact-finding procedures in connection with reports of financial fraud, waste and abuse in government made by agencies, IPAs or members of the public. Reports may be made telephonically or in writing through the fraud hotline or website established by the state auditor for the confidential reporting of financial fraud, waste, and abuse in government. Reports may be made telephonically to the fraud hotline by calling 1-866-OSA-FRAUD (1-866-672-3728) or reported in writing through the state auditor's website at www.saonm.org. Reports received or created by the state auditor are audit information and audit documentation in connection with the state auditor's statutory duty to examine and audit the financial affairs of every agency, or in connection with the state auditor's statutory discretion to audit the financial affairs and transactions of an agency in whole or in part.

(4)

Confidentiality of sources: The identity of a person making a report and associated allegations made directly to the state auditor orally or in writing, or telephonically or in writing through the state auditor's fraud hotline or website, or through any other means, alleging financial fraud, waste, or abuse in government is confidential audit information and may not be disclosed, except as required by Section 12-6-6 NMSA 1978.

(5)

Confidentiality of files: A report alleging financial fraud, waste, or abuse in government that is made directly to the state auditor orally or in writing, or telephonically or in writing through the state auditor's fraud hotline or website, any resulting special audit, performance audit, attestation engagement or forensic accounting or other non-attest engagement, and all records and files related thereto are confidential audit documentation and may not be disclosed by the OSA or the agency, except to an independent auditor, performance audit team or forensic accounting team in connection with

a special audit, performance audit, attestation engagement, forensic accounting engagement, non-attest engagement, or other existing or potential engagement regarding the financial affairs or transactions of an agency. Any information related to a report alleging financial fraud, waste, or abuse in government provided to an independent auditor, performance audit team or forensic accounting team, is considered to be confidential audit or engagement documentation and is subject to confidentiality requirements, including but not limited to requirements under Subsections E and M in Section in 2.2.2.10 NMAC, the Public Accountancy Act, and the AICPA Code of Professional Conduct.

(6) The OSA

may make inquiries of agencies as part of the fact-finding process performed by the OSA's special investigations division. Agencies shall respond to the OSA inquiries within 15 calendar days of receipt or as soon as practicable under the circumstances with written notice to the OSA stating the basis for any delay. IPAs shall test compliance with this requirement and report noncompliance as a finding in the annual financial and compliance audit report.

B. Special audit or examination process:

(1)

Designation: Pursuant to Section 12-6-3 NMSA 1978, in addition to the annual audit, the state auditor may cause the financial affairs and transactions of an agency to be audited in whole or in part. Accordingly, the state auditor may designate an agency for special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement regarding the financial affairs and transactions of an agency or local public body based on information or a report received from an agency, IPA or member of the public. For purposes of this rule "special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement" includes,

without limitation, AUP, consulting, and contract close-out (results-based award) engagements that address financial fraud, waste, or abuse in government. It also includes non-attest engagements performed under the forensic services standards issued by the AICPA and engagements performed following the Code of Professional Standards issued by the Association of Certified Fraud Examiners (ACFE). The state auditor shall inform the agency of the designation by sending the agency a notification letter. The state auditor may specify the subject matter, the scope and any procedures required, the AICPA or other professional standards that apply, and for a performance audit, performance aspects to be included and the potential findings and reporting elements that the auditors expect to develop. Pursuant to Section 200.503 of Uniform Guidance, if a single audit was previously performed, the special audit, attestation engagement, performance audit or forensic accounting engagement shall be planned and performed in such a way as to build upon work performed, including the audit documentation, sampling, and testing already performed by other auditors. The attestation and performance audit engagements may be conducted pursuant to government auditing standards if so specified by the OSA.

(2) Costs:

All reasonable costs of special audits, attestation engagements, forensic accounting engagements, non-attest engagements, or single-entity performance audits conducted pursuant to this Section shall be borne by the agency audited pursuant to Section 12-6-4 NMSA 1978. The state auditor, in its sole discretion, may apportion among the Agencies audited some or all of the reasonable costs of a multi-entity performance audit.

(3) Who

performs the engagement: The state auditor may perform the special audit, attestation engagement, performance audit, forensic accounting engagement, or non-

attest engagement alone or with other professionals selected by the state auditor. Alternatively, the state auditor may require the engagement to be performed by an IPA or a team that may be comprised of any of the following: independent public accountants; individuals with masters degrees or doctorates in a relevant field such as business, public administration, public policy, finance, or economics; individuals with their juris doctorate; CFE-certified fraud examiners; CFF-certified forensic auditors; CIA-certified internal auditors; or other specialists. If the state auditor designates an agency for an engagement to be conducted by an IPA or professional team, the agency shall:

(a) upon receipt of notification to proceed from the state auditor, identify all elements or services to be solicited, obtain the state auditor's written approval of the proposed scope of work, and request quotations or proposals for each applicable element of the engagement;

(b) follow all applicable procurement requirements which may include, but are not limited to, Uniform Guidance, Procurement Code (Sections 13-1-28 through 13-1-199 NMSA 1978), or equivalent home rule procurement provisions when selecting an IPA or team to perform the engagement;

(c) submit the following information to the state auditor by the due date specified by the state auditor:

- (i) a completed template for special audits, attestation engagements, performance audits or forensic accounting engagements, provided at www.osanm.org, which the agency shall print on agency letterhead; and
- (ii) a completed contract form including the contract fee, start and completion date, and the specific scope of services to be performed in the format prescribed by the OSA, provided at www.osanm.org, with all required signatures on the contract.

(d) If the agency fails to select an IPA and submit the signed contract to OSA by the due date specified by the state auditor, or, if none within 60 days of notification of designation from the state auditor, the state auditor may conduct the engagement or select the IPA for that agency in accordance with the process described at Subsection F of 2.2.2.8 NMAC.

(4) Errors: Contracts that are submitted to the OSA with errors or omissions shall be rejected by the state auditor. The state auditor shall return the rejected contract to the agency indicating the reason(s) for the rejection.

(5) Recommendation rejections: In the event the agency's recommendation is not approved by the state auditor, the state auditor shall promptly communicate the decision, including the reason(s) for rejection, to the agency, at which time the agency shall promptly submit a different recommendation. This process shall continue until the state auditor approves a recommendation and related contract. During this process, whenever a recommendation and related contract are not approved, the agency may submit a written request to the state auditor for reconsideration of the disapproval. The agency shall submit its request no later than 15 calendar days from the date of the disapproval and shall include documentation in support of its recommendation. If warranted, after review of the request, the state auditor may hold an informal meeting to discuss the request. The state auditor shall set the meeting in a timely manner with consideration given to the agency's circumstances.

(6) Contract amendments: Any proposed contract amendments shall be processed in accordance with Subsection N of 2.2.2.8 NMAC.

(7) Access to records and documents: For any special audit, attestation engagement, performance audit or forensic accounting engagement, or non-attest engagement, the

state auditor and any engaged professionals shall have available to them all documents necessary to conduct the special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement. Furthermore, pursuant to Section 12-6-11 NMSA 1978, when necessary for a special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement the state auditor may apply to the district court of Santa Fe County for issuance of a subpoena to compel the attendance of witnesses and the production of books and records.

(8) Entrance, progress and exit conferences: The IPA or other professional shall hold an entrance conference and an exit conference with the agency, unless the IPA or other professional has submitted a written request to the state auditor for an exemption from this requirement and has obtained written approval of the exemption. The OSA has the authority to notify the agency or IPA or other professional that the state auditor shall be informed of the date of the entrance conference, any progress meetings and the exit conference. If such notification is received, the IPA or other professional and the agency shall invite the state auditor or his designee to attend all such conferences no later than 72 hours before the proposed conference or meeting. The state auditor may also require the IPA or other professional to submit its audit plan to the state auditor for review and approval. The date of the exit conference(s) and the names and titles of personnel attending shall be stated on the last page of the special audit report.

(9) Required reporting: All reports for special audits, attestation engagements, performance audits, forensic accounting engagements, or non-attest engagements related to financial fraud, waste or abuse in government undertaken pursuant to 2.2.2.15 NMAC (regardless of whether they are conducted pursuant

to AICPA standards for consulting services, forensic services or for attestation engagements, non-attest engagements, or other professional standards) shall report as findings any fraud, illegal acts, non-compliance or internal control deficiencies, pursuant to Section 12-6-5 NMSA 1978. Each finding shall comply with the requirements of Subsection L of 2.2.2.10 NMAC for audit and attest engagements or Subsection D of 2.2.2.15 NMAC for non-attest engagements.

(10) Report review: As required by Section 12-6-14 NMSA 1978, the state auditor shall review reports of any special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement made pursuant to this section for compliance with the professional services contract and this rule. Upon completion of the report, the IPA or other professional shall deliver the electronic report to the state auditor with a copy of any signed management representation letter, if applicable. Unfinished or excessively deficient reports shall be rejected by the state auditor. If the report is rejected the firm shall submit an electronic version of the corrected rejected report for state auditor review. The name of the electronic file shall be "corrected rejected report" followed by the agency name and fiscal year. The IPA or other professional shall respond to all review comments as directed by the state auditor.

(11) Report release: After OSA's review of the report for compliance with the professional services contract and this rule, the state auditor shall authorize the IPA to print and submit the final report. An electronic version of the report, in the PDF format described at Subsection B of 2.2.2.9 NMAC, shall be delivered to the state auditor within five business days. The state auditor shall not release the report until all the required documents are received by the state auditor. The state auditor shall provide the agency with a letter authorizing the release of the report

pursuant to Section 12-6-5 NMSA 1978. Agency and local public body personnel shall not release information to the public relating to the special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement until the report is released and has become a public record pursuant to Section 12-6-5 NMSA 1978. Except for the exception under Subsection B of 2.2.2.15 NMAC, at all times during the engagement and after the engagement report becomes a public record, the IPA or other professional(s) shall not disclose to the public confidential information about the auditee or about the engagement. Confidential information is information that is not generally known to the public through common means of providing public information like the news media and internet.

(12) Disclosure by professionals: The IPA or other professional shall not disclose information identified as confidential information provided to them by the state auditor unless otherwise specified by the state auditor. Disclosure of confidential information by the IPA or other professional may result in legal action by the state auditor, or in the case of an IPA, restriction pursuant to Subsection D of 2.2.2.8 NMAC.

(13) Payment: Progress payments up to (but not including) ninety-five percent of the contract amount do not require state auditor approval and may be made by the agency if the agency monitors the progress of the services procured. If requested by the state auditor, the agency shall provide a copy of the approved progress billing(s). Final payments over ninety-five percent may be made by the agency pursuant to either of the following:

(a) stated in the letter accompanying the release of the report to the agency, or
(b) in the case of ongoing law enforcement investigations, stated in a letter prior to the release of the report to the agency.

C. Agency-initiated special audits or examinations:

(1)

Applicability: With the exception of agencies that are authorized by statute to conduct performance audits and forensic accounting engagements, this section applies to all special audits and examinations in which an agency enters into a professional services contract for a special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement relating to financial fraud, waste or abuse, but the agency has not been designated by the state auditor for the engagement pursuant to Subsection B of 2.2.2.15 NMAC. For purposes of this rule, "special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement" includes, without limitation, AUP, consulting, forensic services and contract close-out (results-based award) engagements that address financial fraud, waste or abuse in government.

(2)

Contracting: An agency, IPA or other professional shall not enter into a professional services contract for a special audit, attestation engagement, performance audit, forensic accounting engagement, or non-attest engagement regarding the financial affairs and transactions of an agency and relating to financial fraud, waste or abuse in government without the prior written approval of the state auditor. The proposed professional services contract shall be submitted to the state auditor for review and approval after it has been signed by the agency and the IPA or other professional, unless the agency or IPA or other professional applies to the state auditor for an exemption and the state auditor grants the exemption. When contracting with an IPA or other professional, the agency shall contract only with an IPA or other professional that has been approved by the state auditor to conduct such work. The state auditor may, in its sole discretion, require a non-IPA professional to submit proof of qualifications, a firm profile or

equivalent documentation prior to approving the contract. The contract shall include the contract fee, start and completion date, and the specific scope of services to be performed, and shall follow any template that the state auditor may provide. See Subsection F of 2.2.2.10 NMAC for applicable restrictions on the engagement letter.

(3)

Applicability of other rules: The provisions outlined in Subsection B of 2.2.2.15 NMAC apply to agency-initiated special audits, attestation engagements, performance audits and forensic accounting engagements.

D. Finding requirements for special audits or examinations:

(1)

Communicating findings: All finding reference numbers shall follow a consistent format. Findings required by Section 12-6-5 NMSA 1978 shall be presented in a separate schedule of findings and placed at the end of the report.

(a)

Section 12-6-5 NMSA 1978 requires that for every special audit and examination made “each report set out in detail, in a separate section, any violation of law or good accounting practices found by the audit or examination.”

(b)

Each finding shall specifically state and describe the following:

(i)

condition (provides a description of a situation that exists and includes the extent of the condition and an accurate perspective, the number of instances found, the dollar amounts involved, if specific amounts were identified);

(ii)

criteria (identifies the required or desired state or what is expected from the program or operation; cites the specific section of law, regulation, ordinance, contract, or grant agreement if applicable);

(iii)

effect (the logical link to establish the impact or potential impact of the difference between the situation that exists (condition) and the required or

desired state (criteria); demonstrates the need for corrective action in response to identified problems or relevant risks);

(iv)

cause (identifies the reason or explanation for the condition or the factors responsible for the difference between what the auditors found and what is required or expected; the cause serves as a basis for the recommendation);

(v)

recommendation addressing each condition and cause; and

(vi)

agency response (the agency’s response shall include specific planned corrective actions with a timeline and designation of what employee position(s) are responsible for meeting the deadlines in the timeline).

[2.2.2.15 NMAC - Rp, 2.2.2.15 NMAC, 3/23/2021]

2.2.2.16 ANNUAL FINANCIAL PROCEDURES REQUIRED FOR LOCAL PUBLIC BODIES WITH ANNUAL REVENUES LESS THAN FIVE HUNDRED THOUSAND DOLLARS (\$500,000) (TIERED SYSTEM):

A. Annual revenue and state funded capital outlay expenditures determine type of financial reporting:

All local public bodies shall comply with the requirements of Section 6-6-3 NMSA 1978. Pursuant to Section 12-6-3 NMSA 1978, the annual revenue of a local public body determines the type of financial reporting a local public body shall submit to the OSA. Local public bodies are mutual domestic water consumers associations, land grants, incorporated municipalities, and special districts.

(1) The annual

revenue of a local public body shall be calculated on a cash basis as follows:

(a)

Revenue shall exclude capital outlay funds. OSA defines capital outlay funds as funds expended pursuant to the Property Control Act definition of

a capital outlay project. Per section 15-3B-2 NMSA 1978 “Capital outlay project” means the acquisition, improvement, alteration or reconstruction of assets of a long-term character that are intended to continue to be held or used, including land, buildings, machinery, furniture and equipment. A “capital outlay project” includes all proposed expenditures related to the entire undertaking.

(b)

Revenue shall exclude federal or private grants. For the purpose of 2.2.2.16 NMAC “private grant” means funding provided by a non-governmental entity.

(2)

For the purposes of 2.2.2.16 NMAC “state funded capital outlay expenditures” are expenditures made pursuant to any funding provided by the New Mexico legislature for a capital outlay project as defined in the Property Control Act, Section 15-3B-2 NMSA 1978, either received directly by the local public body or disbursed through an administering agency.

B. Determination of revenue and services:

Annually, following the procedures described in Subsection F of 2.2.2.8 NMAC, the state auditor shall provide local public bodies written authorization to obtain services to conduct a financial audit or other procedures. Upon receipt of the authorization, a local public body shall determine its annual revenue in accordance with Subsection A of 2.2.2.16 NMAC. The following requirements for financial reporting apply to the following annual revenue amounts (tiers):

(1) if a

local public body’s annual revenue is less than ten thousand dollars (\$10,000) and the local public body did not directly expend at least fifty percent of, or the remainder of, a single capital outlay award, then the local public body is exempt from submitting a financial report to the state auditor, except as otherwise provided in Subsection C of 2.2.2.16 NMAC;

(2) if a local

public body’s annual revenue is ten thousand dollars (\$10,000) or more

but less than fifty thousand dollars (\$50,000), then the local public body is exempt from submitting a financial report to the state auditor, except as otherwise provided in Subsection C of 2.2.2.16 NMAC;

(3) if a local public body's annual revenue is less than fifty thousand dollars (\$50,000), and the local public body expended at least fifty percent of, or the remainder of, a single capital outlay award during the fiscal year, then the local public body shall procure the services of an IPA for the performance of a tier three AUP engagement in accordance with the audit contract for a tier three AUP engagement;

(4) if a local public body's annual revenue is greater than fifty thousand dollars (\$50,000) but less than two hundred-fifty thousand dollars (\$250,000), then the local public body shall procure the services of an IPA for the performance of a tier four AUP engagement in accordance with the audit contract for a tier four AUP engagement;

(5) if a local public body's annual revenue is greater than fifty thousand dollars (\$50,000) but less than two hundred-fifty thousand dollars (\$250,000), and the local public body expended any capital outlay funds during the fiscal year, then the local public body shall procure the services of an IPA for the performance of a tier five AUP engagement in accordance with the audit contract for a tier five AUP engagement;

(6) if a local public body's annual revenue is two hundred-fifty thousand dollars (\$250,000) or greater, but less than five hundred thousand dollars (\$500,000), the local public body shall procure services of an IPA for the performance of a tier six AUP engagement in accordance with the audit contract for a tier six AUP engagement;

(7) if a local public body's annual revenue is five hundred thousand dollars (\$500,000) or more, this section shall not apply and the local public body shall procure services of an IPA for

the performance of a financial and compliance audit in accordance with other provisions of this rule;

(8) notwithstanding the annual revenue of a local public body, if the local public body expended seven hundred-fifty thousand dollars (\$750,000) or more of federal funds subject to a federal single audit during the fiscal year then the local public body shall procure a single audit.

C. Exemption from financial reporting: A local public body that is exempt from financial reporting to the state auditor pursuant to Subsection B of 2.2.2.16 NMAC shall submit written certification to LGD and the state auditor. The certification shall be provided on the form made by the state auditor, available through OSA-Connect. The local public body shall certify, at a minimum:

(1) the local public body's annual revenue for the fiscal year; and

(2) that the local public body did not expend fifty percent of or the remainder of a single capital outlay award during the fiscal year.

(3) The OSA will not accept the certification of exemption from financial reporting for the current year until the prior year certifications or AUP reports (whichever is appropriate) have been submitted.

D. Procurement of IPA services: A local public body required to obtain an AUP engagement shall procure the services of an IPA in accordance with Subsection F of 2.2.2.8 NMAC.

E. Access to Records and Documents: For any AUP the agency should produce all documents necessary to conduct the engagement.

F. Requirements of the IPA selected to perform the AUP:

(1) The IPA shall provide the local public body with a dated engagement letter during the planning stages of the engagement, describing the services to be provided. See Subsection F

of 2.2.2.10 NMAC for applicable restrictions on the engagement letter.

(2) The IPA may not subcontract any portion of the services to be performed under the contract with the local public body except for the activation of a contingency subcontractor form in the event the IPA is unable to complete the engagement.

(3) The IPA shall hold an entrance conference and an exit conference with the local public body. The entrance and exit conference shall occur in the forum agreed to by the local public body and the IPA, to include virtual or telephonic options. The OSA reserves the right to require an in-person entrance or exit conference. The OSA has the authority to notify the agency or IPA that the state auditor shall be informed of the date of the entrance conference, any progress meetings and the exit conference. If such notification is received, the IPA and agency shall invite the state auditor or his designee to attend all such conferences no later than 72 hours before the proposed conference or meeting.

(4) The IPA shall submit the report to the OSA for review in accordance with the procedures described at Subsection B of 2.2.2.9 NMAC. Before submitting the report to OSA for review, the IPA shall review the report using the AUP report review guide available on the OSA's website at www.saonm.org. The report shall be submitted to the OSA for review with the completed AUP report review guide. Once the AUP report is officially released to the agency by the state auditor (by a release letter) and the required waiting period of five calendar days has passed, unless waived by the agency in writing, the AUP report shall be presented by the IPA, to a quorum of the governing authority of the agency at a meeting held in accordance with the Open Meetings Act, if applicable. This requirement only applies to agencies with a governing authority, such as a board of directors, board of county commissioners, or city council, which is subject to the Open

Meetings Act. The IPA shall ensure that the required communications to those charged with governance are made in accordance with AU-C 260.12 to 260.14.

G. Progress payments:

(1) Progress payments up to ninety-five percent of the contract amount do not require state auditor approval and may be made by the local public body if the local public body ensures that progress payments made do not exceed the percentage of work completed by the IPA. If requested by the state auditor, the local public body shall provide the OSA a copy of the approved progress billing(s).

(2) Final payments from ninety-five percent to one hundred percent may be made by the local public body pursuant to either of the following:

(a) stated in the letter accompanying the release of the report to the agency, or

(b) in the case of ongoing law enforcement investigations, stated in a letter prior to the release of the report to the agency. In this situation a letter releasing the report to the agency will be issued when it is appropriate to release the report.

H. Report due dates, notification letters and confidentiality:

(1) For local public bodies with a June 30 fiscal year-end that qualify for the tiered system, the report or certification due date is December 15. Local public bodies with a fiscal year end other than June 30 shall submit the AUP report or certification no later than five months after the fiscal year-end. Late AUP reports (not the current reporting period) are due not more than six months after the date the contract was executed. An electronic copy of the report shall be submitted to the OSA. AUP reports submitted via fax or email shall not be accepted. A copy of the signed dated management representation letter shall be submitted with the report. If a due date falls on a weekend or

holiday, or if the OSA is closed due to inclement weather, the report is due the following business day by 5:00 p.m. If the report is mailed to the state auditor, it shall be postmarked no later than the due date to be considered filed by the due date. If the due date falls on a weekend or holiday the audit report shall be postmarked by the following business day.

(2) As soon as the IPA becomes aware that circumstances exist that will make the local public body's AUP report be submitted after the applicable due date, the auditor shall notify the state auditor of the situation in writing.

This notification shall consist of a letter, not an email. However, a scanned version of the official letter sent via email is acceptable. The late AUP notification letter is subject to the confidentiality requirements detailed at Subsection M of 2.2.2.10 NMAC. This does not prevent the state auditor from notifying the legislative finance committee or applicable oversight agency pursuant to Subsections F and G of Section 12-6-3 NMSA 1978. There shall be a separate notification for each late AUP report. The notification shall include a specific explanation regarding why the report will be late, when the IPA expects to submit the report and a concurring signature by the local public body. If the IPA will not meet the expected report submission date, then the IPA shall send a revised notification letter. In the event the contract was signed after the report due date, the notification letter shall still be submitted to the OSA explaining the reason the AUP report will be submitted after the report due date. The late report notification letter is not required if the report was submitted to the OSA for review by the deadline, and then rejected by the OSA, making the report late when resubmitted.

(3) Local public body personnel shall not release information to the public relating to the AUP engagement until the report is released and has become a public record pursuant

to Section 12-6-5 NMSA 1978. At all times during the engagement and after the AUP report becomes a public record, the IPA shall follow applicable professional standards and 2.2.2 NMAC regarding the release of any information relating to the AUP engagement.

I. Findings: All AUP engagements shall report as findings any fraud, illegal acts, non-compliance or internal control deficiencies, consistent with Section 12-6-5 NMSA 1978. The findings shall include the required content listed at Subparagraph (d) of Paragraph (1) of Subsection L of 2.2.2.10 NMAC.

J. Review of AUP reports and related workpapers: AUP shall be reviewed by the OSA for compliance with professional standards and the professional services contract. Noncompliant reports shall be rejected and not considered received. Such reports shall be returned to the firm and a copy of the rejection letter shall be sent to the local public body. If the OSA rejects and returns an AUP report to the IPA, the report shall be corrected and resubmitted to the OSA by the due date, or the IPA shall include a finding for non-compliance with the due date. The IPA shall submit an electronic version of the corrected rejected report for OSA review. The name of the electronic file shall be "corrected rejected report" followed by the agency name and fiscal year. The OSA encourages early submission of reports to avoid findings for late reports. After its review of the AUP report for compliance with professional standards and the professional services contract, the OSA shall authorize the IPA to print and submit the final report. An electronic version of the AUP report, in PDF format, as described at Subsection B of 2.2.2.9 NMAC, shall all be delivered to the OSA within five business days. The OSA shall not release the AUP report until the electronic version of the report is received by the OSA. The OSA shall provide the local public body with a letter authorizing

the release of the report after the required five day waiting period. Released reports may be selected by the OSA for comprehensive report and workpaper reviews. After such a comprehensive report and workpaper review is completed, the OSA shall issue a letter to advise the IPA about the results of the review. The IPA shall respond to all review comments as directed. If during the course of its review, the OSA finds significant deficiencies that warrant a determination that the engagement was not performed in accordance with provisions of the contract, applicable AICPA standards, or the requirements of this rule, any or all of the following action(s) may be taken:

- (1) the IPA may be required to correct the deficiencies in the report or audit documentation, and reissue the AUP report to the agency and any others receiving copies;
- (2) the IPA's eligibility to perform future engagements may be limited in number or type of engagement pursuant to Subsection D of 2.2.2.8 NMAC;
- (3) for future reports, for some or all contracts, the IPA may be required to submit working papers with the reports for review by the OSA prior to the release of the report; or
- (4) the IPA may be referred to the New Mexico public accountancy board for possible licensure action.

K. IPA independence:

IPAs shall maintain independence with respect to their client agencies in accordance with the requirements of *government auditing standards*, December 2018 revision, issued by the US-GAO (GAGAS 3.17-3.108). [2.2.2.16 NMAC - Rp 2.2.2.16 NMAC, 3/23/2021]

HISTORY of 2.2.2 NMAC:

Pre-NMAC Regulatory Filing History: The material in this part was derived from that previously filed with the State Records Center and Archives under SA Rule No. 71-1, Regulations of State Auditor

Relating to Audit Contracts with Independent Auditors by State Agencies, filed 5/14/1971; SA Rule No. 71-2, Regulations of State Auditor for Audits by Independent Auditors, filed 5/27/1971; SA Rule No. 72-1, Regulations of State Auditor Relating to Audit Contracts With Independent Auditors by Agencies of the State of New Mexico, filed 6/1/1972; SA Rule No. 72-2, Regulations of State Auditor for Audits by Independent Auditors, filed 6/1/1972; SA Rule No. 74-1, Regulations of State Auditor Relating to Reporting Statutory Violations, filed 2/28/1974; SA Rule No. 74-2, Rotation of Assignments, filed 2/28/1974; SA No. 78-1, Regulations Governing the Auditing of New Mexico Governmental Agencies, filed 11/3/1978; Amendment No. 1 to SA Rule 78-1, Regulations Governing the Auditing of New Mexico Governmental Agencies, filed 5/28/1980; SA Rule No. 82-1, Regulation Governing the Auditing of New Mexico Governmental Agencies, filed 12/17/1982; SA Rule No. 84-1, Regulations Governing the Auditing of Agencies of the State of New Mexico, filed 4/10/1984; SA Rule No. 85-1, Regulations Governing the Auditing of Agencies of the State of New Mexico, filed 1/28/1985; SA Rule No. 85-3, Regulation for State Agencies Concerning NCGA Statement No. 4 - Accounting and Financial Reporting Principles for Claims and Judgements and Compensated Absences, filed 4/16/1980; SA Rule No. 85-4, Regulations Governing the Auditing of Housing Authorities of the State of New Mexico, filed 6/12/1985; SA Rule No. 85-5, Regulations Pertaining to Single Audits of State Agencies and Local Public Bodies, filed 6/17/1985; SA Rule No. 85-6, Audits of Grants to Subrecipients, filed 6/17/1985; SA Rule 86-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 1/20/1986; SA Rule No. 86-2, Regulation Governing Violations of Criminal Statutes in Connection with Financial Affairs, filed 3/20/1986; SA Rule No. 86-3, Professional Services Contracts, filed

7/9/1986; SA Rule 87-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 2/13/1987; SA Rule 87-2, Approval of Audit Contracts, filed 4/2/1987; SA Rule 87-3, Audit Requirements for Deferred Compensation, Retirement Plans, Budget and Public Money for the State of New Mexico, filed 8/14/1987; SA Rule 88-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 2/10/1988; SA Rule 89-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 3/10/1989; SA Rule 90-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 3/1/1990; SA Rule 90-3, Auditor's Responsibilities Related to Fees Collected on Convictions Relating to Intoxicating Liquor and Controlled Substances, filed 5/7/1990; SA Rule 91-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 3/13/1991; SA Rule 92-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 3/6/1992; SA Rule 93-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 2/25/1993; SA Rule 94-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 2/25/1994; Amendment 1 to SA Rule 94-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 5/16/1994; SA Rule 95-1, Regulations Governing the Audits of Agencies of the State of New Mexico, filed 3/16/1995; and 2 NMAC 2.2, Requirements for Contracting and Conducting Audits of Agencies, filed 4/2/1996.

History of Repealed Material:

2 NMAC 2.2, Requirements for Contracting and Conducting Audits of Agencies - Repealed, 3/30/2001.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 3/29/2002.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 4/30/2003.
2.2.2 NMAC Requirements for Contracting and Conducting Audits of

Agencies - Repealed, 3/31/2004.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 5/13/2005.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 3/16/2006.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 4/16/2007.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 4/15/2008.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 2/27/2009.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 2/12/2010.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 2/28/2011.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 2/15/2012.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 2/28/2013.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 2/28/2014.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 3/16/2015.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 3/15/2016.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 3/14/2017.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 2/27/2018.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 3/10/2020.
 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies - Repealed, 3/23/2021.

Other History:

2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies, filed 2/15/2018, is replaced by 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies, effective 3/10/2020.
 2.2.2 NMAC Requirements for

Contracting and Conducting Audits of Agencies, filed 2/27/2020, is replaced by 2.2.2 NMAC Requirements for Contracting and Conducting Audits of Agencies, effective 3/23/2021.

**TAXATION AND
REVENUE,
DEPARTMENT OF**

The New Mexico Taxation and Revenue Department approved the repeal of 3.4.1 NMAC, Corporate Income Taxes - General Provisions, filed 12/1/2000 and replaced it with 3.4.1 NMAC, Corporate Income Taxes - General Provisions, effective 3/23/2021.

The New Mexico Taxation and Revenue Department approved the repeal of 3.4.10 NMAC, Returns and Reporting Methods, filed 12/1/2000 and replaced it with 3.4.10 NMAC, Returns and Reporting Methods, effective 3/23/2021.

The New Mexico Taxation and Revenue Department approved the repeal of 3.5.18 NMAC, Determination of Sales in this State of Other than Tangible Personal Property for Inclusion in Sales Factor, filed 6/18/2001 and replaced it with 3.5.18 NMAC, Determination of Sales in this State of Other than Tangible Personal Property for Inclusion in Sales Factor, effective 3/23/2021.

**TAXATION AND
REVENUE,
DEPARTMENT OF**

**TITLE 3: TAXATION
CHAPTER 4: CORPORATE
INCOME TAXES
PART 1: GENERAL
PROVISIONS**

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

[3.4.1.1 NMAC - Rp, 3. 4.1.1 NMAC, 3/23/2021]

3.4.1.2 SCOPE: This part applies to every domestic corporation and to every foreign corporation employed or engaged in the transaction of business in, into or from New Mexico or deriving any income from any property or employment in New Mexico.
 [3.4.1.2 NMAC - Rp, 3. 4.1.2 NMAC, 3/23/2021]

**3.4.1.3 STATUTORY
AUTHORITY:** Section 9-11-6.2 NMSA 1978.
 [3.4.1.3 NMAC - Rp, 3. 4.1.3 NMAC, 3/23/2021]

3.4.1.4 DURATION:
 Permanent.
 [3.4.1.4 NMAC - Rp, 3. 4.1.4 NMAC, 3/23/2021]

**3.4.1.5 EFFECTIVE
DATE:** March 23, 2021, unless a later date is cited at the end of a section, in which case the later date is the effective date.
 [3.4.1.5 NMAC - Rp, 3. 4.1.5 NMAC, 3/23/2021]

3.4.1.6 OBJECTIVE: The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Corporate Income and Franchise Tax Act.
 [3.4.1.6 NMAC - Rp, 3. 4.1.6 NMAC, 3/23/2021]

3.4.1.7 DEFINITIONS:
[RESERVED]
 [3.4.1.7 NMAC - Repealed, 3/23/2021]

**3.4.1.8 CITATION OF
REGULATIONS:** Unless otherwise stated, all citations of statutes in Title 3, Chapter 4 NMAC pertaining to the Corporate Income and Franchise Tax Act are to the New Mexico Statutes Annotated, 1978 (NMSA 1978).
 [3.4.1.8 NMAC - Rp, 3. 4.1.8 NMAC, 3/23/2021]

3.4.1.9 [RESERVED]
 [3.4.1.9 NMAC - Repealed, 3/23/2021]

3.4.1.10 INCOME FROM OBLIGATIONS OF GOVERNMENTS:

A. Income from United States government obligations.

(1) Income from obligations issued by the United States are not includable in net income.

(2) Because they are not obligations of the United States, income from investment in the following is includable in net income:

(a) financial instruments guaranteed by the federal national mortgage association (“Fannie Maes”), the government national mortgage association (“Ginnie Maes”), the federal national home loan association (“Freddie Macs”) and any similar organization whose income states are not prohibited by federal law from subjecting to income taxation;

(b) financial instruments issued by the college construction loan insurance corporation or the national consumer cooperative bank;

(c) agreements (“repo’s”) to sell and repurchase United States government obligations; and

(d) agreements (“reverse repo’s”) to purchase and resell United States government obligations.

B. Income from obligations of Puerto Rico and territories and possessions of the United States. Income from obligations of the commonwealth of Puerto Rico and of Guam, the Virgin Islands, American Samoa, Northern Mariana Islands and other territories or possessions of the United States are includable in net income only to the extent that inclusion is not prohibited by federal law. Income from such obligations which New Mexico is prohibited from taxing by the laws of the United States may be deducted from net income.

C. Exclusion of certain income from mutual funds or trusts.

(1) Income from investments in mutual funds, unit investment trusts or simple trusts

which are invested in obligations of the United States, obligations of the state of New Mexico or its agencies, institutions, instrumentalities or political subdivisions or obligations of the commonwealth of Puerto Rico or territories or possessions of the United States may be deducted from net income to the extent that such investment income is nontaxable income provided that:

(a) for the purposes of Subsection C of 3.4.1.10C NMAC, “nontaxable income” means income from investments in obligations of:

(i) the United States;

(ii) the state of New Mexico or any of its agencies, institutions, instrumentalities or political subdivisions;

(iii) the commonwealth of Puerto Rico, the income from which obligations states are prohibited from taxing by the laws of the United States; and

(iv) Guam, the Virgin Islands, American Samoa, Northern Mariana Islands or other territories or possessions of the United States, the income from which obligations states are prohibited from taxing by the laws of the United States; and

(b) the mutual fund, unit investment trust or simple trust provides to the investor an annual statement of the income, by source, which was distributed to the individual investor.

(2) Only that amount of income may be deducted which is shown on the statement as flowing through to the investor from obligations of the United States, of the commonwealth of Puerto Rico, of Guam, the Virgin Islands, American Samoa, Northern Mariana Islands or other territories or possessions of the United States or of the state of New Mexico or any of its agencies, institutions, instrumentalities or political subdivisions.

D. Expenses related to certain investment income.

(1) Because this investment income is exempt from income taxation by New Mexico, expenses of the taxpayer related to the earning of income from investments, directly or through mutual funds, unit investment trusts or simple trusts, in obligations of the United States, obligations of the state of New Mexico or its agencies, institutions, instrumentalities or political subdivisions or obligations of the commonwealth of Puerto Rico or territories or possessions of the United States may not be deducted from net income. To the extent that such expenses have been deducted in determining federal taxable income, the amount must be added back to net income.

(2) Income from investment in state and local bonds is subject to New Mexico income taxation. Expenses of the taxpayer related to the earning of income from investments, directly or through mutual funds, unit investment trusts or simple trusts, in state or local bonds are deductible in determining net income. To the extent that such expenses have not been deducted in determining federal taxable income, these amounts may be subtracted from net income.

E. Income earned on “state or local bonds”.

(1) Not included in the term “state or local bond” is any obligation of the commonwealth of Puerto Rico or of territories or possessions of the United States the income from which New Mexico is prohibited from taxing by the laws of the United States.

(2) For taxable years beginning on or after January 1, 1991, income from investing in any state or local bond, as that term is defined in Section 7-2A-2 NMSA 1978, is includable in base income.

(3) Income from investing in state or local bonds is to be included in base income in the year it is actually received without regard to federal tax treatment of the income, except that:

(a) the taxpayer may elect to report this

income for New Mexico purposes on an accrual basis; and

(b)

income from investing in state or local bonds earned or accrued before the first taxable year beginning on or after January 1, 1991, but which is received after that date is not includable in base income. Income is earned or accrued ratably, by assigning an equal amount of income to each day of the accrual period.

(4) Example

1: A, a New Mexico corporation, purchases a state of California municipal bond in 20X0 and receives semi-annual interest payments. A does not elect to report to New Mexico on an accrual basis. All income from this bond is included in base income. This income is included only as the interest payments are received.

(5) Example

2: B, a New Mexico corporation and calendar year filer, purchases a city of Los Angeles municipal bond in 20X0. This bond pays interest semi-annually on April 1 and October 1. B does not elect to report to New Mexico on an accrual basis. On April 10, 20X1, B receives \$1,000 of interest. Since this payment includes interest earned or accrued before January 1, 20X1, this income is to be allocated between the period prior to the taxable year and the period following December 31, 20X0. The income accrual period is 182 days in length (October 1, 20X0, through March 31, 20X1), of which 90 days are in B's first taxable year beginning on or after January 1, 20X1. B's 20X1 base income includes \$494.51 ($\$1,000 \times 90/182$). The remaining \$505.49 is not subject to New Mexico corporate income tax.

(6) Example

3: C, a New Mexico corporation and calendar year filer, purchased a city of San Francisco municipal bond on January 1, 1981 for \$1,400. C does not elect to report accrued income on this bond for New Mexico corporate income tax purposes. Although this bond pays interest semi-annually, C bought it stripped and at a discount, C has no right to the interest. On January 1, 1995, C receives the bond

principal of \$5,000. This is C's first and only payment on the bond. Since this payment includes income earned or accrued before January 1, 1991, the income is allocated between the period prior to January 1, 1991, and the period following December 31, 1990. The income accrual period is 5112 days, of which 1461 are after December 31, 1990. C's 1995 base income includes \$1,028.87 ($(1461/5112) \times (\$5,000 - \$1,400)$).

The remaining \$2,571.13 of income is not subject to New Mexico corporate income tax.

[3.4.1.10 NMAC - Rp, 3. 4.1.10 NMAC, 3/23/2021]

3.4.1.11 BASE INCOME FOR FILING AS A SEPARATE CORPORATE ENTITY:

For a corporation filing a separate return for taxable years beginning before January 1, 2020 and for a corporation that is not part of a unitary group or is required to file a separate return under Regulation 3.4.10.16 for taxable years beginning on or after January 1, 2020, that corporation's base income shall be determined by completing a simulated federal corporate income tax return for the separate corporation. In completing the simulated federal return, only the income and expenses of the separate corporation will be allowed. The simulated return shall be prepared as if the corporate entity were filing a federal return as a separate corporation and not as a corporation included in a consolidated return. All provisions of the Internal Revenue Code which would apply to the filing as a separate corporation shall apply to the completion of the simulated return. Procedures and adjustments allowed by the Internal Revenue Code which apply to the filing of a federal consolidated return concerning the elimination of intercompany transactions or the sale or dissolution of one of the corporations within the federal consolidated group shall not be allowed when completing the simulated federal return for New Mexico income tax purposes. In no case shall a net operating loss established for the corporation

reporting on a separate corporation basis be excluded from the base income of any other corporation or from the base income reported on any combined or consolidated return for any group of corporations except as a net operation loss carryover deduction to the extent allowable under Section 7-2A-2 NMSA 1978, and applicable federal limitations.

[3.4.1.11 NMAC - Rp, 3. 4.1.11 NMAC, 3/23/2021]

3.4.1.12 FOREIGN SOURCE DIVIDENDS - PRIOR TO JANUARY 1, 2020:

A. Foreign source dividends, as the term is used under federal law, received by a corporation reporting to New Mexico as a separate entity are wholly or partially excludable from the corporation's base income as follows:

(1) Seventy percent of the dividends included on lines 13 and 14, schedule C, federal form 1120 received from corporations owned less than twenty percent by the reporting corporation but only if those dividends would have been subject to the seventy percent deduction under 26 U.S.C. Section 243(a)(1) had the payor of the dividends been a domestic corporation.

(2) Eighty percent of the dividends included on lines 13 and 14, schedule C, federal form 1120 received from corporations owned twenty percent to eighty percent by the reporting corporation but only if those dividends would have been subject to the eighty percent deduction under 26 U.S.C. Section 243(c) had the payor of the dividends been a domestic corporation.

(3) One hundred percent of the dividends included on lines 13 and 14, schedule C, federal form 1120 received from corporations owned more than eighty percent by the reporting corporation but only if those dividends would have been subject to the one hundred percent deduction under 26 U.S.C. Section 243(a)(3) had the payor of the dividends been a domestic corporation.

B. The exclusion of foreign source dividends set forth in 3.4.1.12 NMAC applies only so long as New Mexico's method of taxing foreign source dividends is unconstitutional.

C. Section 3.4.1.12 NMAC applies to taxable years beginning on or after January 1, 1997 but prior to January 1, 2020. [3.4.1.12 NMAC - Rp, 3. 4.1.12 NMAC, 3/23/2021]

3.4.1.13 FOREIGN SOURCE DIVIDENDS AFTER JANUARY 1, 2020: For tax years beginning on or after January 1, 2020, "base income" under Section 7-2A-2 NMSA 1978 includes special deductions allowed under the Internal Revenue Code Sections 241 through 249 including the deduction for foreign source dividends under Section 245A. [3.4.1.13 NMAC - N, 3/23/2021]

3.4.1.14 UNITARY BUSINESS: The definition of a "unitary group" under Section 7-2A-2 NMA1978 rests on the underlying concept of "unitary business", which reflects the general constitutional principles that have been set out by the U.S. Supreme Court and is meant to be applied consistent with those constitutional principals. See, in particular, *Mobil Oil Corp. v. Comm'r of Taxes of Vt.*, 455 U.S. 425, 438 (1980) where the court noted that a "separate accounting, while it purports to isolate portions of income received in various states, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale." The court then characterized these as "factors of profitability" which "arise from the operation of the business as a whole." See also, *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 18 (2008). There, the court reiterated past holdings that the unitary business principle as articulated applies generally to entities, not assets, and that "an asset can be a part of a taxpayer's unitary business even without a 'unitary relationship'

between the 'payor and payee.'" The court went on to review its precedent saying, "where the asset is another business, a unitary relationship's 'hallmarks' are functional integration, centralized management, and economies of scale." When a portion of a unitary business is conducted in New Mexico, the state has the constitutional authority to impose tax on that portion of the income derived from that business, provided that the tax is not discriminatory and is fairly apportioned. The primary factors indicating an economically interdependent business include centralized management, functional integration, and economies of scale, which may be demonstrated by substantial flows of value between components of the business as well as other similar indicia. [3.4.1.14 NMAC - N, 3/23/2021]

HISTORY OF 3.4.1 NMAC:
Pre-NMAC History: The material in this part was derived from that previously files with the State Records Center:
R.D.-C.I.T. Regulations 14:1, 14:2, Regulations Pertaining to Corporate Supported Child Care; Credits Allowed Corporation Income Tax Act Section 7-24A-14 NMSA 1978, filed 10/16/1984.
R.D.-C.I.T. Regulation 8.6:1, 8.6:2, 8.6:3, Regulations Pertaining to the Corporate Income Tax Act Section 7-2A-8.6 NMSA 1978, filed 5/17/1985.
R.D.-C.I.T. Regulations 8:1/8:2, Regulation Pertaining to Separate Accounting Defined Corporation Income Tax Act Section 7-2A-8 NMSA 1978, filed 5/12/1986.
R.D.-C.I.T. Regulation 5.1:1/2, Regulation Pertaining to Corporation Income Tax Act Section 7-2A-5.1 NMSA 1978, filed 11/18/1986.
R.D.-C.I.T. Regulation 9.1:1, Regulation Pertaining to Corporation Income Tax Act Section 7-2A-9.1 NMSA 1978, filed 11/18/1986.
C.I.T. Regulation 9:2, Regulation Pertaining to Reporting Methods for the Corporation Income Tax Act Section 7-2A-9 NMSA 1978, filed 6/2/1987.

TRD Rule 2A-88, Regulations Pertaining to the Corporate Income and Franchise Tax Act (Sections 7-2A-1 to 7-2A-13), filed 9/16/1988.
TRD Rule CIT-91, Regulations Pertaining to the Corporate Income and Franchise Tax Act 7-2A-1 to 7-2A-14 NMSA 1978, filed 1/7/1992.

History of Repealed Material: 3.4.1 NMAC, Corporate Income Taxes - General Provisions, filed 12/1/2000, Repealed 3/23/2021.

NMAC History:
3 NMAC 4.1, Corporate Income Taxes - General Provisions, filed 12/31/1996.
3.4.1 NMAC, Corporate Income Taxes - General Provisions, filed 12/1/2000.
3.4.1 NMAC, Corporate Income Taxes - General Provisions, filed 12/1/2000, Replaced by 3.4.1 NMAC, Corporate Income Taxes - General Provisions, effective 3/23/2021.

TAXATION AND REVENUE, DEPARTMENT OF

TITLE 3: TAXATION
CHAPTER 4: CORPORATE
INCOME TAXES
PART 10: RETURNS AND
REPORTING METHODS

3.4.10.1 ISSUING AGENCY: Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe NM 87504-0630. [3.4.10.1 NMAC - Rp, 3.4.10.1 NMAC, 3/23/2021]

3.4.10.2 SCOPE: This part applies to every domestic corporation and to every foreign corporation employed or engaged in the transaction of business in, into or from New Mexico or deriving any income from any property or employment in New Mexico. [3.4.10.2 NMAC - Rp, 3.4.10.2 NMAC, 3/23/2021]

3.4.10.3 STATUTORY

AUTHORITY: Section 9-11-6.2 NMSA 1978.

[3.4.10.3 NMAC - Rp, 3.4.10.3 NMAC, 3/23/2021]

3.4.10.4 DURATION:

Permanent.

[3.4.10.4 NMAC - Rp, 3.4.10.4 NMAC, 3/23/2021]

3.4.10.5 EFFECTIVE

DATE: March 23, 2021, unless a later date is cited at the end of a section, in which case the later date is the effective date.

[3.4.10.5 NMAC - Rp, 3.4.10.5 NMAC, 3/23/2021]

3.4.10.6 OBJECTIVE: The

objective of this part is to interpret, exemplify, implement and enforce the provisions of the Corporate Income and Franchise Tax Act.

[3.4.10.6 NMAC - Rp, 3.4.10.6 NMAC, 3/23/2021]

3.4.10.7 DEFINITIONS:

[RESERVED]

[3.4.10.1 NMAC - Repealed, 3/23/2021]

3.4.10.8 [RESERVED]

[3.4.10.8 NMAC - Repealed, 3/23/2021]

3.4.10.9 [RESERVED]

[3.4.10.9 NMAC - Repealed, 3/23/2021]

3.4.10.10 SEPARATE

CORPORATE ENTITY:

[RESERVED]

3.4.10.11 COMBINED

RETURNS - PRIOR TO

JANUARY 1, 2020:

A. Members of a combined group: A group of unitary corporations may include both domestic corporations and foreign corporations other than foreign corporations which are incorporated in a foreign country and are not engaged in trade or business in the United States during the taxable year. Such a group may file a state corporate income and franchise tax

return using the combination of unitary corporations method if it otherwise meets the requirements of the Corporate Income and Franchise Tax Act and regulations thereunder.

B. Base income for members of a combined group.

(1) When a group of unitary corporations files a New Mexico corporate income and franchise tax return using the combination of unitary corporations method, the base income for the combined group of unitary corporations shall be determined by completing a simulated federal corporate income tax return. In completing the simulated federal return, only the income and expenses of the combined corporations will be allowed. The simulated return shall be prepared as if the combined group was filing a federal consolidated return including only the corporations in the unitary (combined) group.

(2) When completing the simulated federal return for New Mexico income tax purposes, all procedures and adjustments allowed by the Internal Revenue Code which apply to the filing of a federal consolidated return concerning the elimination of intercompany transactions or the sale or dissolution of one of the corporations within the federal consolidated group shall be allowed, but only for those transactions between members of the combined group of unitary corporations. No adjustments shall be made or allowed for transactions with any corporation that is not a member of the combined group of unitary corporations. Otherwise, all provisions of the Internal Revenue Code which would apply to the filing of a consolidated return shall apply to the completion of the simulated return for the combined group of unitary corporations.

C. This Regulation 3.4.10.11 NMAC is retroactively applicable to taxable years beginning on or after January 1, 1992 but before January 1, 2020. For returns for taxable years beginning on or after January 1, 2020, see 3.4.10.14 NMAC.

[3.4.10.11 NMAC - Rp, 3.4.10.11 NMAC, 3/23/2021]

3.4.10.12 CONSOLIDATED

FILING ELECTION: When a group of corporations has properly made an election to file on a consolidated basis for New Mexico corporate income tax purposes, the filing group must include all of the members of the group properly included in the filed federal consolidated return.

[3.4.10.12 NMAC - N, 3/23/2021]

3.4.10.13 INFORMATION

RETURNS; RENTS AND ROYALTIES

A. Persons paying rents and royalties from oil and gas properties located in New Mexico, who are required to file internal revenue service information return form 1099-MISC on such payments, shall file the rent and royalty information with the department in the manner stated below.

(1) Persons paying such rents and royalties on properties located in New Mexico are required to segregate the New Mexico rents and royalties paid from the rents and royalties paid everywhere and report only those rents and royalties from New Mexico properties to the department. The department will accept the information on magnetic media in lieu of paper returns. The magnetic media must comply with the internal revenue service reporting requirements for filing information returns.

(2) A person who has entered into an agreement with the internal revenue service identified as "consent for internal revenue service to release tax information" will be deemed to have complied with the filing requirements of this 3.4.10.13 NMAC.

B. The due date for information returns required to be filed with the department shall be June 15 of each year following the close of the previous calendar year.

C. This section is applicable to taxable years beginning on or after January 1, 1983.

[3.4.10.13 NMAC - Rp, 3.4.10.13 NMAC 3/23/2021]

3.4.10.14 COMPUTATION OF BASE AND NET INCOME - APPLICABLE TO PERIODS BEGINNING ON OR AFTER JANUARY 1, 2020:

A. Each corporate member of a unitary filing group computes its “base income” by determining the federal taxable income or federal net operating loss of the corporation on a separate corporate basis as though the member was a separate domestic entity for the taxable year, applying the Internal Revenue Code and applicable regulations. This base income is computed after deductions provided for in Sections 241 through 249 of the Internal Revenue Code but before any deduction for net operating losses. Then, before the base income of the unitary group is determined, the members make the following adjustments to federal taxable income or net operating loss:

- (1) adding to that income:
 - (a) interest received on a state or local bond exempt under the Internal Revenue Code;
 - (b) the amount of any deduction claimed in calculating taxable income for all expenses and costs directly or indirectly paid, accrued or incurred to a captive real estate investment trust; and
 - (c) the amount of any deduction, other than for premiums, for amounts paid directly or indirectly to a commonly controlled entity that is exempt from corporate income tax pursuant to Section 7-2A-4 NMSA 1978; and
- (2) subtracting from that income:
 - (a) income from obligations of the United States net of expenses incurred to earn that income;
 - (b) other amounts that the state is prohibited from taxing because of the laws or constitution of this state or

the United States net of any related expenses;

- (c) an amount equal to one hundred percent of the Subpart F income, as that term is defined in Section 952 of the Internal Revenue Code, as that section may be amended or renumbered, included in the income of the corporation; and
- (d) an amount equal to one hundred percent of the income of the corporation under Section 951A of the Internal Revenue Code, after allowing the deduction provided in Section 250 of the Internal Revenue Code; and
- (3) making other adjustments deemed necessary to properly reflect income of the unitary group, including attribution of income or expense related to unitary assets held by related corporations that are not part of the filing group.

B. The filing group’s net income is computed by combining the member’s base income, whether positive or negative, eliminating or deferring intercompany income and expense of the filing group members in a manner consistent with the consolidated filing requirements of the Internal Revenue Code and the Corporate Income and Franchise Tax Act; and without deducting any amount of net operating loss carryover.

[3.4.10.14 NMAC - N, 3/23/2021]

3.4.10.15 NET OPERATING LOSSES OF FILING GROUPS - APPLICABLE TO TAXABLE YEARS BEGINNING ON OR AFTER JANUARY 1, 2020:

A. In general, for taxable years beginning on or after January 1, 2020, New Mexico provides that net operating loss carryovers be computed on a post-apportioned basis and that the carryover be treated as an attribute of the unitary group, subject to the limitations under the Internal Revenue Code, including the consolidated filing regulations applied to the New Mexico unitary filing group as though it was the federal consolidated group.

B. A unitary filing group calculates its net operating loss carryover as follows:

- (1) determining the amount of “grandfathered net operating loss carryover,” if any, by:
 - (a) identifying the amount of net loss properly reported to New Mexico for taxable years beginning January 1, 2013 and prior to January 1, 2020 as part of a timely filed original return, or an amended return for those taxable years filed prior to January 1, 2020, that can be attributed to a corporation or corporations which are properly included in the taxpayer’s return for the first taxable year beginning on or after January 1, 2020;
 - (b) reducing each loss identified by:
 - (i) adding back deductions for royalties or interest paid to any related corporation or group of corporations in computing the loss, but only to the extent that such adjustment would not create a net loss for that related corporation or group; and
 - (ii) subtracting net operating loss deductions taken prior to January 1, 2020 that would be properly charged against those losses consistent with the Internal Revenue Code and provisions of the Corporate Income and Franchise Tax Act applicable to the year of the deduction; and
 - (c) apportioning any remaining loss to New Mexico using the apportionment factors that can properly be attributed to the corporation or corporations for the year of the net loss.
- (2) Computing the “net operating loss carryover” as follows:
 - (a) add:
 - (i) the apportioned net loss properly reported on an original or amended tax return for taxable years beginning on or after January 1, 2020 by the taxpayer, including a filing group as properly determined under the Corporate Income and Franchise Tax Act;

(ii) the portion of an apportioned net loss properly reported to New Mexico for a taxable year beginning on or after January 1, 2020, on a separate year return, to the extent the taxpayer would have been entitled to include the portion of such apportioned net loss in the taxpayer's consolidated net operating loss carryforward under the Internal Revenue Code and consolidated filing rules if the taxpayer filed a consolidated federal return; and

(iii) the taxpayer's grandfathered net operating loss carryover; and.

(b) subtract:

(i) the amount of the net operating loss carryover attributed to an entity that has left the unitary filing group, computed in a manner consistent with the consolidated filing requirements of the Internal Revenue Code and applicable regulations, as if the taxpayer were filing a consolidated return; and

(ii) the amount of net operating loss deductions properly taken by the taxpayer.

C. For taxable years after January 1, 2020, a taxpayer may take a "net operating loss deduction" to the extent allowed under the Internal Revenue Code as of January 1, 2018 for the taxable year in which the deduction is taken, including the eighty percent limitation of Section 172(a) of the Internal Revenue Code as of January 1, 2018, calculated on the basis of the taxpayer's apportioned net income. In no case may the taxpayer's net operating loss deduction exceed eighty percent of the taxpayer's apportioned net income for the year in which the deductions taken.

[3.4.10.15 NMAC - N; 3/23/2021]

3.4.10.16 OBLIGATION OF EXCLUDED CORPORATIONS TO FILE A RETURN: When a unitary group of corporations files a return, whether it is a worldwide, water's edge, or consolidated group

return, if that return properly excludes one or more related corporations, those corporations are not relieved of the obligation to file tax returns and pay any tax owed on a separate entity basis. These corporations may separately elect to file a worldwide or water's edge return as a unitary group only if that return will include all corporations that are properly a part of that unitary group. In computing base income and net income, the corporation or corporations that properly file in a separate return from related corporations will not eliminate or defer intercompany transactions with those related corporations. [3.4.10.16 NMAC - N, 3/23/2021]

HISTORY OF 3.4.10 NMAC:

Pre-NMAC History: The material in this part was derived from that previously files with the State Records Center:

R.D.-C.I.T. Regulations 14:1, 14:2, Regulations Pertaining to Corporate Supported Child Care; Credits Allowed Corporation Income Tax Act Section 7-24A-14 NMSA 1978, filed 10/16/1984.

R.D.-C.I.T. Regulation 8.6:1, 8.6:2, 8.6:3, Regulations Pertaining to the Corporate Income Tax Act Section 7-2A-8.6 NMSA 1978, filed 5/17/1985.

R.D.-C.I.T. Regulations 8:1/8:2, Regulation Pertaining to Separate Accounting Defined Corporation Income Tax Act Section 7-2A-8 NMSA 1978, filed 5/12/1986.

R.D.-C.I.T. Regulation 5.1:1/2, Regulation Pertaining to Corporation Income Tax Act Section 7-2A-5.1 NMSA 1978, filed 11/18/1986.

R.D.-C.I.T. Regulation 9.1:1, Regulation Pertaining to Corporation Income Tax Act Section 7-2A-9.1 NMSA 1978, filed 11/18/1986.

C.I.T. Regulation 9:2, Regulation Pertaining to Reporting Methods for the Corporation Income Tax Act Section 7-2A-9 NMSA 1978, filed 6/2/1987.

TRD Rule 2A-88, Regulations Pertaining to the Corporate Income and Franchise Tax Act (Sections 7-2A-1 to 7-2A-13), filed 9/16/1988. TRD Rule CIT-91, Regulations

Pertaining to the Corporate Income and Franchise Tax Act 7-2A-1 to 7-2A-14 NMSA 1978, filed 1/7/1992.

History of Repealed Material:

3.4.10 NMAC, Returns and Reporting Methods, filed 12/1/2000, Repealed 3/23, 2021.

NMAC History:

3 NMAC 4.10, Returns and Reporting Methods, filed 12/31/96.

3.4.10 NMAC, Returns and Reporting Methods, filed 12/1/2000.

3.4.10 NMAC, Returns and Reporting Methods, filed 12/1/2000, Replaced by 3.4.10 NMAC, Returns and Reporting Methods, effective 3/23, 2021.

TAXATION AND REVENUE, DEPARTMENT OF

**TITLE 3: TAXATION
CHAPTER 5: UNIFORM
DIVISION OF INCOME FOR TAX
PURPOSES**

**PART 18: DETERMINATION
OF SALES IN THIS STATE OF
OTHER THAN TANGIBLE
PERSONAL PROPERTY FOR
INCLUSION IN SALES FACTOR**

3.5.18.1 ISSUING

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

[3.5.18.1 NMAC - Rp, 3.5.18.1 NMAC, 3/23/2021]

3.5.18.2 SCOPE: This part applies to every taxpayer having income which is taxable for income tax purposes both within and without New Mexico.

[3.5.18.2 NMAC - Rp, 3.5.18.2 NMAC, 3/23/2021]

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

[3.5.18.3 NMAC - Rp, 3.5.18.3 NMAC, 3/23/2021]

3.5.18.4 DURATION:

Permanent.
[3.5.18.4 NMAC - Rp, 3.5.18.4 NMAC, 3/23/2021]

3.5.18.5 EFFECTIVE

DATE: March 23, 2021, unless a later date is cited at the end of a section, in which case the later date is the effective date.
[3.5.18.5 NMAC - Rp, 3.5.18.5 NMAC, 3/23/2021]

3.5.18.6 OBJECTIVE:

The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Uniform Division of Income for Tax Purposes Act.
[3.5.18.6 NMAC - Rp, 3.5.18.6 NMAC, 3/23/2021]

3.5.18.7 DEFINITIONS:

[RESERVED]
[3.5.18.7 NMAC - Repealed, 3/23/2021]

3.5.18.8 SALES FACTOR

- SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN THIS STATE - APPLICABLE TO TAXABLE YEARS BEGINNING PRIOR TO JANUARY 1, 2020:

A. In general. Section 7-4-18 NMSA 1978 provides for the inclusion in the numerator of the sales factor of gross receipts from transactions other than sales of tangible personal property (including transactions with the United States government). Under Section 7-4-18 NMSA 1978 gross receipts are attributed to this state if the income producing activity which gave rise to the receipts is performed wholly within this state. Also, gross receipts are attributed to this state if, with respect to a particular item of income, the income producing activity is performed within and without this state but the greater proportion of the income producing activity is performed in this state, based on costs of performance.

B. Income producing activity: defined.

(1) The term "income producing activity" applies

to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its obtaining gains or profit. Such activity does not include transactions and activities performed on behalf of a taxpayer such as those conducted on its behalf by an independent contractor. Accordingly, income producing activity includes but is not limited to the following:

(a) the rendering of personal services by employees or the utilization of tangible or intangible property by the taxpayer in performing a service;

(b) the sale, rental, leasing, licensing or other use of real property;

(c) the rental, leasing, licensing or other use of tangible personal property; or

(d) the sale, licensing or other use of intangible personal property.

(2) The mere holding of intangible personal property is not, of itself, an income producing activity.

C. Costs of performance: defined. The term "costs of performance" means direct cost determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

D. Application:

(1) In general. Receipts (other than from sales of tangible personal property) in respect to a particular income producing activity are in this state if:

(a) the income producing activity is performed wholly within this state; or

(b) the income producing activity is performed both in and outside this state and a greater proportion of the income producing activity is performed in this state than in any other state, based on costs of performance.

(2) Special rules: The following are special

rules for determining when receipts from the income producing activities described below are in this state:

(a) Gross receipts from the sale, lease, rental or licensing of real property are in this state if the real property is located in this state.

(b) Gross receipts from the rental, lease or licensing of tangible personal property are in this state if the property is located in this state. The rental, lease, licensing or other use of tangible personal property in this state is a separate income producing activity from the rental, lease, licensing or other use of the same property while located in another state; consequently, if property is within and without this state during the rental lease or licensing period, gross receipts attributable to this state shall be measured by the ratio which the time the property was physically present or was used in this state bears to the total time or use of the property everywhere during such period.

(c) Gross receipts for the performance of personal services are attributable to this state to the extent such services are performed in this state. If services relating to a single item of income are performed partly within and partly without this state, the gross receipts for the performance of such services shall be attributable to this state only if a greater portion of the services were performed in this state, based on costs of performance. Usually where services are performed partly within and partly without this state the services performed in each state will constitute a separate income producing activity; in such case the gross receipts for the performance of services attributable to this state shall be measured by the ratio which the time spent in performing such services in this state bears to the total time spent in performing everywhere. Time spent in performing services includes the amount of time expended in the performance of a contract or other obligation which gives rise to such gross receipts. Personal service not directly connected with

the performance of the contract or other obligation, as for example, time expended in negotiating the contract, is excluded from the computations.

E. This section applies to taxable years beginning before January 1, 2020.

[3.5.18.8 NMAC - Rp, 3.5.18.8 NMAC, 3/23/2021]

3.5.18.9 SALES FACTOR - SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN THIS STATE - APPLICABLE TO TAXABLE YEARS BEGINNING ON OR AFTER JANUARY 1, 2020:

A. Sales factor: Sales other than sales of tangible personal property in this state: General rules:

(1)

Definitions. For the purposes of this Section (3.5.18.9 NMAC) these terms have the following meanings:

(a)

“Billing address” means the primary mailing address relating to a customer’s account as of the time of the transaction as kept in good faith in the normal course of business and not for tax avoidance purposes.

(b)

“Business customer” means a customer that is a business or organization operating in any form and generally includes customers other than individual customers.

(c)

“Customer” means the person with which the taxpayer has a contract for the transaction, regardless of who pays for or may benefit from the transaction.

(d)

“IRC” means the Internal Revenue Code as currently written and subsequently amended.

(e)

“Individual customer” means a customer that is a natural person.

(f)

“Intangible property” means property that is not physical or whose representation by physical means is merely incidental.

(g)

“Place of order” means the physical location from which a customer

places an order resulting in a contract with the taxpayer.

(h)

“Population” means the most recent population data maintained by the U.S. census bureau for the year in question as of the close of the taxable period.

(i)

“Related party” means any person who may exercise control of the taxpayer, or is generally controlled by the taxpayer, directly or indirectly, whether through ownership or agreement.

(j)

“Sale” in the context of Section 7-4-18 NMSA 1978 means a transaction described in that section, including a lease or license and depending on the context also means the receipts from that transaction.

(k)

“Source” means, in general, attributing a sale to a state using the rules under Section 7-4-18 NMSA, 1978 and this regulation.

(l)

“State or location where a contract of sale is principally managed by the customer” means the primary location from which a customer’s employee or agent interacts with the taxpayer and oversees the taxpayer’s activities under the contract.

(m)

“Use” means use for the intended purpose of the intangible property.

(2)

Hierarchical rules: Where a hierarchical rule applies under this regulation, a taxpayer must make a reasonable effort to apply each rule, in order, before defaulting to any subsequent rule.

(3) Rules of

reasonable approximation as provided for in Subsection B of Section 7-4-18 NMSA 1978. This regulation includes various rules of reasonable approximation for determining when a sale should be included in the New Mexico sales factor numerator. These rules apply when the proper inclusion of sales in sales factor numerator cannot be determined. The method of reasonable approximation should make use of reliable information and be applied consistently.

(4) Exclusion

of sales from the sales factor: As provided in Subsection C of Section 7-4-18 NMSA 1978, sales should be excluded from the sales factor if:

(a)

using the same rules applicable under Subsection A of Section 7-4-19 NMSA 1978 or a method of reasonable approximation under Subsection B of Section 7-4-18 NMSA 1978 used by the taxpayer to determine if sales are included in the New Mexico sales factor numerator, the sales would be sourced to a state in which the taxpayer is not taxable, as defined under Section 7-4-4 NMSA 1978 and applicable regulations; or

(b)

the taxpayer is unable to determine where sales are sourced under Subsection A of Section 7-4-18 NMSA 1978 or a proper method of reasonable approximation under Subsection B of Section 7-4-18 NMSA 1978.

(5) Related-

party transactions - Information imputed from customer to taxpayer. Where a taxpayer has receipts subject to this Section (3.5.18.9 NMAC) from transactions with a related-party customer, any information necessary to apply the rules under Subsection A Section 7-4-18 NMSA 1978 will be imputed to the taxpayer and the taxpayer may not use a rule of reasonable approximation to determine if those sales should be included in the New Mexico sales factor numerator or should be excluded from the sales factor under Subsection C Section 7-4-18 NMSA 1978.

(6) No

limitation on Section 7-4-19 NMSA 1978. Nothing in this regulation limits the authority granted to the department under Section 7-4-19 NMSA 1978. Regulations adopted pursuant to Section 7-4-19 NMSA 1978 control to the extent they conflict with provisions of this regulation.

B. Sale, rental, lease or license of real property. In the case of a sale, rental, lease or license of real property, the receipts from the sale are

in New Mexico if and to the extent that the property is in New Mexico.

C. Rental, lease or license of tangible personal property: In the case of a rental, lease or license of tangible personal property, the receipts are from the sale of tangible personal property in New Mexico if and to the extent that the tangible personal property is located in New Mexico. If property is mobile property that is located both within and without New Mexico during the period of the lease or other contract, the receipts are assigned to New Mexico in the same percentage as the time the property is used in the state.

D. Sale of a service: general rule - Determining the category of a service. The receipts are from a sale of a service in New Mexico if and to the extent that the product of the service or the service is delivered to a location in New Mexico. These rules in this subsection define three general categories of services and set out rules for when a service in that category is delivered in New Mexico. A service may fall into more than one category. If a service could be characterized as both an in-person service and a professional service, it will be deemed an in-person service. The third category of service - other services - excludes services that can be categorized and assigned based on the rules for in-person or professional services.

(1) In-person services: An in-person service is a service that is physically performed by the taxpayer, whether through employees, agents, or by third parties on behalf of the taxpayer, while in the same location as the customer or on the customer's real or tangible personal property. Examples include: health care services; in-person training or entertainment; child care services; repair, installation, cleaning or maintenance services; and construction and similar services.

(a) Determining the New Mexico sales factor numerator. Sales of in-person services are included in the New Mexico sales factor numerator if those

services are performed on a customer or the customer's property in the state.

(b) Reasonable approximation. If the taxpayer has insufficient information to determine where its in-person services are performed, the taxpayer shall reasonably approximate where those sales are sourced using general information on customers' locations or other similar information.

(2) Professional services. In general. Professional services are services performed for customers by the taxpayer's employees or agents, or by third parties on behalf of the taxpayer, which require the application of specialized knowledge or skill to the customer's particular facts and circumstances, but exclude in-person services. Examples include: management, consulting and similar services; financial and investment services not subject to 3.5.19.17 NMAC; technology and data processing services; legal services; and architectural, engineering and design services.

(a) Determining the New Mexico sales factor numerator: The following hierarchy of rules apply:

(i) Architectural and engineering services with respect to real or tangible personal property. If the service is an architectural or engineering service, it is included in the New Mexico sales factor numerator if the service relates to real estate improvements or tangible personal property located, or expected to be located, in the state.

(ii) Related party transactions. If the customer is a related party, then the taxpayer's sale of the services to that customer are included in the New Mexico sales factor numerator to the extent of that customer's New Mexico apportionment factor as properly determined under Section 7-4-1, et seq. NMSA 1978 and applicable regulations.

(iii) Large individual or business customers: If the sale is to an individual or business customer to

which the taxpayer sells five percent or more of its total professional services in a single year, then the sale is included in the New Mexico sales factor numerator: (1) if the customer is an individual customer whose residence is New Mexico, or (2) if the customer is a business customer and the place where the contract for professional services is primarily managed by the customer is in New Mexico.

(iv) Other individual customers: If the taxpayer has information to accurately determine where an individual customer takes delivery of the sale of the professional service, then that sale is included in the New Mexico sales factor numerator if the customer took delivery of the service in New Mexico. Otherwise, the sale is included in the New Mexico sales factor numerator if the customer's primary billing address is in the state.

(v) Other business customers: If the taxpayer has information to accurately determine the location from which the contract for professional services is principally managed by a business customer, then the sale is included in the New Mexico sales factor numerator if that location is in New Mexico. Otherwise, the sale is included in the sales factor numerator if the customer's billing address is in New Mexico.

(b) Reasonable approximation: If, in applying the rules under (iv) and (v) above, the taxpayer lacks information to determine the customer's primary billing address (for example, if someone other than the customer is paying for the service) the taxpayer may use a method of reasonable approximation to determine whether the sales for which the information is lacking are included in the New Mexico sales factor numerator and to determine the sourcing of those sales for purposes of Subsection C of Section 7-4-18 NMSA 1978.

(3) Other services. Services other than in-person or professional services are sourced under this Paragraph

(3) of Subsection D of 3.5.18.9 NMAC. The rules in this paragraph may distinguish services based on whether they are delivered physically or electronically, whether they are delivered to a customer or to a third party (including the customer's customer), and whether the customer is an individual or business customer. If a rule depends on whether the customer is an individual or a business customer, and the taxpayer acting in good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer.

(a)

Services delivered by physical means to a customer or a third party. Services delivered by physical means to a customer or third party exclude in-person and professional services, but generally include delivery services, themselves, and services that produce a physical product which is then delivered by the taxpayer. In addition to delivery services, examples include: items designed and printed by the taxpayer to the order of the customer that are delivered to the customer's customers by mail; and customized software services where the software is physically installed on the customer's computer.

(i)

Determining the New Mexico sales factor numerator. The sale of services delivered by physical means to a customer or third party are delivered are included in the New Mexico sales factor numerator if the delivery takes place in New Mexico.

(ii)

Rule of reasonable approximation. If the taxpayer cannot determine where services are actually delivered, the taxpayer may use a method of reasonable approximation determine sales that will be included in the New Mexico sales factor, and for purposes of Subsection C of 7-4-18 NMSA 1978, including the use of population or other information.

(b)

Services delivered electronically to a customer. Services delivered electronically include services that are

transmitted by any electronic medium whether or not the service provider owns, leases or otherwise controls medium.

(i)

Determining the New Mexico sales factor numerator. In the case of the sale of a service delivered electronically, the following hierarchy of rules apply: (a) if the sale is to a related party, the sale is included in the New Mexico sales factor numerator to the extent of that customer's New Mexico apportionment factor as properly determined under Section 7-4-1, et seq. NMSA 1978 and applicable regulations; (b) if the sale is to an individual or business customer to which the taxpayer sells five percent or more of its total other services in a single year, the sale is included in the New Mexico sales factor numerator: if the customer is an individual customer whose residence is New Mexico, or if the customer is a business customer and the place where the contract for professional services is primarily managed by the customer is in New Mexico; and (c) if the sale is to a customer other than a customer described in (a) or (b), the sale is included in the New Mexico sales factor numerator if the customer's primary billing address is in the state.

(ii)

Reasonable Approximation: If, in applying the rule under sub-item (c) of item (i) above, the taxpayer lacks information to determine the customer's primary billing address (for example, if someone other than the customer is paying for the service) the taxpayer may use a method of reasonable approximation to determine whether the sales for which the information is lacking are included in the New Mexico sales factor numerator and to determine the sourcing of those sales for purposes of Subsection C of Section 7-4-18 NMSA 1978.

(c)

Services delivered electronically on behalf of a customer to a third party. A service delivered electronically "on behalf of" a customer is one in

which a customer contracts for the service to be delivered electronically directly by the taxpayer or through one or more intermediaries, provided the service does not change its form, to one or more third parties who are the customer's intended recipients of the service. Examples include: delivery of electronic advertising to a customer's intended audience and subcontracted services performed electronically for the customer's customers.

(i)

determining the New Mexico sales factor numerator. The sale of a service delivered electronically to third-party recipients on behalf of the customer is delivered in New Mexico if and to the extent that the third-party recipients are in New Mexico;

(ii)

rule of reasonable approximation. If the taxpayer cannot determine the state or states where the sales of a service delivered electronically are actually delivered to the customer's intended third-party recipients, the taxpayer may use a method of reasonable approximation to determine whether the sales are included in the New Mexico sales factor numerator and to determine the sourcing of those sales for purposes of Subsection C of Section 7-4-18 NMSA 1978.

E. Sale, lease, or

license of intangible property.

General rule. Sourcing of receipts from the sale, lease or license of intangible property depends primarily on the nature of the intangible property and the method by which receipts are determined, rather than on whether the transaction is a true sale, lease or license.

(1) Contract

right or government license that authorizes activity in specific geographic area. In the case of a sale, lease or license of a contract right, government license or similar intangible property that authorizes the holder to conduct a activity in a specific geographic area, the receipts from the sale are included in the New Mexico sales factor numerator to the extent that the intangible property is

used or is authorized to be used within the state.

(2) Marketing intangible: The receipts from granting a right to use intangible property in connection with the sale, lease, license, or other marketing of goods or services to a consumer are included in the New Mexico sales factor numerator to the extent of the sale or provision of those goods or services is located or occurs in New Mexico. Examples of marketing intangibles include trademarks, service marks and trade names.

(3) Production intangible: The receipts from granting a right to use intangible property, other than a marketing intangible, used in manufacturing (a "production intangible") are included in the New Mexico sales factor numerator to the extent that the use for which the fees are paid takes place in New Mexico.

(4) Mixed intangible: The receipts from a sale, lease or license transaction that involves a mixture of a marketing and production intangible may be included in the New Mexico sales factor as provided in Paragraphs (2) or (3) of Subsection E of 3.5.18.9 NMAC on the basis of the taxpayer's separate statement of these rights, and the related receipts, to the customer as part of the contract with the customer. Otherwise, the receipts will be treated as receipts from a marketing intangible.

(5) Intangible property that resembles a sale of goods or services, including digital goods and services. If receipts from the sale, lease or license of intangible property resembles the sale of a goods or services such that other rules under Section 7-4-17-18 NMSA 1978, or these or other regulations of the department can accurately and appropriately be used to source those receipts, including rules of reasonable approximation, the receipts are included in the New Mexico sales factor numerator as provided in those rules.

(6) Sublicenses. If the receipts from the sale, lease or license of intangible

property is to a customer that the taxpayer is aware will grant a sublicense to others, regardless of the form that sublicense may take, and if the taxpayer's own receipts are determined based on its customer's sublicensing of the intangible property, then the taxpayer shall use the rules under this regulation, including rules of reasonable approximation, that would apply to the sourcing of its customer's receipts to determine the sales to be included in the New Mexico sales factor numerator. It is not necessary for the application of this paragraph for the taxpayer to use the same method actually used by its customer to source the sublicensing receipts.

(7) Software transactions - Generally: Receipts from the sale, lease or license of software, whether "canned" or custom, is treated as the sale, lease or license of tangible personal property, rather than intangible property or the performance of a service, except that, to the extent necessary, the taxpayer may use a method of reasonable approximation under these rules if the taxpayer lacks information to determine where the software is delivered.

F. Mediation: Whenever a taxpayer is subjected to different sourcing methodologies regarding intangibles or services, by the department and one or more other state taxing authorities, the taxpayer may petition for, and the department may participate in, and encourage the other state taxing authorities to participate in, non-binding mediation in accordance with the alternative dispute resolution rules promulgated by the multistate tax commission from time to time, regardless of whether all the state taxing authorities are members of the multistate tax compact. [3.5.18.9 NMAC - N, 3/23/2021]

HISTORY OF 3.5.18 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: BOR 71-1, (Income Tax Regulation

10-1) Attachment of Federal Schedule C to New Mexico Income Tax Return, filed 1/5/1971.

BOR 72-1, Regulation for Income Tax Act Section 72-15A-10 NMSA 1953, filed 1/12/1972.

BOR 72-2, (Income Tax Reg. 10-2) Filing of New Mexico Partnership Returns, filed 1/18/1972.

R.D.I.T. Regulation 12:2, Regulation Pertaining to Requirement for the Acceptance of Computer Generated Form PIT-1 and Related Schedules Income Tax Act, Section 7-2-12 NMSA 1978, filed 4/2/1984.

I.T. Regulation 12:4, Regulation Pertaining to Requirement for the Acceptance of Computer Generated Form PIT-1 and Related Schedules Income Tax Act, Section 7-2-12 NMSA 1978, filed 9/4/1987.

R.D.-I.T. Regulation 12:3, Regulation Pertaining to Requirement for the Preparation of Acceptable Reproductions of New Mexico Income Tax Forms Income Tax Act Section 7-2-12 NMSA 1978, filed 4/18/1984.

BOR 74-1, Regulations in Effect and Pertaining to the New Mexico Income Tax Act and the New Mexico Uniform Division of Income for Tax Purposes Act, filed 1/15/1974.

TRD Rule 4-88, Regulations Pertaining to the Uniform Division of Income for Tax Purposes Act Sections 7-4-1 to 7-4-21 NMSA 1978, filed 9/16/1988.

TRD Rule UDI-93, Regulations Pertaining to the Uniform Division of Income for Tax Purposes Act, Sections 7-4-1 through 7-4-21 NMSA 1978, filed 9/20/1993.

History of Repealed Material:

3.5.18 NMAC, Determination of Sales in this State of Other than Tangible Personal Property for Inclusion in Sales Factor, filed 6/18/2001 Repealed 3/23/2021.

NMAC History: 3 NMAC 5.18, Determination of Sales in this State of Other than Tangible Personal Property for Inclusion in Sales Factor, filed 12/31/1996.

3.5.18 NMAC, Determination of Sales in this State of Other than

Tangible Personal Property for Inclusion in Sales Factor, filed 6/18/2001.

3.5.18 NMAC, Determination of Sales in this State of Other than Tangible Personal Property for Inclusion in Sales Factor, filed 6/18/2001 was replaced by 3.5.18 NMAC, Determination of Sales in this State of Other than Tangible Personal Property for Inclusion in Sales Factor, effective 3/23/2021.

TAXATION AND REVENUE, DEPARTMENT OF

This is an amendment to 3.4.14 NMAC, added Section 11, effective 3/23/2021.

3.4.14.11 TAX CREDITS: APPLICATION TO UNITARY GROUPS: With respect to taxable years beginning on or after January 1, 2020, when any corporation properly files as part of a worldwide, water's edge or consolidated return, if that corporation has qualified for and continues to hold an unused amount of New Mexico tax credit that it could properly take against its tax liability in a particular taxable year, then that unused amount of tax credit may be applied against the tax liability of the unitary group in accordance with the law applicable to that credit. Any other limitations on the credit apply in the same manner to the unitary group as they would apply to the corporation that holds the credit.
[3.4.14.11 NMAC - N, 3/23/2021]

TAXATION AND REVENUE, DEPARTMENT OF

This is an amendment to 3.5.4 NMAC, Sections 9, 10 and 11 effective 3/23/2021.

3.5.4.9 TAXABLE IN ANOTHER STATE - WHEN A TAXPAYER IS "SUBJECT TO" A TAX - FOR TAXABLE YEARS BEGINNING PRIOR TO

JANUARY 1, 2020:

A. A taxpayer is "subject to" one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 if it carries on business activity in such state and such state imposes or has the ability to impose such a tax thereon. Any taxpayer which asserts that it is subject to one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 in another state shall furnish to the department upon its request evidence to support such assertion. The department may request that such evidence include proof that the taxpayer has filed the requisite tax return in such other state and has paid any taxes imposed under the law of such other state; the taxpayer's failure to produce such proof may be taken into account in determining whether the taxpayer in fact is subject to one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 in such other state.

B. If the taxpayer voluntarily files and pays one or more of such taxes when not required to do so by the laws of that state or pays a minimal fee for qualification, organization or for the privilege of doing business in that state, but

(1) does not actually engage in business activity in that state; or

(2) does actually engage in some business activity, not sufficient for nexus, and the minimum tax bears no relation to the taxpayer's business activity within such state, the taxpayer is not "subject to" one of the taxes specified within the meaning of Subsection A of Section 7-4-4 NMSA 1978.

C. The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income tax even though every state does not do so. In states which do not, other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes enumerated in Subsection A of Section 7-4-4 NMSA 1978 which may be considered as basically

revenue raising rather than regulatory measures shall be considered in determining whether the taxpayer is "subject to" one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 in another state.

D. When determining whether a taxpayer is taxable in another state, the term "taxpayer" shall apply to each separate member of a combined or consolidated filing group and shall not apply to the group as a single taxpaying entity, unless the taxpayer can demonstrate that application of this rule will subject it to multiple taxation based on the application of a contrary rule in the other state.

E. This version of this section applies to taxable years beginning prior to January 1, 2020. For tax periods beginning on or after January 1, 2020 see 3.5.4.11 NMAC. [1/15/1974, 9/15/1988, 9/20/1993, 1/15/1997; 3.5.4.9 NMAC - Rn & A, 3 NMAC 5.4.9, 6/29/2001; A, 3/23/2021]

3.5.4.10 TAXABLE IN ANOTHER STATE - WHEN A STATE HAS JURISDICTION TO SUBJECT A TAXPAYER TO A NET INCOME TAX FOR TAXABLE YEARS BEGINNING PRIOR TO JANUARY 1, 2020:

The second test, that of Subsection B of Section 7-4-4 NMSA 1978, applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such business activity under the constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272, 15 U.S.C.A. Sections 381-385. In the case of any "state" as defined in Section 7-4-2 NMSA 1978 other than a state of the United States or political subdivision of such state, the determination of whether such "state" has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applied in that "state". If jurisdiction is otherwise present,

such “state” is not considered as without jurisdiction by reason of the provisions of a treaty between that “state” and the United States. This section applies to taxable years beginning prior to January 1, 2020. For taxable years beginning on or after January 1, 2020 see 3.4.11 NMAC.

[1/15/1974, 9/15/1988, 9/20/1993, 1/15/1997; 3.5.4.10 NMAC - Rn & A, 3 NMAC 5.4.10, 6/29/2001; A, 3/23/2021]

3.5.4.11 TAXABLE IN ANOTHER STATE; WHEN A TAXPAYER IS “SUBJECT TO” A TAX - FOR TAXABLE YEARS BEGINNING ON OR AFTER

JANUARY 1, 2020: For periods beginning on or after January 1, 2020. New Mexico follows the so-called Finnigan approach. This approach determines when a corporation will be deemed to be taxable in New Mexico as well as to the question of when a taxpayer is “taxable in another state” for purposes of Section 7-4-4 NMSA 1978, and sourcing of sales under Sections 7-4-17 and 7-4-18 NMSA 1978. In general, under the Finnigan approach, New Mexico looks to the activities of the unitary group, or if the group has elected to file a consolidated return, to the activities of the consolidated group, to determine if any member of the group is taxable in New Mexico or in another state. If the group, or any member of the group, could be subjected to New Mexico corporate income tax under both constitutional principles and any applicable federal statutory law, then all members of the group are taxable in New Mexico. Similarly, when determining if a member of the group is “taxable in another state,” if the state has jurisdiction to impose such a tax on the unitary business in whatever form it may allow that unitary business to file, whether or not it does impose such a tax, then all members of that unitary group are taxable in that state. This version of this section applies to taxable years beginning on or after January 1, 2020. [3.5.4.11 NMAC - N, 3/23/2021]

TAXATION AND REVENUE, DEPARTMENT OF

This is an amendment to 3.5.10 NMAC, Section 8 effective 3/23/2021.

3.5.10.8

[APPORTIONMENT FORMULA:

A. Except for taxpayers who are manufacturers and taxpayers using a special apportionment formula under Section 7-4-19 NMSA 1978, all business income of the trade or business of the taxpayer shall be apportioned to this state by use of the single-weighted sales apportionment formula set forth in Section 7-4-10 NMSA 1978.

B. For taxable years beginning on or after January 1, 1995, manufacturers who have elected to apportion in accordance with the double-weighted sales apportionment formula set forth in Section 7-4-10 NMSA 1978 shall apportion in accordance with that double-weighted sales apportionment formula for every taxable year covered by the election. A taxpayer who files a combined or consolidated return and who elects to use the double-weighted sales apportionment formula for any eligible manufacturer included in the return must use the double-weighted sales apportionment formula for all eligible manufacturers included in the return.

C. The elements of both apportionment formulae set forth in Section 7-4-10 NMSA 1978 are the property factor, the payroll factor and the sales factor of the trade or business of the taxpayer.]

[RESERVED]

[1/15/1974, 9/15/1988, 9/20/1993, 1/15/1997, 10/29/199999; 3.5.10.8 NMAC - Rn & A, 3 NMAC 5.10.8, 6/29/2001; Repealed, 3/23/2021]

TAXATION AND REVENUE, DEPARTMENT OF

This is an amendment to 3.5.16 NMAC, Section 11 effective 3/23/2021.

3.5.16.11 EFFECT OF COMBINED FILING ON THE SALES FACTOR: For corporations that file on a combined or consolidated basis, the sales factor for the filing group is calculated without the inclusion of intercompany sales that would otherwise be deferred or eliminated under federal consolidated filing rules when calculating net income for the group. [3.5.16.11 NMAC - N; 3/23/2021]

End of Adopted Rules

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Other Material Related to Administrative Law

ENVIRONMENT DEPARTMENT ENVIRONMENTAL IMPROVEMENT BOARD

NOTICE OF PUBLIC COMMENT AND HEARING

The New Mexico Environmental Improvement Board (“Board”) will hold a virtual public hearing on May 28, 2021 beginning at 9:00 a.m. via video conferencing and teleconferencing application Zoom. Comments will also be received via email through the conclusion of the hearing. The Board will consider the matter of EIB 21-05, a proposed certification by the New Mexico Environment Department (“NMED”) that New Mexico has an adequate, federally-approved State Implementation Plan (“SIP”) that addresses elements of Clean Air Act (“CAA”) Section 110(a)(2) infrastructure plan (“iSIP”), as applicable to the 2015 ozone National Ambient Air Quality Standard (“NAAQS”).

To join via video conference, go to: <https://zoom.us/j/91027258886?pwd=V205Nm11OGF5ekhRS2M2MFhNYVQ3QT09>
Meeting ID: 910 2725 8886
Passcode: 646285

To join via teleconference, dial: 1-346-248-7799 and enter the meeting ID and access code above.

To comment via email, send correspondence to : Pamela.jones@state.nm.us.

If you are having difficulties joining the meeting, please contact Pam Jones at (505) 660-4305 or Lorrie Gasca at (505) 231-0914.

The hearing is being held via internet, email and telephonic means due to the concerns surrounding the Novel Coronavirus 2019 (“COVID-19”) and in accordance with Governor

Michelle Lujan Grisham’s Declaration of a Public Health Emergency in Executive Order 2020-004 and subsequent orders; various Public Health Emergency Orders limiting mass gatherings; and the Office of the Attorney General’s Open Government Division’s Guidance to Public Entities Regarding the Open Meetings Act and Inspection of Public Records Act Compliance During COVID-19 State of Emergency.

The purpose of the hearing is to consider the matter of EIB 21-05 to certify that New Mexico has an adequate, federally-approved SIP that addresses CAA Section 110(a)(2)(D) (i) regarding interstate transport of air pollution in this submittal. The proposed certification confirms to the U.S. Environmental Protection Agency (“EPA”) that the State of New Mexico has the required “infrastructure” in place under the current SIP to implement, maintain, and enforce the revised 2015 Ozone NAAQS and fulfills its “good neighbor” obligations under the CAA.

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

The proposed certification may be reviewed on NMED’s web site at https://www.env.nm.gov/aqb/prop_regs.html, or by contacting Michael Baca at michael.baca@state.nm.us. You may also contact Michael Baca if interested in attending an informational open house on the proposed certification or submitting comments. NMED will respond in writing to all comments regarding the SIP certification if received by 5:00 p.m. MDT on April 22, 2021.

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures) Environmental Improvement Board, the Environmental Improvement Act, Section 74-1-9 NMSA 1978, the Air Quality Control Act Section 72-2-6

NMSA 1978, and other applicable procedures. The proposed certification was developed by NMED to comply with the requirements contained in Section 110 of the CAA and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans.

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

- (1) Identify the person for whom the witness(es) will testify;
- (2) identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background;
- (3) include a copy of the direct testimony of each technical witness in narrative form;
- (4) include the text of any recommended modifications to the proposed regulatory change; and
- (5) list and attach all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 pm on May 7, 2021, and should reference the docket number, EIB 21-05 and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Pamela Jones, Board Administrator
Environmental Improvement Board
P.O. Box 5469
Santa Fe, NM 87502
Tel (505) 827-2425
Fax (505) 827-2836
email: pamela.jones@state.nm.us

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

A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing, or submit it at the hearing. A member of the general public may submit a written statement to Pamela Jones, Board Administrator at the address provided above.

Persons having a disability who need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing contact Pamela Jones no later than May 7, 2021 at (505) 827-2425 or pamela.jones@state.nm.us.

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

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 and 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination

programs, policies or procedures, you may contact:

Kathryn Becker, Non-Discrimination Coordinator
New Mexico Environment Department
1190 St. Francis Dr., Suite N4050
P.O. Box 5469
Santa Fe, NM 87502
(505) 827-2855
nd.coordinator@state.nm.us

If you believe that you have been discriminated against with respect to a NMED program or activity, you may contact the Non-Discrimination Coordinator identified above or visit our website at <https://www.env.nm.gov/non-employee-discrimination-complaint-page/> to learn how and where to file a complaint of discrimination.

**JUNTA DE MEJORAMIENTO
AMBIENTAL DE NUEVO
MÉXICO
AVISO DE COMENTARIOS
PUBLICOS Y AUDIENCIA**

La Junta de Mejoramiento Ambiental de Nuevo México ("Junta") celebrará una audiencia pública virtual el 28 de mayo de 2021, a partir de las 9:00 a.m., a través de videoconferencia y teleconferencia de la aplicación Zoom. También se recibirán comentarios por correo electrónico hasta la conclusión de la audiencia. La Junta considerará el asunto de la EIB 21-05, una certificación propuesta por el Departamento de Medio Ambiente de Nuevo México ("NMED" por sus siglas en inglés) de que Nuevo México tiene un Plan Estatal de Implementación ("SIP" por sus siglas en inglés) adecuado y aprobado por el gobierno federal que aborda elementos del plan de infraestructura ("iSIP") Sección 110(a)(2) de la Ley de Aire Limpio ("CAA" por sus siglas en inglés), según sea aplicable al Estándar Nacional de Calidad del Aire Ambiental del ozono de 2015 ("NAAQS" por sus siglas en inglés).

Para unirse por videoconferencia, vaya a

<https://zoom.us/j/91027258886?pwd=V205Nm110GE5ekhRSHI2MFhNYVQ3QT09>

Identificación de la reunión: 910 2725 8886

Código de acceso: 646285

Para unirse por teleconferencia, marque: 1-346-248-7799 e ingrese el número de identificación de la reunión y el código de acceso anteriores.

Para hacer comentarios por correo electrónico, envíe la correspondencia a: Pamela.jones@state.nm.us.

Si tiene dificultades para unirse a la reunión, comuníquese con Pam Jones (505) 660-4305 o con Lorrie Gasca (505) 231-0914.

La audiencia se está llevando a cabo a través de Internet, correo electrónico y medios telefónicos debido a las preocupaciones en torno al Nuevo Coronavirus 2019 ("COVID-19") y de acuerdo con la Declaración de Emergencia de Salud Pública de la gobernadora Michelle Luján Grisham en la Executive Order 2020-004 (Orden Ejecutiva 2020-004) y las órdenes subsiguientes; varias órdenes de emergencia de salud pública que limitan las reuniones masivas; y Guidance (Guía) de la División de Gobierno Abierto de la Oficina del Procurador General para las Entidades Públicas con respecto a la Ley de Reuniones Abiertas y el Cumplimiento de la Ley de Inspección de Registros Públicos durante el Estado de Emergencia COVID-19.

El propósito de la audiencia es considerar el asunto de la EIB 21-05 para certificar que Nuevo México tiene un SIP adecuado, aprobado por el gobierno federal, que aborda la Sección 110(a)(2)(D)(i) de la CAA con respecto al transporte interestatal de la contaminación del aire en esta presentación. La certificación propuesta confirma a la Agencia de Protección Ambiental de los Estados Unidos ("EPA" por sus siglas en inglés) que el Estado de Nuevo México cuenta con la

“infraestructura” requerida bajo el SIP actual para implementar, mantener y hacer cumplir el NAAQS de ozono revisado de 2015 y cumple con sus obligaciones de “buen vecino” bajo la CAA.

El proponente de esta adopción y revisión reglamentaria es el Departamento de Medio Ambiente de Nuevo México (“NMED” por sus siglas en inglés).

La certificación propuesta puede revisarse en el sitio web del NMED en https://www.env.nm.gov/aqb/prop_regs.html, o comunicándose con Michael Baca en michael.baca@state.nm.us. También puede comunicarse con Michael Baca si está interesado en asistir a una jornada de puertas abiertas informativa sobre la certificación propuesta o en presentar comentarios. El NMED responderá por escrito a todos los comentarios relativos a la certificación del SIP si se reciben a más tardar hasta el 22 de abril de 2021.

La audiencia se llevará a cabo de acuerdo con 20.1.1 NMAC (Procedimientos de Reglamentación) Junta de Mejoramiento Ambiental, la Ley de Mejoramiento Ambiental, Sección 74-1-9 NMSA 1978, la Ley de Control de la Calidad del Aire Sección 72-2-6 NMSA 1978, y otros procedimientos aplicables. La certificación propuesta fue elaborada por el NMED para cumplir con los requisitos contenidos en la Sección 110 de la CAA y el 40 CFR Parte 51, Requisitos para la Preparación, Adopción y Presentación de Planes de Implementación.

Todas las personas interesadas tendrán una oportunidad razonable en la audiencia para presentar pruebas, datos, puntos de vista y argumentos pertinentes, de forma oral o por escrito, presentar pruebas instrumentales e interrogar a los testigos. Las personas que deseen presentar un testimonio técnico deberán presentar a la Junta un aviso por escrito de su intención de hacerlo. El aviso de intención deberá:

- (1) Identificar a la persona para la cual el testigo o testigos testificarán;
- (2) identificar cada uno de los testigos técnicos que la persona tiene intención de presentar e indicar las cualificaciones de dicho testigo, incluida una descripción de su historial académico y laboral;
- (3) incluir una copia del testimonio directo de cada testigo técnico en forma narrativa
- (4) incluir el texto de cualquier modificación recomendada al cambio reglamentario propuesto; y
- (5) enumerar y adjuntar todas las pruebas instrumentales que se prevé que ofrezca esa persona en la audiencia, incluida cualquier declaración propuesta de los motivos para adoptar las normas.

Los avisos de intención para la audiencia deben recibirse en la Oficina de la Junta a más tardar a las 5:00 p.m., del 7 de mayo de 2021, y deben hacer referencia al número de expediente, EIB 21-05 y a la fecha de la audiencia. Los avisos de la intención de presentar un testimonio técnico deben enviarse a

Pamela Jones, administradora de la Junta
Junta de Mejoramiento Ambiental
P.O. Box 5469
Santa Fe, NM 87502
Tel. (505) 827-2425
Fax (505) 827-2836
correo electrónico: pamela.jones@state.nm.us

Cualquier miembro del público puede testificar en la audiencia. No se requiere aviso previo para presentar un testimonio no técnico en la audiencia. Cualquier miembro puede también ofrecer pruebas instrumentales relacionadas con ese testimonio, siempre y cuando la prueba instrumental no sea indebidamente repetitiva del testimonio.

Los miembros del público que deseen presentar una declaración por escrito para que conste en el registro, en lugar de prestar testimonio oral en

la audiencia, deberán presentar la declaración por escrito antes de la audiencia, o presentarla durante la audiencia. Los miembros del público pueden presentar una declaración por escrito a Pamela Jones, administradora de la Junta, a la dirección indicada anteriormente.

Las personas con discapacidad que necesiten un lector, un amplificador, un intérprete calificado de lenguaje de señas o cualquier otra forma de ayuda o dispositivo auxiliar para asistir o participar en la audiencia deben comunicarse con Pamela Jones a más tardar hasta el 7 de mayo de 2021 llamado al (505) 827-2425 o pamela.jones@state.nm.us

La Junta puede tomar una decisión sobre la certificación propuesta al término de la audiencia, o la Junta puede convocar una reunión después de la audiencia para considerar la acción sobre la propuesta.

El NMED no discrimina por motivos de raza, color, origen nacional, discapacidad, edad o sexo en la administración de sus programas o actividades, tal y como exigen las leyes y reglamentos aplicables. El NMED es responsable de la coordinación de los esfuerzos de cumplimiento y de la recepción de las consultas relativas a los requisitos de no discriminación implementados por el 40 C.F.R. Partes 5 y 7, incluido el Título VI de la Ley de Derechos Civiles de 1964, según enmendada; la Sección 504 de la Ley de Rehabilitación de 1973; la Ley de Discriminación por Edad de 1975, el Título IX de las Enmiendas de Educación de 1972, y la Sección 13 de las Enmiendas de la Ley Federal de Control de la Contaminación del Agua de 1972. Si tiene alguna pregunta sobre este aviso o sobre cualquiera de los programas, políticas o procedimientos de no discriminación de NMED, puede ponerse en contacto con

Kathryn Becker, coordinadora de no discriminación
Departamento de Medio Ambiente de

Nuevo México
1190 St. Francis Dr., Suite N4050
P.O. Box 5469
Santa Fe, NM 87502
(505) 827-2855
nd.coordinator@state.nm.us

Si cree que ha sido discriminado con respecto a un programa o actividad de NMED, puede ponerse en contacto con el Coordinador de No Discriminación identificado arriba o visitar nuestro sitio web en <https://www.env.nm.gov/non-employee-discrimination-complaint-page/> para aprender cómo y dónde presentar una queja de discriminación.

**GOVERNOR,
OFFICE OF THE**

EXECUTIVE ORDER 2021-010

**RENEWING THE STATE
OF PUBLIC HEALTH
EMERGENCY INITIALLY
DECLARED IN EXECUTIVE
ORDER 2020-004, OTHER
POWERS INVOKED IN
THAT ORDER, AND ALL
OTHER ORDERS AND
DIRECTIVES CONTAINED IN
EXECUTIVE ORDERS TIED
TO THE ONGOING PUBLIC
HEALTH EMERGENCY**

On December 31, 2019, several cases of pneumonia with an unknown cause were detected in Wuhan City, Hubei Province, China, and reported to the World Health Organization (“WHO”). The underlying virus giving rise to those reported instances of respiratory illness was later identified as a novel coronavirus disease which has been referred to as “COVID-19.”

By the time the first COVID-19 cases had been confirmed in New Mexico, on March 11, 2020, COVID-19 had already spread globally and throughout the United States. At that time, more than 100,000 people had been infected globally and there were more than 1,000 cases in the United States, spread out over 39

states. The President of the United States declared a national state of emergency for COVID-19 on March 13, 2020. As of March 4, 2021 the Centers for Disease Control and Prevention (“CDC”) reported over 28 million people have been infected in the United States, with over 517,000 related deaths, and the New Mexico Department of Health has reported 186,156 positive COVID-19 cases and 3,769 related deaths in New Mexico.

Public health organizations have implemented emergency measures intended to slow the spread of COVID-19. For example, on January 20, 2020, the CDC activated its Emergency Operations Center in response to the COVID-19 outbreak. The WHO declared a Public Health Emergency of International Concern shortly thereafter. All of our sister states have declared a state of emergency and implemented significant measures and deployed substantial resources to fight the spread of COVID-19.

New Mexico has taken aggressive measures to reduce the spread of COVID-19 and to mitigate its impacts. I have been in frequent contact with federal and state agencies and officials who are coordinating their efforts and resources to fight COVID-19. Various state agencies have been at the forefront of our State’s response to COVID-19, particularly the New Mexico Department of Health. The hard work of a variety of state employees has made a difference in our fight against COVID-19. Due to the continued spread of COVID-19, it is necessary for all branches of State government to continue taking actions to minimize transmission of COVID-19 and to reduce its attendant physical and economic harms.

Therefore, for the reasons above, I, Michelle Lujan Grisham, Governor of the State of New Mexico, by virtue of the authority vested in me by the Constitution and laws of the State of New Mexico, hereby ORDER and DIRECT:

1. In consultation with the New Mexico Department of Health, I have determined that the statewide public health emergency proclaimed in Executive Order 2020-004, and renewed in Executive Orders 2020-022, 2020-026, 2020-030, 2020-036, 2020-053, 2020-55, 2020-059, 2020-064, 2020-073, 2020-080, 2020-085, 2021-001, and 2021-004 shall be renewed and extended through April 2, 2021.

2. All other powers, directives, and orders invoked in Executive Order 2020-004 remain in effect.

3. All other Executive Orders with a duration that was tied to the COVID-19 public health emergency or that was not explicitly stated shall continue with the same effect, including any orders appropriating emergency funding as well as Executive Orders 2020-016, 2020-020, 2020-021, 2020-025, and 2020-039.

This Order supersedes any previous orders, proclamations, or directives in conflict. This Executive Order shall take effect on March 5, 2021 and shall remain in effect until April 2, 2021 unless renewed, modified, or until the Governor rescinds it.

**DONE AT THE EXECUTIVE
OFFICE THIS 5TH DAY OF
MARCH 2021**

**ATTEST:
/S/MAGGIE TOULOUSE OLIVER
SECRETARY OF STATE**

**WITNESS MY HAND AND THE
GREAT SEAL OF THE STATE OF
NEW MEXICO**

**/S/MICHELLE LUJAN
GRISHAM
GOVERNOR**

**TAXATION AND
REVENUE,
DEPARTMENT OF****NOTICE OF MINOR,
NONSUBSTANTIVE
CORRECTION**

The Taxation and Revenue Department gives Notice of a Minor, Nonsubstantive Correction to 3.15.8 NMAC.

Pursuant to the authority granted under State Rules Act, Subsection D of Section 14-4-3 NMSA 1978, please note that the following minor, non-substantive corrections to spelling, grammar and format have been made to all electronic copies of the above rule:

In Section 9, Subsection D, Paragraph (3), Subparagraph (b), Items (i) and (ii), subitems were changed from (I)(II)(III) to (a) (b) and (c), respectively and where appropriate.

A copy of this Notification will be filed with the official version of each of the above rules.

**End of Other Material
Related to Administrative
Law**

2021 New Mexico Register

Submittal Deadlines and Publication Dates

Volume XXXII, Issues 1-24

Issue	Submittal Deadline	Publication Date
Issue 1	January 4	January 12
Issue 2	January 14	January 26
Issue 3	January 28	February 9
Issue 4	February 11	February 23
Issue 5	February 25	March 9
Issue 6	March 11	March 23
Issue 7	March 25	April 6
Issue 8	April 8	April 20
Issue 9	April 22	May 4
Issue 10	May 6	May 25
Issue 11	May 27	June 8
Issue 12	June 10	June 22
Issue 13	June 24	July 7
Issue 14	July 8	July 20
Issue 15	July 22	August 10
Issue 16	August 12	August 24
Issue 17	August 26	September 14
Issue 18	September 12	September 28
Issue 19	September 30	October 13
Issue 20	October 14	October 26
Issue 21	October 28	November 9
Issue 22	November 15	November 30
Issue 23	December 2	December 14
Issue 24	December 16	December 28

The *New Mexico Register* is the official publication for all material relating to administrative law, such as notices of rulemaking, proposed rules, adopted rules, emergency rules, and other material related to administrative law. The Commission of Public Records, Administrative Law Division, publishes the *New Mexico Register* twice a month pursuant to Section 14-4-7.1 NMSA 1978.

The New Mexico Register is available free online at: <http://www.srca.nm.gov/new-mexico-register/>. For further information, call 505-476-7941.